

PUBLIC CONSULTATION ON CONTENT ONLINE IN THE SINGLE MARKET

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TYPES OF CREATIVE CONTENT AND SERVICES ONLINE

- 1. Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?**

GESAC groups together 34 of the biggest authors' societies in the European Union, Norway and Switzerland, and so speaks for more than 500,000 authors and copyright owners in the fields of music, graphic and plastic arts, literary, dramatic and audiovisual works, as well as music publishers. More specifically, GESAC represents the entire European music repertoire.¹

Authors' societies play a paramount role in the online content market in general, and online music market in particular. They do not directly offer content to consumers through the Internet or mobile networks. They grant online and mobile music providers the licenses for the use of musical works and collect from them the due royalties, which they then distribute amongst authors, composers and music publishers. These licenses are granted for a variety of uses, including pay-per-download (PPD), streaming, subscription services, webcasting, simulcasting, etc.

In that sense, their activity does not vary substantially from what they do in the offline world where they grant licenses for the use of musical works in broadcasts, live events, discotheques, mechanical reproduction on CDs, etc.

As such the legal base for the granting of those licenses is basically the same, namely the exclusive rights of reproduction and/or communication to the public. In the case of a PPD service, the license would thus cover the right of mechanical reproduction, in order to allow the online music provider to make copies of the works on its databases and to allow consumers to download the works, and, on the other hand, the right of communication to the public, in this case including the right of making available of the works.

¹ Except for the Estonian and Slovenian repertoire.

Having said that, the licenses themselves are of course adapted to the different forms of exploitation mentioned above and may evolve to cover those that may appear in the future.

- 2. Are there other types of content which you feel should be included in the scope of the future Communication? Please indicate the different types of content/services you propose to include.**

The list seems exhaustive enough.

CONSUMPTION, CREATION AND DIVERSITY OF ONLINE CONTENT

- 3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.**

The main concern for authors' societies are violations of copyright, most notably through illegal file-sharing and peer-to-peer (P2P) systems, such as Firstload, Usenext, Rapidshare, eMule, etc. This problem hinders the development of legitimate online services enormously, and ultimately significantly reduces the potential income of rights holders. It is therefore paramount that measures be adopted in order to stop unauthorised downloads of copyright protected content.

We think that, without prejudice of the freedom of choice of individual rights holders, collective rights management should be encouraged. Collective rights management is the only way to offer one-stop shops where licensees can quickly get clearance to exploit all the works that they need for their operations with the highest degree of legal certainty. Individual licensing, as it is currently the rule in the clearance of some neighbouring rights, notably those of record producers, implies negotiations with each and every rights holder, which delays the setting up of online or mobile services.

Another problem is lack of interoperability, which will be discussed in detail in the answer to question 5.

- 4. Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?**

It is our understanding that both at EU level and at a national level the legal protection is sufficient against unauthorised access to consumers' personal information.

As regards the protection of personal data, there has been some controversy vis-à-vis the introduction of Digital Rights Management (DRM) technology.

DRMs are necessary in order to assure an effective control of the different uses of copyright protected material in the online and mobile world. They allow for users of a service to be identified before a work is made available to them, in order to make sure that this user has a

legal access to this work (for example, in a subscription service). It also allows service providers to control that consumers use the works in accordance with the terms of the contract. Without this control, it would be impossible to offer different services to users (PPD, subscription services, streaming, pay per listen, etc.) and charge them accordingly.

Moreover, technological protection measures (TPMs) that impede the uncontrolled dissemination of copyright protected material over the Internet, do not seem to pose any concerns vis-à-vis protection of personal data. These measures are proportionate to the effect, since they allow for infringers of copyright laws to be identified. Without them, fighting piracy in the Internet would be a much more difficult task.

Unfortunately, public enforcement authorities do not always have the resources to monitor illegal uses of copyright protected content in the Internet. That is why rights holders themselves need to verify these violations, which of course has to be done in full compliance with personal data protection legislation.

5. How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?

Authors' societies believe that lack of interoperability between online services and playback devices is indeed an obstacle for the development of online content markets. It reduces consumer acceptance and is often used as an excuse to use illegal services. Therefore, authors' societies are in favour of measures that favour this interoperability.

Having said that, it is important to point out that interoperability should not put in peril the effectiveness of DRMs or TPMs. A right balance between fostering interoperability while at the same time safeguarding the protection of DRMs and TPMs has to be found.

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, establishes that, if a software publisher 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 then decide if this refusal is justified. In any case, 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 TPMs and DRMs and the protection of copyright protected content. It must be noted that only software editors, manufacturers of technical systems or service providers can ask the Authority to intervene, but never individual consumers.

6. How far is cultural diversity self-sustaining online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic 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 continues to be Europe's most important asset.

COMPETITIVENESS OF EUROPEAN ONLINE CONTENT INDUSTRY

7. If you compare the online content industry in Europe with the same industry in other regions of the world, what in your opinion are the strengths and weaknesses of our industry in terms of competitiveness? Please give examples.

In October 2005 the Commission adopted a Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services. The Commission thought necessary to intervene based on a Study on a Community Initiative on the Cross-Border Collective Management of Copyright (hereinafter the Commission Study) released by DG Markt in July 2005,² which stressed the need to close the gap between the EU and the US vis-à-vis the development of online services. DG Markt described a situation in which the EU was lagging well behind the US in this respect.³ However, according to other information that we have had access to (and that we shared with DG Markt), coming most notably from Jupiter (October 2004), Forrester (February 2005) and PricewaterhouseCoopers (2005)⁴, the differences of the development of the European and American music online markets were significantly less pronounced than those pictured in the Working Document. What is more, estimates published by Understanding & Solutions in 2005⁵ show that the gap between Europe and the US will be considerably reduced by 2008 (€867 million versus €1006 million) and that Europe would take the lead in 2010 (€1593 million versus €1416 million).

