



Audiovisual and Media Policies Unit  
Directorate-General for Information Society and Media  
European Commission

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Sent by e-mail to [avpolicy@ec.europa.eu](mailto:avpolicy@ec.europa.eu)

The Global Entertainment Retail Association-Europe (GERA-Europe) is the trade association of entertainment retailers in Europe. GERA-Europe's members are national trade associations of entertainment retailers from Austria, Belgium, France, Germany, Italy, the Netherlands and the UK. Through its national members, GERA-Europe represents entertainment retailers such as Fnac, Virgin, Free Record Shop, Woolworths, Amazon and HMV as well as hundreds of independent and smaller retailers.

Entertainment retailers have a wealth of experience in the sale of entertainment products both in stores and on-line, in dealing with rights management systems in the EU and have the technical means based on market demand to distribute content EU-wide. The delivery market for entertainment retail includes a variety of physical stores, television, mobile and on-line distribution all selling music and audiovisual content in different formats and quantities.

The association welcomes the opportunity to provide the Commission with its comments on the Consultation on online content in the Single Market.

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***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.)?***

GERA-Europe represents entertainment retailers across Europe. Its membership comprises bricks & mortar retailers and online retailers (some companies operate in both sectors). Entertainment products include principally music, video, games and books. Additional services such as box office ticketing, photo processing and products such as merchandising and clothing are often part of the product mix offered by such stores. Please note that an increasing number of entertainment retailers tend to diversify by increasing the range of products offered in their stores in order to compensate for the slump in music sales and the decrease in the video market. This diversification includes consumer electronics, stationery and Internet services in many instances.

It is important to distinguish between relevant markets in the online entertainment retail domain. Online services include e-commerce offerings such as mail ordering of physical products via the Internet and purely digital offerings, including digital music services whether pay to download, web-cast or streamed radio services, video-on-demand services, music video streaming or any audiovisual media content online. The purely digital offerings do not involve physical products. These services range from copyright content to user generated content and in some cases are adapted for mobile consumption through wireless and 3G networks. They also range from simple posted content that customers can pull to interactive content which allows for personalisation of the service to an individual customer. The market for pure digital content enjoys very specific characteristics in the legal and copyright domain, the technical environment, and the pricing structure.

The way in which the online business of GERA-Europe members is commercialised differs greatly from the way in which similar services are commercialised in the offline environment. These differences are driven by the role of the consumer in the online environment where consumption of content is driven to at least an equal degree by the service provider on the one hand and the online consumer on the other. The way in which scheduling, packaging, creation of content, payment, multi platform consumption are defined in the online environment and managed render the environment a unique one, independent of equivalent services in the offline world. Traditional content is usually provided through mass medium channels without the ability to alter viewing or usage. Online usage is determined more by personalisation and on-demand availability allowing the customer to effectively tailor their own media provision.

***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 of identified content types seems appropriate, although it is important that any work done by the European Commission in this area should look at all types of content and services and the barriers which exist to bringing both to market. These barriers include national legal systems, including licensing of content, contractual obligations etc., which are all based in and controlled by individual member states.

For example, the present licensing regime for music is based on a territorial, or member-state by member-state system. If an online service provider wishes to establish themselves in a country they must first procure a license to sell the repertoire of that national collecting society. To sell to a consumer in a country other than that in which they are established they must then obtain a licence from that national society also, and so on and so forth. Therefore should a service provider wish to provide a pan-European service, they would have to negotiate (costly) licences with the collecting societies of each of the 25 Member States. In reality there are at least two collecting societies per member-state. The internet has no national boundaries unlike the licences with which the online operators must adhere to. There is no internal market for online music.

As a second example, the situation with respect to non-contractual and contractual legal obligations is essentially based on a country of destination principle whereby a retailer with an online offering, although located in one member state, must be prepared to deal with legal challenges and consumer disputes in the jurisdiction in which the consumer is resident. Again, this regime essentially removes any notion of an Internal Market for retailers. These issues are currently being legislated for at EU level by the Rome I (Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations) and Rome II (Proposal for a European Parliament and Council Regulation of 22 July 2003 on the law applicable to non-contractual obligations)

***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?***

Access to recourse for consumers, lack of interoperability, a series of competition and internal market issues (ranging from VAT regimes, country of origin rules) , technical issues (lack of interoperability), copyright mis-use (exclusives, abusive delays, national remits), intellectual property stretch (e.g. interoperability issue for music downloads), imperfect copyright licensing systems, contractual law issues all constitute a non-exhaustive list of issues which prevent online markets from developing across Europe fully and more rapidly. Not all of these issues are specific to Europe, but all of them could benefit from a fresh perspective in Europe.

