



29 February 2008

## **EuroISPA Response to the European Commission's Content Online consultation**

Below is our response to the Commission's Content Online consultation, with regard to the issues of most importance to our members.

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

EuroISPA believes that multi-stakeholder cooperation should not be considered simply on the basis of ISPs cooperating with rights holders to defend their existing business models (i.e. those in conjunction with offline players) from the effects of mass unauthorised 'making available' in P2P networks. In practice, a well balanced cooperation must also provide far greater scope for online players to displace - through competition - traditional offline retailers:

#### Widespread Availability of Legal online content

As noted on several occasions, EuroISPA believes that the best way to tackle piracy is to ensure that attractive legal alternatives, meeting consumers' needs and expectations are available. Progress in this respect is patchy.

As regards music, the Commission's Recommendation on collective management has triggered substantial change in licensing practices. Whether the long term effect will be positive is too early to say, but in the meantime the complexity for rights users has only increased. The Commission needs to ensure that a system that more efficiently meets the needs of end users is arrived at quickly either by voluntary action from rights holders or by legislation.

As regards audiovisual content, it remains vital that content is widely available online, meaning:

- As soon as possible after the work is made available to the public.
- On a variety of platforms – this is especially important in countries where content is today only available on platforms that limit their audience (e.g. an ISP that only permits access to its own customers to encourage churn in the ISP market).
- Through a great variety of business models offering different choice and price point to consumers (download, rental, subscription etc.).
- Available to consumers in all member states (too often, not all relevant content is being licensed to players active in smaller member states).
- With a broad variety of new and library content, and both local and international content.

### Education of consumers

EuroISPA believes that the best solution to strengthen online respect for copyright is to convince users that a legitimate solution is better, through the implementation of attractive business models, pricing and quality of service. In this respect, content owners should accept enforcement methods which rely less on criminal sanctions and are more oriented to prevention and informing consumers about potential copyright violations.

### Cooperation becoming erersatz law enforcement

We also wish to avoid, at all costs, the "privatisation" of law enforcement. In particular, we need to avoid a situation developing where cooperation between stakeholders results in an "automatic" chain of enforcement by which a content owner accesses the logs of an Internet Service Provider, finds traces of potential infringement and, with dedicated software, sends out filings to the relevant authorities against the alleged infringers.

### **10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to be followed?**

While EuroISPA supports multi-stakeholder agreements, in principle, we cannot support the Olivennes agreement in its current form since, in many respects, it is a vague framework, with many crucial details still missing. Therefore, no one can foresee how effective and practicable this agreement would be in practice and, therefore, whether it offers an example to be followed. EuroISPA stresses that the French Memorandum of Understanding aims to fit one specific national legal context, is not yet binding and lacks planned legal foundations which, themselves, are subject to change during the legislative process.

In addition EuroISPA doubts that any of the purported achievements of the Olivennes agreement, as it is currently envisaged, would be proportionate to the far-reaching societal consequences resulting from its implementation. In particular, the expected benefits of any blacklisting of users would not be in proportion to the problem that is being addressed and the proposed far-reaching infringement on basic rights (data protection, the right to communication) and needs (internet access and, potentially, also telephony and TV) of European citizens.

EuroISPA's members strongly condemn unlawful online content of all types, including piracy. The lawful dissemination of copyrighted works is in the interest of all parties who wish to promote the availability of legitimate content in the fight against piracy. ISPs have consistently proven themselves to be reliable partners for law enforcement authorities in dealing with online crime – working within agreed legal frameworks and helping judicial authorities enforce legislation developed within the context of agreed public policy objectives.

Within this context, and within the context of long-standing and constructive dialogue in several EU Member States between ISPs and the music and film industries, media leaks and campaigns by the music industry against ISPs are very disappointing and fundamentally counterproductive. Much of what has been relayed in the press is inaccurate, misleading and does not contribute to much needed productive and proportionate self-regulatory approaches. ISPs want and need a solution to the problem of illegal online activity, but need to be able to have constructive dialogue with all appropriate parts of industry – aiming to eventually reach agreements which are more legally sound, proportionate and complete than the agreement reached between parts of the industry and the French government.