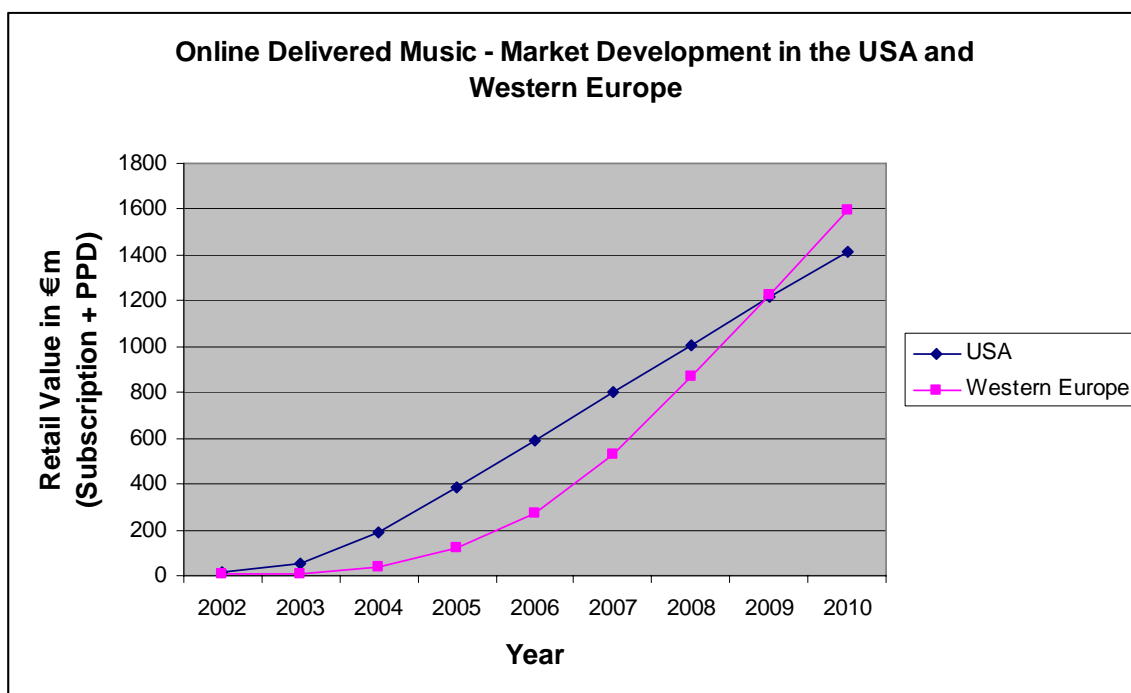
The following graph and table show the projections made by U&S.

² This DG Markt Study was followed by an Impact Assessment, which reproduces the same figures and arguments. This Impact Assessment was released on 11th October, that is 7 days before the Recommendation was published.

³ As a matter of fact DG Markt used provisional figures of a study that was to be published at a later time.

⁴ Music and Copyright, *PWC Forecasts Online Recorded Music Sales Will Rise to \$6.6 bn in 2009 and Mobile Sales to \$18.9 bn*, 6th of July 2005.

⁵ Understanding & Solutions, *Music Market Outlook, Formats & Technologies Report*, June 2005.



	2002	2003	2004	2005	2006	2007	2008	2009	2010
USA	12	50	187	382	590	800	1006	1215	1416
Western Europe	4	6	35	119	274	528	867	1224	1593

Source: Understanding & Solutions

As we can see, the study foresees that online music services in Western Europe⁶ have had a slower start than in the US, but that it is already growing faster and will surpass the latter by 2009.

On the other hand, the DG Markt Study failed to recognize the importance of mobile music services, which are significantly more developed in Europe than in the US (over €700 million versus around €200 million in 2004, according to Understanding & Solutions).⁷

Comparison of Market Value of Mobile and Online Delivered Music (in €bn)

	Mobile Music		ODM		Total	
	2004	2010	2004	2010	2004	2010
USA	0.17	0.83	0.19	1.42	0.36	2.25
Western Europe	0.70	1.50	0.04	1.59	0.74	3.09

As we can see, Europe is rapidly catching up with the US as regards development of Online Delivered Music, and it has a clear lead vis-à-vis the USA in the Mobile Music market. The European Mobile Music market was in 2004 four times bigger than that of its American counterpart. Although the American market is expected to grow rapidly, by 2010 it will be still 45% smaller than that of Europe.

⁶ Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Norway, Spain, Sweden, Switzerland and the UK.

⁷ Supra 5.

In the following bullet points there is a description of what we understand that are the strengths and weaknesses of the European online and mobile industries. These strengths and weaknesses also help understand the differences of development between Europe and the United States.

- **Weaknesses:**

Legal factors:

- *Insufficient legal protection of rights holders.* The Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the E-Commerce Directive) was a step forward in the direction of clarifying the potential liability of ISPs in copyright violations. However, the protection granted to rights holders through this Directive is not as strong as, for example, that of the US Digital Millennium Copyright Act. As a consequence, the implementation of this Directive by many European countries does not include a proper mechanism for the notification of copyright infringements to ISPs for them to adopt the necessary measures to block these infringements. This reduces the incentives for ISPs to collaborate in the prosecution of piracy, and this is why the number of P2P platforms is much higher in Europe than in the US.⁸

Socio-economic factors:

- *Lower penetration rates of broadband Internet.* The US has a much higher penetration rate than most EU countries. 57% of American households have a broadband Internet connection⁹ compared to only 23% in the EU-25 (25% in the EU-15).¹⁰ Since there are many more households with broadband Internet, it is only natural that there is a much bigger potential customer base for online music providers;
- *Different development rates of e-commerce in general.* American consumers have a long tradition of buying products by catalogue. That is why e-commerce was rapidly embraced in the USA and has had a slower take-off in Europe. This not only affects click-and-mortar businesses models but also online content services.

