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**GESAC'S SUBMISSION TO THE CONSULTATION ON "POST-I2010: PRIORITIES FOR NEW STRATEGY FOR EUROPEAN INFORMATION SOCIETY (2010-2015)"**

***General Remarks***

GESAC represents 34 of the main collective copyright management societies (authors' societies) in the European Union, Norway and Switzerland, that administer the royalties of almost 500 000 authors, composers and writers of a variety of sectors (music, audiovisual, literary and visual and graphic arts), as well as of music publishers.

GESAC welcomes the opportunity to express its views in the context of the Post i2010 initiative.

While GESAC is ready to start a dialogue on the issues raised in the Questionnaire, we would like to stress that, in GESAC's opinion, any measure related to copyright in the context of the Post i2010 initiative should grant rights holders an increased and adequate protection from piracy.

GESAC would also like to emphasize that a strong coordination of all the services dealing with copyright is absolutely necessary to the efficiency of any policy and initiative related to the protection of creation and creativity.

Please note that GESAC will only reply to points 5 and 6 of the Questionnaire. The original text of the questionnaire will be in bold, while GESAC's answer will be in regular font.

## 5. Consolidating the online Single Market

*The economic potential of the digital single market across the EU is still underexploited: Difficulties faced by businesses to adapt to a cross-border market - Opening their market to other Member States represents major challenges for online service providers in terms of compliance with national legislation, product/service delivery, local language, after-sale and guarantee services, etc. Businesses are facing many barriers to selling across the borders, mainly because of the different regulations applicable at Member State level in areas such as consumer protection, VAT, recycling of electrical and electronic equipment, specific products regulations, payment transaction costs.*

*Fragmentation of national rules hampering cross-border e-commerce - Consumers may therefore be offered the same product or service but at different prices depending on where they are located; some products or services are even simply not available to them for the same reason. These kinds of problems are addressed by Article 20 of the Services Directive that forbids discrimination on the basis of nationality or place of residence. From 2010 onwards online traders will be prevented from refusing access to their services or applying different conditions depending on the country of residence of the consumer, unless this is directly justified by objective criteria.*

*Lack of consumer trust and confidence - Consumers do not feel safe making transactions on the internet as they lack trust in the seller's identity, the applicable law or the protection of personal data. They may also have doubts about the safety of transactions and do not know where to find help in case of problems. The lack of transparency of online providers makes consumers even more uncomfortable about online transactions. Lack of clarity regarding terms and conditions, steps to conclude a contract, use of personal data, licence terms are others doubts facing consumers before purchasing online.*

### *A - Creating a level playing field in the European online market*

*To unlock the economic potential of the digital single market, a level playing field needs to be created for businesses, including SMEs, enabling them to deliver their services and products all over the EU, where possible by harmonising applicable rules.*

*5.1 Do you think further harmonisation of national regulations would be a way towards an easier access of consumers and businesses to a barrier-free European digital single market? - multiple choices reply- (optional)*

- No
- Yes, in the field of consumer protection
- yes, in the field of payment transaction costs
- yes, in the field of VAT ()
- yes, in the field of waste of electrical and electronic equipment
- Other. Please specify: -open reply- (optional)

Further harmonisation in the field of VAT can only have a positive effect on the development of a European digital single market. In addition, in order to unlock the potential of the digital single market, reduced tax rates for certain online products should be introduced, notably

copyright protected content. This would help the development of legitimate online services by reducing the competitive disadvantage they are facing vis-à-vis illegitimate services.

Additionally, 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 by collective management societies. The issue requires immediate action by the Commission and is developed in further detail in our answer to question 6.5.