The most immediate concern to all online providers is the perceived slow erosion of the underlying principles of the e-Commerce Directive. The E-Commerce Directive is the type of sensible regulation which allows for the evolution of online content by enshrining two simple principles – the country of origin and limited liability for the transmission of e-commerce services. The definition of Information Society Services, particularly the on-demand provision of service, has allowed Internet services to grow and develop with undue hindrance in Europe. Now there are a series of legislative initiatives which will have the effect of further fragmenting the market, some examples of which are:

- Rome I - Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations.
- Rome II - Proposal for a European Parliament and Council Regulation of 22 July 2003 on the law applicable to non-contractual obligations.
- Audio visual media services (AVMS) directive - Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

The recent watering down of the country of origin principle in the draft Framework Services Directive shows there is a concerted attempt to eradicate the country of origin principle which goes directly against the grain of the Internet being a global medium for transmission and provision of online services.

***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?***

There is little doubt that recent privacy violation scandals in the news environment have done little to address doubts in the consumers' minds as to the protection of privacy. Not all European countries deal with privacy issues in the same way, although the raft of EU legislation on data protection and privacy has meant that in general the privacy of a European consumer can be deemed to be better protected than in other regions in the world. One only has to look at the French example, where CNIL (Commission Nationale de l'Informatique et des Libertés [www.cnil.fr](http://www.cnil.fr)) has a broad mandate to protect personal data in France and as a result enjoys public trust. On a wider European stage, there are many pieces of legislation with which retailers with both online and traditional sales channels must comply, which arguably ensures the same level of consumer protection for all stakeholders in the online environment as in the offline environment. The measures already in place include:

The E-commerce Directive: The Directive applies to both businesses and consumers, and sets down a coherent structure of rules to be observed by entities doing various kinds of online business to ensure a high level of consumer protection.

Data Protection Directive: The main principles behind the Data Protection Directive are:

- personal data must always be processed fairly and lawfully, be collected for explicit and legitimate purposes and used accordingly, and be relevant and not excessive in relation to the purpose for which they are processed;
- data that identify individuals must not be kept longer than necessary, be accurate and, where necessary, kept up to date;
- data controllers are required to provide reasonable measures for data subjects to rectify, erase or block incorrect data about them;
- each Member State must provide one or more independent supervisory authorities to monitor the application of the Directive.

Rome I<sup>1</sup>: This proposal aims at converting the Rome Convention on the law applicable to contractual obligations into a Community Regulation and to modernise some of its rules. This instrument applies to contractual obligations (e.g. consumer contracts, contracts involving purchase of property etc.) in situations involving a choice of law between two or more countries. The proposal aims to raise the level of legal certainty and facilitate the working of the internal market.

Rome II<sup>2</sup>: The aim of this proposal is to standardise the rules regarding non-contractual obligations and thus extend the harmonisation of private international law.

Distance Selling Directive: This directive puts consumers who purchase goods or services through distance communication means in a similar position to consumers who buy goods or services in shops hence providing them with legal security.

The main issue of consumer trust remains with the broader use of the Internet. Consumer trust in the online environment is being undermined by fraudulent activities being managed via the internet. Phishing, online fraud, keystroke viruses and identity theft all prevent the broader uptake of online services due to the consumers worry with using the Internet to perform payment transactions.

***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?***

Interoperability is a major source of concern to most online retailers across the globe. To date, market forces do not appear to have chosen a particular technology or platform which is widely accepted across the market, even more so in the mobile space. This lack of interoperability is most certainly a factor in the slow growth of consumer uptake in the legitimate online music environment. A number of online retailers are increasingly dissatisfied with the policy adopted by some major technology companies to refuse to license their technologies to legitimate and well established retailers. Some legal and regulatory developments which relate to this policy have come up in France, Denmark and Sweden with interoperability as the central issue. These are yet to have a concrete impact on the market. What is more, interoperability has sometimes been apprehended in too narrow a fashion, with a leading Internet site being accused of not opening

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations

<sup>2</sup> Proposal for a European Parliament and Council Regulation of 22 July 2003 on the law applicable to non-contractual obligations.

up to other consumer electronics formats, whereas the issue encompasses also the problem of consumer electronics or IT companies refusing to license their technology (comprising of formats and DRMs) to third-party Internet sites (i.e. not controlled by them).

Interoperability will have to be addressed in order to address its damaging factor on a nascent market which is already suffering as a result of legal barriers across the EU. Put simply, a consumer should be able to buy a piece of music from any entertainment retailer and enjoy that music on a consumer electronics or hardware platform of his or her choosing.