- **Strengths:**

Socio-economic factors:

- *High development and penetration of mobile technology and services.* As mentioned above, mobile content services are much more developed in Europe than in the US. The reason for that is threefold: a higher technological development of the European mobile industry, higher penetration of the mobile technology in the population, and very low piracy level in the mobile world;

⁸ It should also be taken into account the high number of court decisions favorable to rights holders that have been adopted in the US, Australia or Japan (eg: Grokster, Kazaa, etc.) in comparison to those obtained in the EU.

⁹ Source: Nielsen/Net Ratings, March 2005.

¹⁰ Source: Eurostat. It must be noted that the only countries in the whole EU with a penetration rate of over 50% are Denmark and the Netherlands.

- *A more culturally and linguistically diverse content.* It is undeniable that one of Europe's biggest assets is its cultural and linguistic diversity. This asset should be protected, promoted and, if need be, incentivised.
- ***Factors that have been wrongly pointed out as weaknesses***
- *Complexity of rights clearance.* As for the complexity of the licensing process, GESAC believes that it has been widely exaggerated. The high development rate of the European Mobile Music Market, proves that operators have not had problems in clearing rights, at least authors' rights, that they can easily get from authors' societies. An example of the ease to clear these rights is the agreement between Finish authors' society and Nokia, which granted the latter a global license of the world repertoire for mobile uses.¹¹ Moreover, it should be noted that, contrary to what has been often indicated, rights clearance in the US is not always very efficient. There are a number of different authors' societies, the reproduction right is not managed by the same societies as the right of communication to the public and collective management of online rights is not the general rule.
- *Lack of pan European licenses.* It has been pointed out that one of the major obstacles for the development of music online services is the lack of pan European licenses. Here again this has been widely exaggerated., It should be noted that there is no pan European music market. That has even been acknowledged by DG Competition in its Decision on the merger of BMG and Sony.¹² As a matter of fact, online music providers develop different marketing strategies in the different European markets. iTunes is a good example hereof. iTunes' marketing strategy is done on a country-by-country basis. They have a different website for every country where the service is offered, with promotional campaigns according to local tastes.
- Until the end of 2004, authors' societies were indeed offering pan European licenses. However, they had to suspend these licenses due to DG Competition's concerns vis-à-vis the economic residence clause of the Santiago and Barcelona agreements that made these licenses possible. In the meantime, the development of online music services has not slowed down, much to the contrary. This point will be discussed in further detail in the answer to question 14.

¹¹ As for true-tones or real-tones, operators also need clearance from the owners of the sound recordings, thus the recording industry. There, since negotiations need to take place with each and every record company for which clearance is needed, the situation might be somewhat more complex.

¹² Commission Decision of 19 July 2004. Case No. COMP/M. 3333 – Sony/BMG. Recital (15).

NEW BUSINESS MODELS AND TRANSITION OF TRADITIONAL ONES INTO THE DIGITAL WORLD

- 8. Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?**

As mentioned above, authors' societies do not act as online or mobile content providers, themselves. Therefore, they do not intend to offer these services. However, the services identified as having the biggest potential for success are the following:

- Pay per download, including ringtones and/or truetones for mobile phones, and pay per listen services;
- Subscription services;
- Radio and television broadcasts (simulcasting and webcasting);

These services can be delivered both via the Internet and mobile operators, and are for the most part already available with a various degree of consumer acceptance.

As regards, the territorial scope of these services, please refer to the answer to question 14.

- 9. Please supply medium term forecasts on the evolution of demand for online content in your field of activity, if available.**

Please refer to the answer to question 7.

- 10. Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.**

As regards interoperability, please refer to the answer to question 5.

- 11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?**

Authors' societies face a number of difficulties in securing revenue streams. The main problem they encounter is piracy, of course, which is discussed in the answer to question 21, and which causes a significant decrease of the income of authors, composers and music publishers represented by authors' societies.

This is, however, not the only problem. It is not always easy to get a satisfactory level of remuneration from legitimate online music providers, which in many cases are part of big media or telecom conglomerate with strong bargaining power.

Moreover, some authors' societies fear that by the elimination of reciprocal representation agreements, difficulties may arise for the enforcement and auditing of authors' rights, when uses take place outside the traditional territory of operation of said authors' societies. They foresee increased costs associated to remote administration and outsourcing of legal counsel.

Apart from that, and in order to secure an adequate income for authors, composers and music publishers, the role of the different players needs to be clear. Authors' societies grant licenses for the use of their works directly to online music providers and not through the record producer, which licenses the use of the sound recording.

Licensing to and collecting revenues directly from the online music provider is justified, since it is the latter who is responsible for the acts of reproduction and communication to the public of the works. Moreover, it is the online music providers who invoice consumers for the use of the works and as such the one capable of providing authors' societies with the information about such use. That information is, in turn, necessary to calculate the royalties due for the use of the works, which have to be redistributed to authors' societies' members accordingly.

PAYMENT AND PRICE SYSTEMS

12. What kinds of payment systems are used in your field of activity and in the country or countries you operate in? How could payment systems be improved?

Not applicable.