### Necessary requirements and conditions for voluntary industry agreements

As Internet accessibility and openness are main constituents of the information society in Europe, there are a number of requirements and conditions that must be considered when setting up voluntary industry agreements:

- Limitations of liability of ISPs
  - 1) According to Article 15 of the E-Commerce Directive 2000/31/EC, Member States “shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity”. This requires that any industry agreement remain a voluntary commitment.
  - 2) There has to be a clear distinction between the different roles of a) hosting providers and b) access providers (in their role as “mere conduits”). Although we question the desirability and efficacy of filtering solutions (see response to Question 11), we note that articles 12-15 of the E-Commerce Directive require explicit confirmation by policy makers that any voluntary deployment of filtering or technologies meant to identify copyright protected content does not:
    - for mere conduits (Article 12), imply a “selection or modification” of content;
    - for hosters (Article 14), give rise to “actual knowledge” about content being processed. It needs to be recognised that technologies meant to identify protected content can never be perfect; some allegedly illegal content will inevitably slip through unbeknownst to the hoster/filterer. The presence of technologies meant to identify protected content must therefore not give rise to a presumption of actual knowledge that exposes the service provider to liability. Instead, the existing presumption should pertain: that it is for an aggrieved party (the beneficiary of filtering in the first place) to provide a clear and precise notice to the hoster of any remaining allegedly illegal content. The hoster is then under an obligation to take down the content (in accordance with all applicable codes of conduct etc.).
- Proportionality

Any voluntary agreements that involve EuroISPA members would ensure that action taken against users is proportionate. Voluntary agreements should address complications relating to infringements happening without the knowledge of the account holder, be it by other members of the household or over unsecured wireless networks or in network configurations where several people share a single IP address. The proportionality and, indeed, effectiveness of cutting off the whole connection or blacklisting a user has, for example, not yet been addressed in discussions.

Simply cutting a connection is not a deterrent, while the expense and time of establishing a national blacklist, when a user can circumvent the system by simply sharing a wireless connection or asking another member of the household to sign up an account, is of little obvious value.

In these circumstances, calls for termination would appear excessive and would benefit neither ISPs nor right holders. The fact that increasingly users are using their broadband connections as their telecommunications medium (through triple- or quadruple-play offers) causes further concern about using termination as a reaction to alleged copyright infringement.

In addition, Europe has had a world-leading approach to key aspects of human rights and data protection principles. The relevant laws, directives and international legal instruments are the

basis of decades of public policy development and agreement. Any agreement needs to avoid destabilising or contradicting this agreed public policy, by either breaching the letter or spirit of existing legislation or by inadvertently acting as a “thin end of the wedge” which cause unintended consequences for European citizens.

Article 8 of the European Convention on Human Rights states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 of the European Convention on Human Rights states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 3 of the Directive on unfair terms in consumer contracts (93/13/EEC) states:

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The annex to the Directive on unfair terms in consumer contracts (93/13/EEC) lists, for example, the following as unfair contract terms

- (b) “inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations“ and
- (f) “authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer“.

While the provisions of the Directive on unfair terms in consumer contracts are dependent on the legal context in any given Member State, there is a possibility that ISPs claiming the right to unilaterally terminate user accounts on the basis of information received from third parties and without verification by an independent third party or judicial entity would fall foul of this legislation.

A further barrier to the French approach being used as an example to be followed is the way in which personal data is treated across the EU. Member States should therefore pay particular attention to previously agreed public policy objectives in relation to protection of private data and

related national data protection legislation when seeking to support the implementation of voluntary industry agreements. There is little, as yet, that can be gleaned from the current state of discussions regarding the French agreement on the issue of how personal data will be handled, as the division of powers between the judiciary and the proposed administrative authority is far from being definitively agreed. Consequently, the French agreement does not offer any form of model that could be used as an example to be followed on this point.

The proposed authority would have broad but, as yet, undefined powers, to fine Internet access providers for not acting in a manner that it considers sufficiently diligent, requiring ISPs to prevent infringements and to cut off access for consumers. While it is proposed that the authority be given the widest possible powers, there are no corresponding proposals with regard to the protection of human rights, due process, proportionality, free speech or privacy.