***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?***

Cultural diversity has flourished in the online environment. Never before have people been able to access cultures globally through the sharing of audio, visual and audiovisual content. It is the ubiquity of the online environment that allows for a level of cultural diversity that can never be attained in an offline environment. It is not difficult to imagine specific measures that would increase cultural diversity online, nor is it necessarily something that is needed. It can be argued that there is huge cultural diversity in the online environment and that there is no need to 'legislate' for something that already exists. Moreover, content consumption and the diversity of content consumed are driven in large part by the consumer, not the content provider. While a broadcaster will choose to broadcast certain content at a certain time, it is the consumer that makes this choice in the online environment. The role of the consumer in promoting cultural diversity is far greater in this environment than in the offline environment and this has proven to be a fantastic promoter of cultural diversity. For example, most online service providers have no choice but to marry 'global' content with very local content in each individual member state because of consumer demand. Only in the internet environment is it economically viable to make available less-demanded content to a large audience or market base. In the offline world it is not economically viable to put niche material into stores given the need to maximise value of shelf space. As opposed to limited shelf space or advertising support for some content, the internet makes all forms of content available. This is giving new life to niche artists and creators.

However, the structuring of the online markets proves a very different story. Firstly, the securing of investment streams towards cultural diversity is severely challenged by rampant and vast levels of piracy, which have not been correctly tackled as yet anywhere in Europe. Secondly, the access by consumers to the online markets have to go through strong bottlenecks (ISPs, Telecoms) who are responsible for bandwidth performance, and have strong advantages for payment means and billing services. Another worrying trend for cultural diversity are the numerous new releases being launched on the digital markets as exclusives, meaning that a particular digital store or a mobile phone company would enjoy exclusive access to content for a given period of time. Recent examples of such launches include Robbie Williams, Coldplay and Madonna. These exclusives are shaping the market in a way that concentrate heavy marketing on a small number of renown artists with intense media exposure. The trend is becoming more common in online marketing and does little to sustain, let alone promote, cultural diversity. The result is the creation of a temporary monopoly market which increases the marketing power of a service provider for a given time.

As far as linguistic diversity and catering to local needs concerned, it is once again consumer demand that drives this. A Portuguese consumers demands a service in his/her own language and again all service providers wishing to achieve a successful level of business in this country have no choice but to provide a platform in the local language. An example could be Fnac.com. If anything the Internet is keeping alive linguistic traditions through promotion and exchange of

linguistic heritage through storage of content in multiple languages. For example, FNAC offers Internet sites in Dutch, French, Greek, Italian, Mandarin, Portuguese and Spanish.

***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.***

The DG Internal Market study on a community initiative on cross-border collective management of copyright states that the online music market is growing at a rapid pace<sup>3</sup>. This is especially true for the US, where the online music market is expected to grow to € 1.27 billion by 2008. In contrast, online music revenues in Europe are expected to reach € 559 million by 2008. In 2004, online music revenue in Western Europe amounted to € 27.2 million (23.4 million attributable to “downloads” and € 3.8 million to subscription-based services). The US market amounted to € 207 million (€ 155.9 million attributable to downloads and € 51.1 million to subscription-based services). In 2004, US online revenues were almost eight times higher than those achieved in Western Europe. The US has a far smaller population compared to that of the EU and yet their music market, and full content online market, is significantly greater.

The reasons for this gap in competitiveness between these two enormous markets are plentiful, ranging from low broadband uptake in some EU member states to the archaic territorial licensing systems employed by collecting societies since the 1880s. There is no pan-European licence for content, making entry to the market difficult and costly. This has a knock on effect on the number of services rolled out and their subsequent uptake. Were a retailer in a position to procure one licence for distribution across the EU, the effort spent on procuring up to 50 licences would be spent differently and perhaps notably on promotion of broadband uptake, new services etc. This in turn would drive consumer uptake and render the European online sector more competitive vis-à-vis its global equivalents. A second area is legal certainty. This goes beyond problems unique to content, as consumer redress, contract law, content regulation are incredibly fragmented leading EU operations susceptible to legal uncertainty without large resources to perform both due diligence and compliance with EU rules and regulations. This is why many services are created for purely local market – using .co.uk, .it, rather than .eu portals.