13. What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?

Not applicable.

LICENSING, RIGHTS CLEARANCE, RIGHT HOLDERS REMUNERATION

14. Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? If so, what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

Authors' societies are convinced that multi-territorial licensing and clearance does benefit the development of new services, most notably online content services, and have in the past adapted their cooperation schemes to be able to offer multi-territorial licenses.

However, in order to have a proper understanding of the current situation vis-à-vis multi-territorial licenses granted by authors' societies, it is necessary to describe how the situation has evolved in the last years.

In the offline world, authors' societies have reciprocal representation agreements between each other. Thanks to these agreements each society can, for its own territory, grant users a license of its own repertoire as well as the repertoire of all the other societies it has a reciprocal representation agreement with. Given that these agreements are widely put in place by the majority of authors' societies, it means that the aggregate of all the repertoires they represent is practically the world repertoire. This is the case for music rights, for which users located in the EEA can in an easy and convenient manner get licenses of the world repertoire

from their local authors' society. Apart from the practical advantages that this one-stop-shop licenses have, they also provide users with the legal certainty they need to operate their business.

It is undeniable that for the majority of forms of exploitation in the offline world, the license granted by authors' society only covers one territory. However, it must be pointed out that, contrary to what it has been suggested, authors' societies have always tried to find ways to offer multi-territorial licenses for those cases where there was a demand. In the offline world, authors' societies have long been granting licenses to record companies for the mechanical rights of their works, which cover the whole European territory. Also, as regards satellite transmissions, authors' societies grant multi-territorial licenses covering the entire footprint of the satellite.

The same need for global licenses appeared with the first online services. Therefore, and in order to satisfy the demand of online operators, authors' societies adopted in 2000 the Santiago and Barcelona agreements, with a view to granting worldwide licenses of the world repertoire to Internet operators offering different types of services (downloading, streaming, subscription services, webcasting, simulcasting, etc.). The agreements included a customer allocation clause, by which an Internet operator could only get a license from the authors' society of the territory in which it had its economic residence.

Authors' societies thought this clause was necessary to avoid forum shopping by users, which can have some very detrimental effects on the rights holders. Forum shopping is an incentive for authors' societies to compete with each other on tariffs and lower tariffs mean lower income for authors, composers and music publishers. Moreover, users would try to benefit from the least robust copyright protection and the weakest authors' society. This authors' society would probably be the less demanding in negotiating and enforcing the licensing requirements, thus the less effective. This is why forum shopping is something that authors' societies need to avoid.

DG Competition, however, did not accept the economic residence clause of the Santiago and Barcelona agreements. As expressed in its decisions on the IFPI Simulcasting and Webcasting Agreements - the bilateral agreements reached by Record Producers' collective rights managers (CRM) in order to grant multi-territorial licenses for these kinds of uses only - DG Competition favoured a system in which the user could get a license for the world-wide repertoire from any Record Producers' CRM in the EEA.

At this point, it should be noted that the situation of authors' societies is quite different from that of Record Producers' CRM.

Record Producers' CRM are controlled by four major record companies, which have a world market share of approximately 80% and similar market shares in each of the different EEA countries. This means that the interests of the different Record Producers' CRM in the different EEA countries are the same. Competition among these societies would therefore be in any case very limited.

On the contrary, authors' societies are very different from each other. In each country, they have different members with different interests, as well as different repertoires.

Moreover, it must be noted, that the IFPI Simulcasting and Webcasting agreements are very difficult to implement, especially in establishing the aggregate tariff that this system would imply.

Besides, IFPI Simulcasting and Webcasting agreements only have a very weak importance for records producers as they manage their rights for the main kind of on-line exploitation, such as on-demand services, on an individual basis and not through their collecting societies.

As for the Santiago and Barcelona agreements, given the Commission refusal to accept the customer allocation clause included therein, they could unfortunately not be extended beyond its expiration date of 31 December 2004. As a result, authors' societies were no longer in a position to grant pan European licenses of the world repertoire. They could only grant users pan European licenses for the use of their own repertoire, and licenses for the world repertoire restricted to its own territory.

However it has to be noted that a large part of music service providers, most notably providers of on-demand services, are only interested in a license for one or a few territories, in which they develop specific marketing strategies. Technology, on the other hand, makes it easy for them to block access to those users with an IP address of a territory for which they do not have a license. iTunes is a good example hereof.

However, only months after the Santiago and Barcelona agreements expired, DG Markt published an interim Impact Assessment, in which it considered three options: (1) Do nothing; (2) eliminate territorial restrictions and customer allocation provisions in existing reciprocal representation agreements; or (3) give right-holders the additional choice to appoint a collective rights manager for the online use of their musical works across the entire EU ("EU-wide direct licensing").

DG Markt rightly rejected Option 2. As it has been pointed out above, this option would have very negative consequences since it would have reinforced the position of major operators vis-à-vis rights holders, it would have meant a decrease in the income of the latter and it would have put in peril the system of reciprocal representation agreements, since some societies would have probably chosen to withdraw their repertoire before it was licensed by another authors' society not capable of securing an adequate remuneration.

DG Markt thought that Option 3 was the way forward, and in October 2005 adopted the Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (the Recommendation). The Commission expects that the option chosen will pave the way for the concentration of online music rights in a reduced number of authors' societies, which would grant pan-European licenses each for its own repertoire.

Option 3, to its credit, is an approach more geared towards the defence of rights holders' interests, and that element been welcomed by authors' societies, notably the British and the German societies, PRS and GEMA.

However authors' societies feel that the Recommendation, if not implemented in a satisfactory way, could have negative effects.