***5.2 Do you think businesses, in particular SMEs, should be provided with more practical support to take advantage of the European digital single market? -single choice reply- (optional)***

- *No*
- *Yes, by harmonising access conditions*
- *yes, by providing legal support*
- *yes by providing other kind of support*
- *please specify: -open reply- (optional)*

[Not Applicable]

#### ***B - Improving consumers' trust and confidence in online services***

***Another challenge is to increase consumers' trust and confidence in online service providers. This can be done through developing initiatives aimed at better informing consumers in order to make them fully aware of their protection in the online environment, or through encouraging online providers to better communicate to consumers about their commercial practices in order to make them confident.***

***5.3 How do you think transparency for consumers can be increased? -multiple choices reply- (optional)***

- *Further standardisation of terms and conditions*
- *Easily understandable information summing-up legal information*
- *Encouraging consumer feedback (Web 2.0 style) informing about service provider's practices*
- *Others. Please specify: -open reply- (optional)*

The consumer needs to feel safe and sure that the applicable law is the law of his or her country of residence. For that reason, online service providers should be obliged to comply with all the laws of the country where its customer is located.

**5.3.1 Please give examples of how transparency for consumers can be increased. - open reply- (optional)**

A number of measures could be adopted by the online service provider:

- Clearly inform the consumer that the law where he or she is located will be the applicable law to the transaction;
- Allow the consumer to introduce his or her postal code, so that information on prices already include taxes or other additional payments, such as shipping and handling fees, WEEE, etc.

**5.4 How do you think consumer trust and confidence in the digital single market can be increased? -multiple choices reply- (optional)**

- *Through self-regulation such as codes of conducts*
- *Through trustmarks aimed at disclosing the commercial practices of the online service provider*
- *Through new regulatory measures*
- *Other*
- *please specify: -open reply- (optional)*

[Not Applicable]

**5.5 If you believe trustmarks would increase consumers' trust and confidence, do you think they should: -multiple choices reply- (optional)**

- *Be established EU-wide*
- *Be controlled by a third party*
- *Be subject to sanctions*
- *Compliance with rules should be checked regularly*
- *Other success criteria you would suggest. Please specify: -open reply- (optional)*

[Not Applicable]

**5.6 Do you see other ways to increase consumers' trust and confidence? -open reply- (optional)**

See answers to questions 5.3 and 5.3.1.

**5.7 What are the main other challenges faced by online service providers to develop a digital single market? -open reply- (optional)**

In the field of online content services, piracy constitutes a huge challenge to the development of a legal single market. This point is developed in further detail in the reply to question 6.5.

## **6. Promoting access to creativity at all levels**

*In terms of expectations, Internet users' and the creative content providing sector have never been as at odds as they are today. Creative industry players are struggling to find new viable business models that are able to ensure sufficient revenues for creators and to meet consumer expectations. The market for digital content is still fragmented and broadcasters and other content providers, together with end-users are prevented from benefiting from a true digital Single Market. Participative platforms have grown as passive users (readers, viewers, consumers etc.) have become active producers (or "prosumers"). These users tend to ignore their statutory rights and their obligations towards rights holders for the content they transform or/and simply share in web 2.0 communities. Moreover, intermediaries generally impose take-it-or-leave-it complex standard terms of use to their users. Against this background, users currently do not enjoy a clear set of rights balancing the conditions set by rights holders (with DRMs [Digital Rights Management] and/or license agreements) and internet services or platforms imposing restrictive standard terms of use. In a landscape characterized by peer-to-peer and other such offers, it is essential that SMEs in the EU content sector are capable of providing the content and appropriate platforms for distribution.*

*Public institutions and private partners are beginning to preserve the European cultural heritage digitally. So far only a tiny fraction of the works held by Europe's cultural institutions are available in electronic format. Digitisation of cultural resources is hindered mainly by the lack of adequate funding and by copyright-related issues.*

### **A - Affirming users' rights in the participative web**

*Participative web enhances, among others, users' self-expression, creativity and media pluralism.*

#### **6.1 How can users be empowered through transparent information? -multiple choices reply- (optional)**

- *Warrant new forms of transparency obligations for standard terms and conditions imposed by web 2.0 services to ensure that end-users are aware and understand their rights and obligations*
- *Reshape privacy rules to guarantee that users have access and can effectively control over their personal data stored online*
- *Promote self-regulation*
- *Adopt stricter measures aimed at protecting minors in the social networking web*
- *Others please specify: -open reply- (optional)*

Authors' societies are in favour of maximum transparency as regards what consumers can and cannot do with copyright protected content and Web 2.0 services should be obliged to inform clearly and completely their customers about their rights and obligations in this respect.