***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?***

All the stated activities (PPV, VOD, subscription services, etc...) are envisaged add-ons to the existing marketing mixes of online retailers. While online retailers would like to be able to offer these services EU-wide, there are major obstacles for speedy deployment of such offerings, not least time and the delaying tactics of some rights owners in term negotiations (for example, no record company has offered workable terms for online retailers with music subscription services to date) and geography and the national scopes of most licences, particularly those originating from collecting societies. While tailoring services to local needs is certainly time consuming and challenging, it is without doubt that the major obstacle to rolling out services EU wide is the licensing system currently in place. In order to roll out an online music offering, a retailer, in order to ensure it is operating legitimately, must conclude licences with rights-owners for content they wish to distribute. These licences ensure right-holders are properly remunerated for the content consumed online. The major obstacle created by the licensing system in terms of rolling out an EU-wide service is that the licences are only granted on a territory by territory basis and

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<sup>3</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf)

this essentially splits the internal market into 25 separate regions. All attempts by the European Commission to break down this barrier have thus far fallen well short of providing such a system and in essence have not changed the monopolistic practices of national collecting societies who manage these rights. This acts as a major obstacle to any company trying to provide an EU-wide service and has hampered the development of the sector as a whole. In addition, the tendency of large market players to first concentrate on larger markets (UK, France, Spain, Germany, and Italy) and the procurement of licences for those areas have without doubt stifled consumer choice in other, smaller markets, to which the content providers get in second or third phase roll outs. Another key issue about licensing is the splintering of usage rights – when one gains access to sell copyright music often than have to sign several different licences for the same digital product. If you wished to operate on multiple digital platforms and use the copyright material across different forms (broadcasting and ownership models for instance) you would have to normally procure a licence for digital streaming, interactive streaming, downloads and then multiply this by online, wireless, mobile, iTV and broadcasting licences. This makes it nearly impossible to achieve economies of scale in selling digital content.

Recently, “emusic.”, a US company, has announced that it was deploying in Europe and that it would start with UK, Germany and France, and maybe Holland. This illustrates the discriminating consequences of the difficulties in obtaining copyright clearances across Europe. Those difficulties create a two tier system with large and small countries and end up endangering cultural diversity, otherwise praised by the copyright industries.

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

Market research companies (such as GfK, Forrester, Jupiter, etc.) are best positioned to answer this question. That said, the Commission cites in its study on a ‘Community Initiative on the cross-border collective management of copyright’ ‘that the unavailability of efficient licensing for new forms of online exploitation that allows for a particular form of copyright to be commercially exploited throughout the EU is detrimental to the successful roll-out of a variety of cross-border online services – sacrificing huge potential for European growth and prosperity.’

If necessary changes were made in the legislative and technical environment the market should develop in a way in which it had developed in other regions of the world (notably the US).

***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.***

Interoperability is very clearly the number one issue for online entertainment retailers at the moment. Consumers accessing content from legal download platforms do not understand that some stores cannot supply the format in which they wish to play back their music. To date, market forces do not appear to have chosen a particular technology or platform which is widely accepted across the market. This lack of interoperability is most certainly a factor in the slow growth of consumer uptake in the legitimate online music environment. A number of online retailers are increasingly dissatisfied with the policy adopted by some major technology companies to refuse to license their technologies to legitimate and well established retailers. Some legal and regulatory developments which relate to this policy have come up in France, Denmark and Sweden with interoperability as the central issue. These are yet to have a concrete impact on the market. What is more, interoperability has sometimes been apprehended in too narrow a fashion, with a leading Internet site being accused of not opening up to other consumer electronics formats, whereas the issue encompasses also the problem of consumer electronics or IT companies refusing to license their technology (comprising of formats and DRMs) to third-

party Internet sites (i.e. not controlled by them). Interoperability will have to be addressed in order to address its damaging factor on a nascent market which is already suffering as a result of legal barriers across the EU. Put simply, a consumer should be able to buy a piece of music from any entertainment retailer and enjoy that music on a consumer electronics or hardware platform of his or her choosing. To date the European Commission has yet to address this situation in earnest and competition law seems to have little impact on this phenomenon.

Another major technological barrier to uptake of services is broadband availability and take-up. Increased and sustained efforts should be made at both EU and national level to ensure increased coverage and subsequent take-up. Wireless broadband is a major area of development as it offers a much more streamlined access point for all consumers.

***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?***

Even though GERA-Europe as a trade association does not have access to commercial information of the sort requested in this question, some public statements by online retailers have pointed at the non-sustainable formula in the value chain for music distribution. Online retailers look caught between a rock (dealer price fixed by record companies and licence fees by collecting societies) and a hard place (market price of 0.99 € commanded by the world market leader) with next to no margin in between. This margin must be able to cover fixed costs and expense which often prove an insurmountable obstacle for those companies who can create a volume service. It is interesting to note that no such statements have been made regarding the value chain for the nascent VOD market.

The main method of ensuring a viable online content is to level the playing field where copyright, technological barriers and local regulatory issues do not create imperfect markets which decrease the level of content available. Therefore the Commission must:

- 1) Enhance and protect the country of origin principle based on Article 49 of the Treaty which enshrines this principle.
- 2) Provide for a system whereby interoperability becomes the norm
- 3) Create a copyright licensing system which enhances competition along all links of the distribution chain.
- 4) Recognise the difference in the functioning of the offline and online market and in light of this recognition refrain from imposing the same legislative logic to these very separate markets.