GESAC believes that a close cooperation between authors' societies is desirable to avoid these unwanted effects.

On the other hand, in February 2006, DG Comp sent a Statement of Objections to the International Confederation of Authors' and Composers' Societies (CISAC) and its European members, which are also GESAC's. In the Statement of Objections DG Comp criticized the territoriality clauses included in the reciprocal representation agreements between societies, when applied to cross-border exploitation of rights (Internet, satellite broadcasts and cable distribution). The position expressed by DG Comp seems to favour competition between authors' societies for licensees.

Naturally, all these developments have had an influence in how authors' societies relate to each other in order to satisfy the demand for pan European licenses after the expiration of the Santiago and Barcelona agreements. They are, notably within GESAC, indeed looking for ways to address this demand.

15. Are there any problems concerning licensing and / or effective rights clearance in the sector and in the country or countries you operate in? How could these problems be solved?

It has already been discussed in the previous answer the difficulties that authors' societies have had in finding a suitable model for the granting of multi-territorial licenses. However, GESAC thinks it is important to clarify a couple of issues as regards rights clearance through collective rights managers, such as authors' societies.

First of all, it is important to point out the efficiency of collective rights management, a model that makes good economic sense. It is only by concentrating the management of all the works in one single entity that the following advantages can be achieved:

- Licensees benefit, because they can get a license covering the entire repertoire represented by an authors' society, which through reciprocal representation agreements is the world repertoire. This means that licensees do not need to negotiate with each and every rights holder to get the repertoire they intend to use. If you compare that with the rights clearance procedure of sound recordings, in which, for example for on demand licenses, potential licensees need to negotiate with each and every record producer of each country, you will see the efficiency of the collective rights management model.
- Rights holders benefit because, through collective rights management, economies of scale can be achieved which reduce costs in terms of collection and distribution of royalties, monitoring, auditing, etc. Moreover, through the collective management of their rights they find themselves in a better bargaining position vis-à-vis potential licensees, and that guarantees them an adequate income.

Therefore, authors' societies understand that collective management of rights is beneficial for the development of online content services, as it greatly facilitates the rights clearance procedure.

Even if it sometimes takes time for authors' societies to reach an agreement with licensees, this cannot be considered a serious difficulty in the rights clearance procedure of authors'

society. Indeed it is a normal business situation, in which every party wants to get the best possible terms, notably when legitimate users need a license for a new service, for which no tariff has been decided. However, this situation has never prevented a legitimate user, acting in good faith, to exercise its activity on interim conditions. On the other hand, the argument of authors' societies abusing their "monopolistic" position is once again exaggerated. Apart from the benefits that collective rights management has for licensees, the bargaining power of authors' societies vis-à-vis major users of their repertoire, which in some cases are big media or telecom conglomerates, is very limited.

Another point that needs to be made is that authors' societies have been always done their best to adapt their schemes to new forms of exploitation. Thanks to the Sydney agreement, confirmed in 1993 by the Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, licenses covering the entire footprint of the satellite were already available in the eighties for satellite exploitations and thanks to the 2000 Santiago and Barcelona agreements multi-territorial licenses were introduced for online exploitations. Unfortunately, while the Sydney agreement is still in place these two agreements could not be extended beyond 2004.

As regards the development of new types of licenses for new types of exploitation, authors' societies have always been quick to develop them, even agreeing to temporary low tariffs in order to facilitate the development of these new services. This is the case for pay-per-download on-line licenses. As an example, it only took a few weeks to SACEM to deliver a license to I-tunes when this society opened its on-line service in Europe in 2004.

16. How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of right holders' remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?

The remuneration that authors, composers and music publishers receive from their authors' societies can be divided in two types: remuneration coming from licensed uses through exclusive rights and remunerations established in the framework of a legal license.

- *Licenses through Exclusive Rights*

The first thing that needs to be pointed out is that authors' societies grant licenses to the online music provider only, that is the last person/organisation in the chain of transmission to the public actually responsible for making the service containing the works available to the public and providing information on the actual exploitation.

As regards the remuneration of rights holders for the licensed use of their works, it is established taking into account the elements of the different types of mobile or Internet.

- *Pay-per-download, subscription services and other on demand services:* Most societies negotiate a percentage rate from the income generated by the licensee, based on the price paid by consumers (price per download or monthly fee in a subscription service) and on the advertising revenues generated by the website through which the online music service is made available. In addition, some authors' societies collect a

periodic lump sum for the making available of samples of works. Similar schemes apply to mobile services.

- *Simulcasting, webcasting and other linear services:* These types of services only allow consumers to listen to the music in a linear way, with no possibility of downloading, personalising the service, or accessing the works individually at a moment chosen by them. In this case, the tariff is commonly set as a percentage of total revenues generated by the operator. In other cases, such as Internet portals that make a limited exploitation of musical works, other options are normally available, establishing a ratio of the webpages in a specific website in which music is actually available and the total number of visits to the different pages of the website. Finally, for those cases in which the website does not generate any money, a periodic lump sum payment is demanded in most cases.

Basically authors' societies tend to be flexible, yet making sure that their members are adequately remunerated for the enjoyment and/or commercial benefits generated from the use of their works. Unfortunately their rights are currently being violated on a very high scale..

- ***Remuneration for Uses Covered by an Exception to the Exclusive Rights: the Private Copying Exception***

As regards private copying, GESAC position is very clear. If a Member State has introduced in its legislation the private copy exception, remuneration for these private copies is due to rights holders.