**6.2 How can creativity be stimulated by building EU-wide easily accessible mechanism to allow users to clear rights and be free to work on existing content for non-commercial purposes? -multiple choices reply- (optional)**

- *Ease the complexity of copyright management*
- *Establish a rights clearance database to facilitate creation and distribution of content online*
- *Make copyright law more flexible as regards non-commercial uses*
- *Promote alternative open licensing schemes*
- *Others*

Traditionally, a user as regards the clearance of copyright is an operator exploiting copyright protected content, generally but not always for commercial purposes.. However, the Commission seems to be using the term user in the context of the present question as synonymous with consumer.

In GESAC's opinion a system based on the need for the consumer using the services provided by a Web 2.0 platform to clear rights is inappropriate and based on a wrong understanding of the situation.

It has to be recalled first that copyright laws do not prevent consumers from using copyright protected content within the private sphere, subject only to the private copying compensation provided by the national law according to article 5.2.b) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.<sup>1</sup> This freedom allows the consumer to “*work on existing content for non-commercial purposes*” in his or her private sphere, without any need whatsoever to clear rights. Therefore, as regards uses in the private sphere, the only possible increased flexibility that could be introduced would be an extension of the private copying exception (and thus of private copying compensation schemes) to those countries where this exception does not exist.

As regards a use of copyright protected content by consumers using Web 2.0 services, which exceeds their private sphere, having an additional creative input by the consumer or not, it is the responsibility of the provider of said service (and not of the consumer) to clear rights.

Indeed, the purpose and activity of such services, which are voluntarily and completely construed and organized to fulfil these objectives in the most efficient way, is to communicate protected content on their own brand and to realize and maximise commercial, essentially advertising, receipts.

Consequently, contrary to what has been supported by Web 2.0 service providers, the task to clear the public communication and reproduction rights as necessary in order that their services comply with copyright laws is their responsibility as commercial operators of a public communication service.

It should be pointed out that the claim by certain Web 2.0 operators that their activities are covered by article 14 of the E-Commerce Directive is totally unjustified.<sup>2</sup> This provision,

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<sup>1</sup> GESAC recalls that the private copying exception has not been implemented in all the EU Member States and that a private copying compensation scheme does not exist in all countries where such exception has been introduced..

<sup>2</sup> Directive 20/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular

discussed and adopted when Web 2.0 services did not exist yet, was never meant to cover Web 2.0 services providers whose activity goes beyond hosting content uploaded by consumers but mainly consists in organising the public communication of such content.

Therefore, the temptation to make copyright laws more flexible to facilitate the clearing of rights by end-consumers to work on existing content should be avoided, while the appropriate licenses should be applied for by Web 2.0 service providers themselves.

Finally, concerning the possibility of encouraging open licensing schemes, GESAC draws the attention of the Commission to the following considerations. Firstly, contrary to the media attention it generates, the relevance of open licenses in the audiovisual and musical fields is very limited. Moreover it is essential that creators be well informed about the regime of such licenses as, in our experience, many young authors and composers agree to these types of licenses without fully understanding the consequences as regards the exploitation of their works. Indeed the regime of many of such licenses may jeopardize the future exploitation by the creators of the works to which they are applied.

For the above mentioned reasons, authors' societies feel reserved to encourage open licensing schemes. This reservation, however, does not preclude that certain authors' societies carefully explore whether, and if so, in what manner and under which conditions those schemes, and Creative Commons in particular, could add value to the societies' services to their members.

#### ***6.2.1 Please give examples: -open reply- (optional)***

As indicated above, rights clearance should not take place at the level of the consumer but at the level of the operator.

#### ***6.3 A "fair" non-commercial use of licensed content should be free of technological restrictions in terms of interoperability. Should interoperability of content be left to the market or should users have a clear statutory right to play the content they paid for anytime, anywhere and on any platform? -single choice reply- (optional)***

- ***Market***
- ***Statutory right***

## ***B - Ensuring sustainable copyright***

***The European cultural sector benefits from a unique wealth in terms of diversity and identities. The digital environment offers unprecedented possibilities for the growth of the creative industry. An important balance needs to be struck between sustainability of copyright, possibility of access and protection of cultural diversity in Europe.***

### ***6.4 How could the EU assist the creative industries in shifting towards more sustainable business models? -open reply- (optional)***

EU assistance for the creative industries to shift towards sustainable models is fundamental. This assistance should include the development of efficient means to fight online piracy and of ways that assure remuneration of rights holders, notably in cases of unlawful P2P use.