***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?***

The most commonly used means of payment is undoubtedly the credit/debit card. Online retailers that happen to be related to bricks & mortar retailers have put on the market pre-paid cards for downloads that are available off the shelves in physical stores. The same goes for gift vouchers. Automatic billing on invoices from third parties (e.g. ISPs or telecom companies) are also available in some instances. Finally, some stores have recently come up with new partnerships with mobile phone companies with sometimes SMS based payments. Small to medium size stores have in practice little or no access to the last two means of payment described above. Other than the credit/debit card system it remains to be seen how the other payment systems listed above actually fare in online environment although evidence to date does suggest that there is a place for these systems (Paypal, Nettle for instance).



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

There is very little leeway for online retailers when it comes to determining the price of content, and particularly music, sold online. The end price of content sold both in traditional entertainment retail stores and online is very much driven by the content owners who enjoy both a natural monopoly and a territorial one through collection society licensing for the exploitation of their catalogue and often release products that are non-substitutional in the eyes of the consumers. Therefore, very little room is left for negotiation by retailers. However, once the premium is paid by retailers for content, the distribution market is a competitive one and retailers need to adapt their pricing depending on competitors and the price point consumers are willing to tolerate. One major player in the online environment has essentially set the price for a download (.99 euro) which GERA-Europe members would argue leaves them with no profit margin worth mentioning. It is interesting to note that this major player has a hardware offering linked to its online music service, on which it arguably makes its profit. A specialist entertainment retailer does not have this luxury.

The steady evolution of copyright has now stretched to the point where too much control prevents new markets from emerging. There is for example no justifiable reason why online sales of downloadable music could not enjoy an exhaustion of distribution rights, much to the same extent as physical products do. This approach would create a more favourable environment for the market and would foster competition which in turn should lead to more flexible pricing.

**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?**

Yes. The most appropriate way to achieve Europe-wide licensing is twofold and as follows:

- For those rights which are administered collectively through societies, there should be legal obligations to set up one-stop multi-territorial shops and let these societies administer their own back offices in order to redistribute the collected rights.
- For those rights which are administered individually, the advent of exhaustion of distribution rights for digital material online (also see Q13 for a similar point) would automatically achieve the stated aim of a European scope for all necessary licences in the domain.

The best way of moving this market forward would be to uphold DG Competition's statement of objections in the CISAC case and reach a judgement to that effect. The continued delay in addressing this issue only exacerbates the detrimental licensing system that pervades the EU.

**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?**

For an effective pan-European mechanism of cross-border collective rights management to be achieved, it is important to eliminate the inefficiencies in the process of obtaining music licenses covering the European territory. There is also a need for greater efficiency in the operation of collecting societies, and a need for increased revenues for right holders and lowering of barriers for the provision of legitimate on-line content in Europe, leading to the development of the business in the EU and the elimination of the competitive disadvantage vis-à-vis providers in the US. All efforts at EU level to address the inadequacies of the licensing regime for online distribution in the EU have fallen well short of that which is required to effect real change.

The current licensing regime should be improved as below:

1. Right holders should be allowed to change societies and administer their rights more flexibly than is currently the case in order to obtain the best rights administration and enforcement services, subject to appropriate limitations regarding the scope and continued validity of existing licenses.
2. Collecting societies should not be permitted to only offer rights as a bundle, i.e., as a package of rights with rights paid for but not required.
3. Collecting societies should be mandated to grant each other bilateral licenses in order to prevent that collecting societies maintain the status quo unless undue restrictions are accepted (as was the scenario in the context of the Santiago Agreement). In parallel, appropriate conditions and sanctions should be provided for to ensure that the granting society can ensure the proper administration of the rights granted by the receiving society. Further to this, societies should not be allowed to enter into 'Most Favoured Nation' clauses on rates in their reciprocal deals that would effectively thwart the competitive pressures created by this option. Such reciprocal agreements must not allow exclusive access to their market from other members in the system. This form of market agreement has essentially segmented the market amongst societies.
4. Licensing rates as well as administrative fees should be set by the society licensing the customer/content distributor, subject to arbitration of disputes (see below), in order to avoid the need for inefficient and costly negotiations of license rates between collecting societies and licensees customers on a country-by-country basis.
5. Once a user enters into negotiation with a collecting society, that user should be allowed to roll out its service, based on a reasonable interim arrangement without fear of prosecution for copyright infringement
6. If a user and a collecting society have not agreed a licence within 18 months since the beginning of negotiations, either party should be permitted to refer the negotiations into binding arbitration. A tribunal should be entrusted with the arbitration of copyright disputes between right holders, collecting societies and licensee-customers. The tribunal should be empowered to resolve disputes about licensing and royalty terms, licensing negotiations as well as unlawful actions between the collecting societies affecting the members or the licensee-users. Notwithstanding decisions made at EU Member State copyright tribunals (notably the UK) in the interim, we would support the notion of a copyright tribunal decision being applied to both parties to the arbitration across their dealings in the EU.