There are several crucial issues which must be addressed, in order that any self-regulatory mechanism be able to achieve an adequate division of responsibilities, avoid the risk of abuse and maximise effectiveness. In particular:

- Quality of evidence

ISPs are in no position to decide on the accuracy and validity of the accusations made by right holders. The French agreement provides no coherent and plausible example to be followed with regard to questions such as indemnities in the event of wrongful notices, conditions which could help limit the number of notices, quality of evidence and the guarantee of a fair trial, as guaranteed by the European Convention on Human Rights.

- Quantity of notices & cost implications

The French example also provides no coherent and plausible example to be followed with regard to the costs of implementing voluntary industry agreements. This is a particular problem for smaller ISPs for whom the capital costs of implementing any automatic system may be prohibitive. Similarly, questions such as maximum quantities of notices, threshold levels of unauthorised content, and pricing mechanisms all currently remain unanswered by the French agreement.

### Conclusion

In isolation, termination of customers' internet connections will not necessarily change behaviour. Voluntary agreements between associations of ISPs and right holders should be used as part of a broader anti-piracy campaign that addresses the commercial aspects of piracy and includes educating users and raising awareness about copyright law. EuroISPA therefore welcomes the recent creation of an Enforcement Unit in DG Internal Market, and believes that it must be adequately resourced.

Ultimately, EuroISPA believes that the policy debate around promoting adoption of on-line distribution must balance measures to address piracy with support for legitimate and innovative services. It is vital that no moves are made at the EU level with explicit public endorsement by national governments. This is important to ensure that consumers understand who is accountable for the notices that they may receive, and also as the simple political signal that ISPs are being required to address uploading could well have an impact on some users and hence reduce the subsequent burden on ISPs.

The fact that a specific agreement in one EU country that still needs to be implemented through a legislative process has been portrayed in the media as a finished and complete answer to the issue of online piracy does nothing to resolve the many outstanding problems. EuroISPA

believes, as outlined above, that there are numerous legal, practical and societal issues that need to be addressed in order to move forward in a productive and consensual way. ISPs need, society needs and rightsholders need a sustainable, effective and proportionate answer to these questions. EuroISPA remains, as ever, a willing and constructive partner in helping to find this answer.

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

EuroISPA does not believe there is an effective *and* proportionate way to apply filtering measures to prevent online copyright infringements. The real question facing policy makers and industry is whether existing filtering measures are a proportionate, cost-effective, efficient approach to dealing with online copyright infringements in a way which will not have considerable unintended consequences outside the scope of the problem being addressed.

In general, EuroISPA believes that the development of innovative content services that meet consumer expectations and needs is the most effective way to prevent online copyright infringement and is far more effective than measures aimed at restricting the rights of users to access online information. In this context, technologies meant to identify copyright-protected content, developed on a voluntary basis with the necessary collaboration of rightsholders and with the objective of favouring online availability of content can, in certain cases, be used to foster innovative content services and business models. This type of collaboration can only be developed on a voluntary basis, in the context of the legal framework defined by the eCommerce Directive. However, there is a significant risk that the implementation of filtering measures at the level of communication networks will have the opposite impact.

Proportionality

There is considerable doubt as to whether existing network filtering technologies would be effective in achieving their stated goal, particularly as users can be expected to use relatively simple encryption techniques to remain “one step ahead” of the technology. Encryption of P2P traffic is already happening at an increasing rate; filtering measures are likely to serve only to encourage universal adoption of encryption to avoid detection. At the same time, filtering can be expected to result in a risk of degradation of network services, of user experience and in the inadvertent blocking of access to legitimate content. The increased costs that would create a further barrier to addressing the digital divide.

As detailed in the WIPO Conventions and the Copyright in the Information Society Directive (2001/29/EC), for example, exemptions to copyright for legitimate, agreed purposes are a recognised and uncontroversial part of intellectual property legislation. It is entirely possible for users to wish to exchange files which do not breach copyright but which nonetheless would risk being “filtered” by network filtering technologies that only allow “approved” files to get through.

Both the EU and Council of Europe have had a global leadership position for many years in promoting free speech and access to information. There is simply no existing filtering technology that will allow full use of current technologies while ensuring that legitimate user behaviour is not restricted. Article 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms is perfectly clear – “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”.

As the costs of Internet access providers will be increased if every user's data needs to be filtered, this cost will ultimately be borne by consumers – including the huge majority of users who do not infringe copyright. It is difficult to imagine another scenario where innocent consumers are asked to pay to have their own legitimate use of a service monitored, in order to protect the interests of third parties with whom they have no relationship.