In fact, the most important obstacles to the development of new online content services are piracy and other forms of unlawful uses. 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. As mentioned hereabove, 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. On the other hand, ISPs have a strong interest in the normalization of their businesses and of the transactions of their subscribers. That is why ISPs should contribute to the developing of sustainable business models for the creative industry.

On top of that, in our view, there is no need to strike a balance between sustainability of copyright, possibility of access and protection of cultural diversity in Europe, because they go hand in hand. A society in which copyright is adequately protected provides for the necessary incentives for market operators to develop sustainable services that satisfy consumer demands. Such a framework would allow for the currently niche market of legitimate online content services to grow exponentially, increasing the content available, reducing the costs of service providers thanks to increased economies of scale, and thus increasing accessibility for the consumer. Like in any other field of business, the lack of protection of property rights (including intellectual property) and investment reduces the incentives to enter the market and for the market to develop itself and reach its full potential both at national and pan-European levels.

At the same time, in a much bigger market of legitimate online content services the content offered will be of a more culturally diverse origin and will remunerate the creators behind this diverse cultural offer.

Finally, it should not be forgotten that the biggest demand for European content comes from European consumers. A piracy-free European market place will increase the market value of

European content, which will make the European content industry more competitive outside Europe.

### *C - Making digital content overcome borders across the EU*

*In the digital environment it is essential to remove artificial barriers to the circulation of creative content and to competitive market, while promoting and protecting cultural diversity. The diverse needs of different types of content (music, audiovisual, text, photos, etc.) should be taken into account.*

#### **6.5 What would facilitate the emergence of business models not based on territorial copyrights? -open reply- (optional)**

The question is somewhat confusing, since any exploitation of copyright protected content is territorial in nature. The territory covered by a license can of course vary. It can be national in scope, it can cover some or all Member States or the whole world, but the license will by definition be “*based on territorial copyrights*”. We assume that the Commission wants to know what could facilitate the emergence of content services that cover more than one Member State.

One of the main elements for the development of multi-territorial services is an easy rights clearance process. Collective management of rights has traditionally been the best tool to provide this. However, collective management is currently facing difficulties as regards two issues: the rights clearance process for cross-border exploitations and the tax regime for cross-border distribution of royalties.

As regards musical rights managed by authors’ societies, licenses covering the world-repertoire for multi-territorial exploitations were available until 2004 thanks to reciprocal representation agreements that had been timely adjusted to the digital environment. Since then, following various, sometimes even contradictory Commission interventions, the conditions have dramatically changed. A process of fragmentation of the repertoires of collecting societies is occurring because international publishers have withdrawn their so-called Anglo-American repertoires mechanical rights from the traditional network of collecting societies and license these rights directly on a multi-territorial basis in cooperation with one or several collecting societies chosen by them. Moreover, it became unclear from copyright and competition law perspective according to what rules authors’ societies should manage their international representations. The result of these evolutions is an increased complexity and cost in the negotiation, licensing and administration of rights, and in some cases uncertainty about the scope of the representation of rights.

Authors’ societies are working to clarify this complex situation. Developing a rights’ clearing system that is fair to all authors, composers and publishers, simple, predictable and cost-efficient, and enables smooth cross-border licensing, has the societies’ highest priority. This issue is currently also on the agenda of the Online Commerce Roundtable. The roundtable was initiated by Commissioner Kroes and is a possible catalyst for the community of European authors’ societies, together with other stakeholders, to find solutions that serve the interests of their members and users alike.

On the other hand, one of the elements that is consistently left outside the debate of cross-border exploitation of rights is the current situation as regards withholding tax rules.

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 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 agenda.

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 paid 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 encourage Member States to ensure that withholding tax rules are no longer a barrier for the development of multi-territory licensing schemes.