This option would lead to the most widespread availability of pan-European licenses of a meaningful scope and thus to lower transaction costs. The competition between collecting societies it will engender would lead to greater operational efficiency of the collecting society, and thus to lower administration fees. It would also provide for competition on license rates. These improvements in turn would lead to lower barriers to entry for large and small content distributors alike. They would lead to more varied and creative license terms (regarding, e.g., the manner in which the content can be acquired and used) benefiting end consumers of content and demand for such content. It is worth observing that true one stop shopping (including rate) presents the opportunity for competitive pricing throughout the Internal Market, which surely must be a desired goal.

This solution would also offer considerable advantages to rights-holders which in turn will benefit consumers. First, rights-holders would continue to be able to adhere to a collecting society close to home, without ultimately being required to join a larger society to ensure the effective administration of their rights. Second, rights-holders would have greater flexibility moving from one collecting society to another than is currently the case. Third, in spite of the competition on license rates among the society, rights-holders could expect higher overall revenues from the increased distribution and availability of varied forms of revenue-generating music and the resulting decreased demand for pirated music. In simple terms, if more music is available at lower rates more end consumers will buy music, leading to an overall increase in revenues from music licenses. More music will be available to the consumers at a better market value which is created by a more compelling relationship between rights-holders and licensees. The imperfect conditions that underpin the current regime means licensing terms are directly impinging on the availability of music to consumers. This solution would also lead to greater revenues from legitimate music that would otherwise be lost to piracy.

***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.)?***

It would appear that the implementation and widespread use of DRMs could allow for a more direct link between actual consumption of content and the remuneration of authors. The speed to redistribution should also increase in theory, as accounting of consumption becomes more automatically interfaced. Levy systems and compensation mechanisms should logically be phased out as DRMs get phased in. Online retailers receive a lot of dismayed comments by angry consumers who do not understand the co-existence of levies and copy limitations on legally acquired content.

However, the use of DRM to prevent unlicensed usage of copyright content should not be confused with the use of DRM to create technological lock-out of competitors.

***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***

Different VAT regimes across Europe create a non level playing field amidst national markets.

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

Online retailers do not benefit directly from incentives or fiscal measures for the development of their platforms anywhere in Europe.

***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?***

Release windows apply to VOD in a number of countries. In France, the current release window for VOD is set at 7 months and 2 weeks after the date of release in theatres. It could be envisaged that a chronological approach to windows be replaced or combined with an evolutionary pricing approach, whereby a film/video would be available on all channels and carriers at the same time but with differentiating pricing and tariffs. This should become a prerogative for rights-holders as once content is captured digitally it can be pirated onto Internet sites so the simultaneous release of content helps eliminate this phenomenon

Entertainment retailers in the retail of actual DVDs online are affected by release windows which again creates a competitive disadvantage vis-à-vis competitors in the so-called Region I area (predominantly the US). Regional coding directly limits a consumer's freedom of choice, often limiting them to the only option of piracy. In research done by the NVGD<sup>4</sup> regarding the financial impact of not being able to sell DVDs (especially from 'zone 1') that can not be imported from outside the EU, that the cost to business was at least 10%. Consumers are able to order DVDs from outside the EU either legally or illegally, but new media service providers are prohibited from selling Region 1 DVDs on their sites. This carve up of the market is entirely nonsensical in the online environment and should be entirely scrapped for online sales.

**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 current priority for online retailers does not lie in network quality but rampant piracy and most particularly peer-to-peer piracy. Network operators enjoy a regime where they are not liable for the activities of their customers on illegal sites, due to the provisions of the e-commerce directive. It is this directive and its implications with regards to the lack of liability of network operators which ought to be reviewed in the opinion of online retailers. Entertainment retailers would be concerned if a two tiered system of internet access led to unreliable access to retailers who had not paid a premium for top tier network connections.