- *Private copy remuneration and convergence.* The argument of convergence has been used to exclude some equipment from the application of a remuneration, on the grounds that they can be used for purposes other than making copies of copyright protected material. GESAC understands that, as long as a piece of equipment or media is used to make copies of copyright protected material, remuneration should be charged. However, GESAC believes that the rate of that remuneration should be commensurate with the actual use of consumers to make copies of copyright protected material. This consumer behaviour can be verified by means of periodic economic studies.
- *Double payment.* Another point that has been referred to during the private copy discussions that have taken place in the last months is the issue of double-payment. Whilst the downloading of a song to one's electronic music library is rewarded by DRM-based payments to some extent, subsequent copying is not. Furthermore, the first download is equivalent to the initial purchase of a commercial CD. Remuneration schemes serve another purpose, namely to compensate authors for the subsequent private copying of their works. Both the initial purchase and subsequent copying require compensation. That isn't double payment; it is fair payment reflecting multiple uses.

- The neutral effect of private copy remuneration on digital sales.

▪ *Example No. 1*

⇒ In Germany, where there is a Remuneration Scheme for Private Copying, more legitimate songs are downloaded than in the UK, where there is no such a scheme, even though it has a lower broadband penetration rate (15.9% vs. 20.1%).¹³

	2004	2005
Germany	6.4	>30.5
UK	5.8	26.4

(in million downloads)

⇒ On top of that more blank CDs were sold in Germany than in the UK (398 million vs. 237 million).

▪ *Example No. 2*

⇒ In France more legitimate songs are downloaded than in Italy, even though the former applies higher rates than the latter.¹⁴

	2005
France	18.6
Italy	14

(in million downloads)

▪ *Example No. 3*

⇒ Countries with similar population where no remuneration is collected can have a lower market value for downloads than countries where remuneration is indeed collected.¹⁵

Countries where no Remuneration is collected	Market Value	Countries where Remuneration is Collected	Market Value
Greece	€ 0.3 m	Sweden	€ 2.5 m

¹³ Source: OCC, Heise Online News citing iTunes and Musicload and Heavyreading.com.

¹⁴ Source: SNEP and Federazione Industria Musicale Italiana.

¹⁵ Source: the Business Software Alliance.

- *Example No. 4*

⇒ Sweden has a higher ratio of market value to population than the Netherlands or Denmark, even though it applies remuneration on MP3 Players and the latter do not.¹⁶

Country with remuneration on MP3 Players	Ratio Market Value/Population	Country with no remuneration on MP3 Players	Ratio Market Value/Population
Sweden	€0.28 per person	The Netherlands	€0.21 per person
		Denmark	€0.20 per person

If anything, the possibility of making copies for private use is something that should foster the development of online services, since it gives the consumer the chance to enjoy the music as he or she is used to do in the offline world.

- *Direct licensing of private copies vs. remuneration schemes.* If private copying was in the future not regulated in the framework of the exception for private copying but licensed through DRM-systems, authors' societies would be forced to raise the remuneration they request from online content providers in order to correspond better to the actual number of copies that the provider allows the user to make. That would in turn either reduce the possibility for consumers to make subsequent copies of legally downloaded songs or raise the price of downloads, the end result being rendering online music services less consumer-friendly. Therefore, it can be argued that, should private copying remuneration schemes have an impact on the development of digital sales, then this impact would be a positive one. However, on the contrary, it is very likely that, in order to promote their services, online content providers would include the price of private copies in the price they charge for the access to the protected works – the current price of €0.99 is considered a standard -. Rights holders would therefore get no remuneration for private copies and would suffer from a substantial harm and a decrease in their protection.

LEGAL OR REGULATORY BARRIERS

17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

Authors' societies are strongly opposed to the idea that intellectual property could hamper in any way the development of online content services.

The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the Copyright Directive) recognises the importance of content and its adequate protection for a proper development of online content services in its 4th whereas clause:

“A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and

¹⁶ Source: the Business Software Alliance and Understanding & Solutions.

lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.”

Indeed the main reason why consumers have demanded broadband Internet connection is for them to be able to download copyright protected material. Unfortunately, as we will discuss below, most of this content comes from unauthorised sources. This has caused significant losses for rights holders in general and for authors in particular and might have even worst consequences in the future. A lack of adequate protection today is the lack of quality content tomorrow. And without quality content, a broad bandwidth becomes irrelevant.

This is clearly recognised in the 9th whereas clause of the Copyright Directive:

*“Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. **Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large.** Intellectual property has therefore been recognised as an integral part of property.”*

18. How does the country you mainly operate in encourage the development of creative online content and services?

GESAC is aware of a number of very interesting initiatives to encourage the development of online content services, but would like to briefly comment on the French *Charter for the Development of a Legitimate Online Music Offer, the respect of Intellectual Property Rights and the Fight against Digital Piracy*,¹⁷ which was signed by Internet Service Providers and rights holders’ representatives under the auspices of the French Government. The parties agree on the following terms:

- ISP’s engage in informing their customers about the dangers of piracy and to collaborate in the fight against it;
- Rights holders engage in taking the necessary legal actions against online copyright infringers;
- Producers and online platforms engage in fostering the digitisation of recordings and in increasing their advertising campaigns and promotional offers online;
- Public authorities adopt initiatives against online piracy, awareness campaigns amongst youngsters, administrations and enterprises, intensify their efforts to apply a reduced VAT rate on music (both online and offline) and to study ways to filter P2P networks.

¹⁷ Charte d’engagements pour le développement de l’offre légale de musique en ligne, le respect de la propriété intellectuelle et la lutte contre la piraterie numérique (2004).