### Cost effectiveness and efficiency

A study carried out for the French Ministries of Culture and Communication, of Industry and of Research stated that:

Large-scale filtering of peer to peer traffic of a very big number of internet users could cause a problem of costs, implementation and maintenance. Taking account of the evolution of ISP architecture, such filtering assumes the implementation of a significant amount of equipment in the network, administration of this equipment and probably of the evolution of the network architecture itself – as well as on the level of information systems.

EuroISPA therefore asks: To what extent can it be considered proportionate, or even desirable at any level, that intermediaries that do not benefit in any way from the alleged illegal activity, should finance, or be obliged to finance, a system of this scale? How much less acceptable does this approach seem when we consider that there is widespread agreement that the most heavily promoted of these technologies offer no answer, or expectation of an answer, to the issue of encrypted files<sup>1</sup>, meaning that an ISP investing heavily in such technology would see the investment rendered meaningless in a short space of time?

### Unintended consequences

There are other forms of online content which are illegal and considered by some as being more important societal issues than the downloading of music. Imagining that, despite the compelling arguments listed above against doing so, filtering was mandated for copyright material, it would be expected that, for example, strong cases would be made to filter out hate speech (where some EU Member States have different rules from others), pornography (where some EU Member States have different rules from others), sensitive information, such as regarding bomb-making (where some EU Member States have different rules from others) and so on.

With potentially different – and sometimes significantly different – national approaches to everything from sensitive information to hate speech, it is impossible to tell what result this will have for access to the Internet in Europe. Will international ISPs have one filtering architecture, one point of contact for new additions to blocking rules and one set of filtering equipment for each country in the EU where they have services? Will it be more cost effective to simply filter everything from everywhere? What will the reaction of governments be, if they discover that their citizens do not have access to information, simply because another EU government has requested it to be filtered?

On a wider scale, imposing filtering in a way which is likely either to result in legal content being made inaccessible or results in cross-border effects (where legal material becomes unavailable because it is illegal in another country, for example) has international legal implications. For example, the UN Covenant on Civil and Political Rights (Article 19) states that “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print,

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<sup>1</sup> Chris Palmer and Seth Schoen, “Debunking Audible Magic – Again”, 20 July 2004. See [http://w2.eff.org/share/audible\\_magic.php?f=audible\\_magic2.html](http://w2.eff.org/share/audible_magic.php?f=audible_magic2.html), last accessed 21 February, 2008.

in the form of art, or through any other media of his choice". As mentioned above, a similar provision also appears in the European Convention on Human Rights.

### Conclusions

As shown by the study described above, that was prepared at the initiation of three French ministries, there are considerable financial and technical implications involved in filtering. While technology has changed since that report was written, that conclusion remains valid. In addition, there are issues regarding sustainability, as shown by the fact that the heavily promoted filtering solutions have no credible answer to the issue of encryption. Furthermore, there are significant legal concerns, both on an EU and international level with regard to filtering.

Consequently, it is clearly far too early for the European Commission to legitimately propose filtering as a proportionate, cost-effective and efficient way of dealing with the problem of copyright infringements on the Internet. The issues need to be studied in considerable depth to assess the public policy implications of this approach. The European Commission should, therefore, refrain from taking any position on filtering before carrying out in-depth research in order to clearly identify the public policy choices available with regard to the technical, economic and social impact of filtering, assessing real costs, the effective benefits and the actual risks.

Without this information, the Commission will be making policy in a vacuum, an approach that can only give rise to further problems in the future and unforeseeable unintended consequences. We therefore urge *all* stakeholders and policy makers to focus on supporting constructive and collaborative discussions rather than heavy-handed inflexible legislative solutions.

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### **About EuroISPA:**

EuroISPA is the world's largest association of Internet Services Providers, representing approximately 1000 ISPs across the EU. EuroISPA is a major voice of the Internet industry on information society subjects such as cybercrime, data protection, e-commerce regulation, EU telecommunications law and safe use of the Internet. Its secretariat is located in Brussels. EuroISPA is predominantly funded by its member and associate member associations and the members of the EuroISPA Industry Forum. For further information on this and other matters concerning EuroISPA, please contact Richard Nash, Regulatory Affairs Manager and Secretary General, at the address set out below.