**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 accounts for over 80% of internet music downloads so our business suffers greatly from piracy, both online and offline. As a matter of fact, piracy is of major concern to online and tradition entertainment retailers. Recent market figures (first half of 2006) show that the market for music downloads has underachieved; it shows little growth whereas new technology markets in their early years of development traditionally enjoy soaring growth rates. Uploading is a more damaging activity than downloading if the issue is looked at logically or consequentially. If this distinction makes sense in enforcement activities, there is no reason to qualify one or the other by means of legal definitions. Enforcement authorities are best left with some leeway to target whomever they choose. Liability of network operators is a necessary condition if public authorities wish to seriously tackle the issue of peer-to-peer piracy (see also Q20). In addition, a combination of state and industry run education of consumers and litigation resulting in heavy penalties against 'up-loaders' is essentially the mix required to at least reduce the impact of piracy on the online sector

**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?***

Education and awareness campaigns contribute to the fight against piracy mostly in the long run. Intense campaigns in schools are under way in the UK in 2006. The Netherlands also had a similar campaign in 2005. France had a campaign orchestrated by *Forum des droits sur l'Internet* in 2004 in high schools. The effectiveness of such campaigns is hard to assess even if most

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<sup>4</sup> Nederlandse Vereniging van Grammofoonplaten Detailhandelaren

professionals and authorities seem to believe that they are necessary. It is clear that education and media literacy go some way to addressing the problem of piracy although there is no reason to believe that either of these factors will eradicate piracy which appears to be firmly embedded in the online environment.

***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?***

Peer-to-peer technology consists essentially of a network vehicle. As such it is not a *pirate* technology and it could contribute to the exchanges of protected content. It is also possible that peer-to-peer network architectures become more efficient in time than a server to multi-point design. Network architecture can effectively be neutral provided that the right environment is in place, including proper gates to the networks with monetising functions, proper DRMs (Digital Rights Management) to manage usage and proper liability regimes to keep the P2P networks under control.

***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)?***

Rating and classification is a major issue for retailers if it implies liability for retailers on the sale of content. Retailers understand their role to properly label inappropriate content and make it difficult to obtain by underage consumers, but a ratings and classification system should not lead to onerous administrative obligations or disproportional measures such as age identification systems or inability to stock some content.

***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?***

The majority of online retailers who are GERA members use DRMs. It is important to understand that the selection of DRM technology, its use, version or format, is imposed by content owners upon online retailers. Nevertheless, DRM is a generic term for technologies that are necessary in order to protect content online. There are no other types of technology available, whereas there are other types of business models, which offer unprotected content. A large number of rights-owners and retailers have chosen the protected route to date, not only because it manages usage of legally purchased material, but also because it enables new business models, such as subscriptions for streaming, VOD through progressive download, regular downloads, access to exclusive / limited content, etc. None of these models would actually work if no DRM were available. In this respect, DRM is to be understood as a generic technology and not as a proprietary system.

This being said, we have to recognise that the recent and very much advertised move (Fall 2006) from some major right owners in the USA to a system where music would be free and not be protected with DRMs, has raised concerns and questions in the minds of consumers, and tremendously helped the plea of those who argue against DRMs: consumers do not understand why DRMs should be compulsory in Europe and would not in America.

**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?**

As stated in question Q25, content owners select the types of DRMs which they request online retailers to use. Therefore online retailers do not shop around for more, or less, robust systems. One consequence of this is an economic one, whereby retailers do not have the opportunity to source less costly solutions, regardless of whether those solutions are as effective as the one designated by the right-holder in question.

As far as the user-friendliness of a DRM enabled service is concerned, again the duty here to use systems with which the consumer is happy lies with the rights-owners, as it is the rights-owner that chooses which DRM package is to be used on a retailer's site. As to usability of these systems, we believe that continued concerted effort should be made jointly by the rights-owners sector on the one hand and the IT sector on the other, to develop DRMs that are user friendly and user acceptable.

Finally, it is worth noting that the entertainment retail sector in principle supports the concept of DRMs as a means to ensure fair remuneration and enable innovative business models.

The issue whether the DRM is robust enough and provides the "appropriate level of protection" or not, is really in right owners' hands, and is not a concern for distributors. Our job is to distribute music under the form that right holders deliver to us. And as a matter of facts, we keep selling in our stores millions of CDs on which the "protection level" is nil.

**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?**

As stated above, DRMs are widely used just because they are contractually required by major companies in their supply contracts.

As regards user friendliness, consumers have a hard time understanding why they are allowed to do 5 transfers (why not 6?) or 7 burns (why not 8?). They do not understand why a track encrypted with WMA DRM cannot fill an iPod without the prior burning of a CDR. They do not understand how it is that they can do whatever they want with physical CDs purchased in brick and mortar stores, and not so with the tracks they buy in digital stores.