#### ***D - Development of ICT sector and of European content industry to reinforce each other***

***It is essential to reinforce competitiveness for the different European players in the current market structure and to realize the potential for more consumer choice and cultural diversity on European and international markets.***

##### ***6.6 How can we contribute to ensuring that the European content industry is able to meet the demands of audiences for a diverse digital content offering? -open reply- (optional)***

As indicated above, the two main elements in order to guarantee that audiences can access a diverse digital content offering are the following:

- Protection of copyright: the protection of rights assures an adequate income for rights holders and for those investing in the development of diverse legitimate online services.

- The creation of an adequate legal and tax framework that does not hamper collective administration of rights which is the best tool for an easy rights clearance procedure.

**6.7 Considering that a growing number of countries worldwide share Europe' approach regarding the need to actively promote online creative content and digital creative industries, how can we initiate or reinforce synergies with these like-minded countries in order to improve our competitiveness in this sector? -open reply- (optional)**

As indicated above the best way to promote online creative content is reducing online piracy to acceptable levels. The European Union should take the lead in the fight against piracy and be an example for third countries. Also, when negotiating international antipiracy agreements, it should make sure that high standards of protection are introduced.

### ***E - Digitisation of cultural resources***

***Digitisation of cultural resources is essential to offer easy access, preserve our cultural heritage and reflect our multicultural societies. However, to be effective, it needs continuous investments on inclusive, accessible and affordable services and has to avoid risks of re-licensing which could hinder the effective access to the content online.***

**6.8 Which of the following issues are the most important to improve the digitisation of cultural resources and their enjoyment by users? (choose maximum 3) -multiple choices reply- (optional)**

- ***Adapting copyright legislation***
- ***Increasing funding, also through public-private partnerships (X)***
- ***Providing large-scale digitisation facilities***
- ***Improving access to content, by encouraging digitisation at national and local level***
- ***Facilitating rights clearance for in-copyright material, orphan works and works out of print or distribution***
- ***Providing multilingual search and retrieval***
- ***Making sure that digitisation of cultural resources is not left only in the hands of private partners (X)***
- ***Others. Please specify: -open reply- (optional)***

As regards digitisation of cultural resources, GESAC understands that it is adequately addressed by the exception for libraries and archives. Therefore no amendment of the Copyright Directive seems necessary.

On the other hand, it must be pointed out that concerning music and the audiovisual sector there is barely a problem with the preservation of works, since most of the content is already digitised.

Regarding digitisation of works and subsequently making them available for economic or commercial aim purposes, there is no reason why they should be covered by the exception. Entities asking for this extension of the exception are for-profit organisations and as such they should get copyright clearance by the rights holders if they want to make copies of copyright protected works and/or make them available.

On the making available of digitised works by public libraries, the Green Paper on Copyright in the Knowledge Economy correctly identifies the need for “*uses made in the context of online delivery*” to be excluded from the scope of the exception. Otherwise it would clearly interfere with a normal exploitation of works or other subject matter. It is one thing for a library to provide for a physical space where a citizen can access works, and quite another to use this exception to compete with online content providers without being subject to the same conditions in terms of getting an authorisation in return for compensation.

#### ***F - Steps to open access to content to people with disabilities***

***6.9 For persons with disabilities, accessing cultural resources is not always possible as their right of access is often in conflict with copyrights. What can be done to ensure equal access to content for persons with disabilities? -multiple choices reply- (optional)***

- ***The exception foreseen in the Copyright Directive for ensuring access by persons with disabilities should be stronger***
- ***The right of access of persons with disabilities should prevail over the rights of the owner of the content***
- ***Other. Please specify: -open reply- (optional)***

GESAC shares the view that access to copyright protected content by people with a disability is a serious problem. However, we believe that it should be treated at national level.

Also, according to the Copyright Directive the exception for people with a disability is limited to uses “*directly related to the disability and of a non-commercial nature, to the extent required by the specific disability*”. We therefore believe that the best way to approach this issue is according to sector and according to type of disability.

We do not see how the exception of the Copyright Directive could be made stronger, other than by extending it to uses that are not directly related to the disability or that are of a commercial nature. GESAC would not see any justification for that.