RELEASE WINDOWS

- 19. Are “release windows” applicable to your business model? If so, how do you assess the functioning of the system? Do you have proposals to improve it where necessary? Do you think release windows still make sense in the online environment? Would other models be appropriate?**

Not applicable

NETWORKS

- 20. The Internet is currently based on the principle of "network neutrality", with all data moving around the system treated equally. One of the ideas being floated is that network operators should be allowed to offer preferential, high-quality services to some service providers instead of providing a neutral service. What is your position on this issue?**

The principle of network neutrality is linked to online piracy. ISPs and telecom operators are obliged to route without discrimination all the information that goes through their networks, including copyright protected material that circulates without authorisation. This is why these operators, acting as mere conduits, cannot be held liable for copyright infringement, which obviously does not incentivise them to help in the fight against online piracy.

If preferential services were available, these could be granted to online content providers with the corresponding license for the service they are offering, leaving those that do not comply with this requirement out of said preferential service. This would increase the competitiveness of legitimate services and reduce that of illegitimate ones.

PIRACY AND UNAUTHORISED UPLOADING AND DOWNLOADING OF COPYRIGHT PROTECTED WORKS

- 21. To what extent does your business model suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between “small” and “big” ones?**

Piracy is a major problem for the music industry in general, and to authors, composers and music publishers in particular, both in the offline and the online world. In the online world, the biggest problem for the music industry is obviously unauthorised exchange of musical works through P2P systems. This could be the single most important problem for the development of viable online content services.

It is true that for the last couple of years a number of online music providers have emerged and that the market is soaring. IFPI reports that in 2005 more than 420 million songs were downloaded from legitimate sources.¹⁸ The iTunes Music Store reported at the beginning of the year that it had sold its 1 billionth song since it was open in 2003. These are indeed

¹⁸ IFPI, Digital Music Report, January 2006.

impressive figures. However, they are dwarfed by the over 20 billion illegal downloads¹⁹ that took place in 2005. 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 1,247 in 2010.²⁰

Illegal file-sharing affects physical sales very negatively. Sales have decreased enormously in the last couple of years in most European countries. Unit sales in France and Germany have decreased over 25% between 2002 and 2005 and 36% in Spain between 2000 and 2005.²¹ This drop in sales of CDs has obviously had an impact in income collected by authors' societies. The French society SACEM reports that there has been a decrease in authors' rights collections of 24% between 2003 and 2004.

As for its impact in the online world, it is certainly not easy for legitimate online music providers to compete in a market where consumers can choose to get the music they want for free. This uncertainty and unfair competition acts as an obstacle against investments in the development of new services or the improvement of existing ones. It reduces the income of online music services and ultimately that of rights holders.

As regards the actions taken by authors' societies to curb piracy, they are basically of two kinds: legal actions and awareness campaigns. Awareness campaigns will be discussed in the following point.

As for legal actions, they have taken place in almost all European countries and were particularly aimed at those making available works for download without authorisation. It must be repeated that both the act of uploading and of downloading are equally prohibited if they have not been authorised by the rights holders. Although the act of uploading is the starting point of the whole illegal activity, it goes hand in hand with the act of downloading. Some French studies indicate that each uploading of a song by a peer is downloaded by six peers on average. Given that in most P2P systems, once a peer has downloaded a work it automatically makes it available to other peers, this means that through the continuous uploads and downloads there is a spiral towards massive copyright violations. Therefore, there is no reason to differentiate both acts.

As regards making a distinction between small and big copyright infringers, it is true that for practical reasons it is sometimes more effective to fight the bigger ones. However, the problem is that P2P systems allow millions of users to become small copyright infringers. Although individually each of these peers does not cause a significant prejudice to rights holders, the aggregate of all of their copyright violations, no matter if they were done with commercial purposes or not, has a devastating effect. Therefore, it is our understanding that no distinction should be made between big and small copyright infringers nor between those who commit the infringement with a commercial purpose and those who do not.

Finally, it should be noted that rights holders understand that the current legal status as regards liability of intermediary ISPs established by the E-Commerce Directive should be reconsidered to incentivise their collaboration in the enforcement of copyright.

¹⁹ IFPI, Annual Global Piracy Report, July 2006.

²⁰ EITO, European Information Technology Observer, 2006.

²¹ Source: SACEM, U&S Music Market Outlook – Formats and Technology Report, and IFPI, Annual Global Piracy Report.

22. To what extent do education and awareness-raising campaigns concerning respect for copyright contribute to limiting piracy in the country or countries you operate in? Do you have specific proposals in this respect?

Awareness-raising and education campaigns have taken place in almost all European countries. Authors' societies are indeed very involved in these campaigns, which are in most cases organised through common platforms with other rights holders.²² The aim is raising awareness amongst users, most notably youngsters, that the creative endeavours of authors and composers need to be protected, that file-sharing of copyright protected material is an illegal act and that other legal alternatives are available. However, awareness and education campaigns targeted at consumers have had, for the time being, a limited effect. They have proved effective in making people understand that unauthorised downloading of copyright protected content is illegal. But changing illegal behaviours of consumers takes time. Therefore these campaigns need to continue and any initiative from the European Commission in this direction would certainly be very welcome.

On the other hand, it is yet to be seen the impact of these campaigns at a political and/or decision-making level.

23. Could peer-to-peer technologies be used in such a way that the owners of copyrighted material are adequately protected in your field of activity and in the country or countries you operate in? Does peer-to-peer file sharing (also of uncopyrighted material) reveal new business models? If so, please describe them?

Legal P2P services are already in place in the US, and are slowly expanding their business activity in Europe. Some of them allow for this service in the framework of a broader subscription service, but it is our understanding that some technologies are being developed in order to take advantage of P2P technology in a broader sense, while guaranteeing rights holders an adequate remuneration for the exploitation of their works.

In any case, authors' societies cannot but salute any initiative that intends to benefit from P2P technology in a legal framework, thus offering a service with the appropriate license, the corresponding remuneration and which allows for the adequate identification of the exploited works.

RATING OR CLASSIFICATION

24. Is rating or classification of content an issue for your business? Do the different national practices concerning classification cause any problem for the free movement of creative services? How is classification ensured in your business (self-regulation, co-regulation)?

Not applicable.

²² See for example: www.gvu.de in Germany, www.anti-piracy.nl in the Netherlands or www.copianos.com in Spain.

DIGITAL RIGHTS MANAGEMENT SYSTEMS (DRMs)

Digital Rights Management systems (DRMs) involve technologies that identify and describe digital content protected by intellectual property rights. While DRMs are essentially technologies which provide for the management of rights and payments, they also help to prevent unauthorised use.

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

Authors' societies do not offer their works to the consumers directly, but through online music providers. Most authors' societies require from licensees the use of effective DRMs. Unfortunately, for the time being, there is no DRM system that is widely accepted by all stakeholders, well functioning, affordable, interoperable and that has proven its value for a number of years for rights holders and users in a wide variety of repertoires and platforms. Therefore, authors' societies do not require any specific DRM solution. Some DRMs that are, however, commonly accepted are WMA, Fairplay and Real G2 in the online world and OMA in the mobile environment.

GESAC sees DRMs as potentially very useful tools to manage and secure distribution of copyright protected material in the online environment. They also offer the possibility of delivering new services to consumers, such as temporary listening to works without paying the whole price of a download. However, at this point in time, the DRMs that are being used by most online music providers are not completely effective, specially in addressing private copying. Fairplay, the DRM of iTunes, for example, allows consumers to make a limited number of copies on devices and on blank CDs. However, once a copy is made on a blank CD the DRM is rendered ineffective and the number of copies that can be made thereof are unlimited.

Moreover, the vast majority of copyright protected content available in the Internet has unfortunately 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.²³ 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.

In order to illustrate the level of music that has some sort of protection in comparison to music without protection, it is useful to look at sales of iPods and songs in the iTunes Music Store. At the beginning of the year, Apple had sold over 1 billion songs in its Online Music Store iTunes since it was opened. By the same time, it had sold 50.8 million iPods.²⁴ This makes an average of less than 20 songs per iPod, which occupy around 0.3% of the storage capacity of a 30GB iPod. The rest of the songs copied in an iPod therefore bear no DRM protection at all. It is very unlikely that the iPod would have had the tremendous success it

²³ European Information Technology Observatory Report 2006, p. 118.

²⁴ El Mundo, *Apple Renueva su Acuerdo con las Discográficas para Seguir Vendiendo Canciones a Un Único Precio*, 3rd May 2006.

had if it only allowed consumers to store music with a DRM protection, namely that from the iTunes Music Store.

Also current DRMs are not entirely satisfactory in terms of tracking and identifying the different exploitation of works.

Authors' societies are therefore concerned with the shortcomings of DRMs at this stage and are working to redress them. The DDEX project is a common initiative of the recording industry (IFPI/RIAA) and authors' societies through their global umbrella organisations (BIEM and CISAC) in order to develop an adequate identification system of downloaded works that can be deployed by online music providers. Also, CISAC, which like BIEM is itself an observer within GESAC and which shares almost all its European members with it, is working on a tool that could address authors' societies concerns vis-à-vis security and interoperability of DRMs.²⁵

26. Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that? What are the consequences for you of not having access to a robust DRM system?

Please refer to the answer to question 25.

27. In the sector and in the country or countries you operate in, are DRMs widely used? Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?

Please refer to the answer to question 25.

28. Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?

Authors' societies do not currently require from licensees the application of copy protection measures.

29. Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

Please refer to the answers to questions 5 and 25.

COMPLEMENTING COMMERCIAL OFFERS WITH NON-COMMERCIAL SERVICES

30. In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in?

Non-commercial services can be complementary to commercial ones, as long as they do not devalue the value of copyright protected content. Initiatives like the digitisation and making

²⁵ <http://www.moebius-forum.org>

available in the Internet of works in the public domain and archives are good example hereof, but all these initiatives can only take place in full compliance with copyright laws.

WHAT ROLE FOR EQUIPMENT AND SOFTWARE MANUFACTURERS?

31. How could European equipment and software manufacturers take full advantage of the creation and distribution of creative content and services online (devices, DRMs, etc.)?

The consumer electronics industry is the main beneficiary of the private copy exception, for without the possibility of making copies of copyright protected material the demand for their products would be significantly lower. Therefore, keeping this exception and the compensation for rights holders that is associated thereto is beneficial for rights holders, consumers and the industry itself.

WHAT ROLE FOR PUBLIC AUTHORITIES?

32. What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?

The primary role of any public authority should be the protection of rights holders, by enforcing copyright legislation. Copyright enforcement is essential to remove uncertainties that hamper investments of online content providers, eliminate unfair competition, and secure their revenues, and ultimately those of rights holders.

33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

As mentioned above, rights holders understand that the current legal status as regards liability of intermediary ISPs established by the E-Commerce Directive should be reconsidered to incentivise their collaboration in the enforcement of copyright.

Another reasonable proposal could be to apply a reduced VAT rate to content online. This initiative would certainly have a positive impact in the aim of fostering the development of online content services. Moreover, the discrimination between books, to which a reduced rate is applied, and music, which does not benefit from such a reduced rate, seems unjustified inasmuch as they are both cultural products.