**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?**

Entertainment retailers stock and sell copy protected CDs, but have absolutely no input as to which tracks should be sold in this protected format – that decision lies squarely with the recording industry and in many instances a retailer will not know that a CD has been copy protected until it arrives in its warehouse. The major problem with this scenario is that many entertainment retailers (such as Fnac) are faced with complaints from their own customers as to the protection on a CD but are completely powerless to do anything about it. This undermines the relationship between retailer and consumer and affects in no way the recording industry which has unilaterally decided to place copy controls on certain CDs. Needless to remark, this is most unsatisfactory, not least because copy controlled content is essentially content with a lock on it, whereas content provided on a DRM basis is content which is entirely accessible, in a controlled manner and is a viable alternative for more stringent control measures.

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

Interoperability is very clearly the number one issue for online retailers at the moment. Consumers accessing content from legal download platforms do not understand that some stores cannot supply the format in which they wish to play back their music. To date, market forces do not appear to have chosen a particular technology or platform which is widely accepted across the market. This lack of interoperability is most certainly a factor in the slow growth of consumer uptake in the legitimate online music environment. A number of online retailers are increasingly dissatisfied with the policy adopted by some major technology companies to refuse to license their technologies to legitimate and well established retailers. Some legal and regulatory developments which relate to this policy have come up in France, Denmark and Sweden with interoperability as the central issue. These are yet to have a concrete impact on the market. What is more, interoperability has sometimes been apprehended in too narrow a fashion, with a leading Internet site being accused of not opening up to other consumer electronics formats, whereas the issue encompasses also the problem of consumer electronics or IT companies refusing to license their technology (comprising of formats and DRMs) to third-party Internet sites (i.e. not controlled by them). Interoperability will have to be addressed in order to address its damaging factor on a nascent market which is already suffering as a result of legal barriers across the EU. Put simply, a consumer should be able to buy a piece of music from any entertainment retailer and enjoy that music on a platform of his or her choosing.

**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?**

We do not believe that any of the above has a substantial impact on the market. However, they are likely to draw people on to the Internet which will facilitate their level of comfort with using the internet to search and consumer online content.

**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 equipment and software manufacturers need to ensure that online content consumption is a seamless process – making it both easy and simple for consumer. The integration of content and devices (for instance the takeover of Loudeye by Nokia) should assist in this regard.

The differences in levy systems do pose a problem with regards to the functioning of the Internal Market. Considering consumers as importers, thus making them liable, does not provide an acceptable solution to the shortcomings in the environment of the Internal Market. Making individuals liable on such a complex issue as copyright in various jurisdictions is impractical and unfair and leads to uncertainty when trading across borders with levied goods. Any solution other than harmonisation would appear too burdensome and would fail to truly provide legal certainty. There is little doubt that the imposition of levies on digital players only serves to raise the overall cost to the consumer and ultimately is another factor which has stifled the growth of the online music market in the EU.

**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 role of governments should be to:

- 1) Ensure the basic network and connectivity
- 2) Eliminate practices which harm the uptake of online content (i.e. licensing system, security)

- 3) Limit the unnecessary regulation of online content (I.e. such as the erosion of the country of origin)
- 4) Intervene only where there is a clear case of need (piracy?)

**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?**

There is a very wide range of initiatives which we believe could be undertaken to address some of the barriers discussed in answers to the two questions above. We provide below a non-exhaustive list of what some of those initiatives could be:

1. **Telecom & ISP liability and accountability** – given the rampant nature of music piracy in the online environment and the direct impact this has on the competitiveness of the European online music retail sector, ISPs must be held accountable for the access they provide to those individuals using pirate sites.
2. **Interoperability** - Provide for a system whereby interoperability of music formats online becomes the norm. **Exhaustion of distribution rights for digital distribution** – parity between exhaustion of distribution rights in the offline world and the online world must be achieved.
3. **VAT level playing field** – provide a level playing field in the application of VAT rates to audio and audiovisual content sold across the EU online.
4. **Private copy regime review** – clarity and streamlining of private copying rules must be put in place across the EU.
5. **Licensing regime** - pan-European licenses on a basis of reciprocal agreements between collecting societies with arbitration mechanisms in case of license disputes.
6. **Effective anti-piracy measures** – piracy accounts for over 80% of all music consumption online. Measures which enable member states to pursue pirate sites and pirate site users with serious effect must be put in place.
7. **Broadband deployment and uptake** – increased effort by member states to make broadband available must be encouraged.
8. **Contractual law in the online environment** - protection for both the business and consumer in contractual obligations under the Rome I and II directives.
9. **Draft AVMS Directive:** application to linear services only to allow for the development of new services before regulating them beyond the rules which already apply to them under the E-Commerce Directive.
10. **Small claims compensation** – for the benefit of consumers, an EU-wide system of small claims applicable to cross border transactions must be put in place
11. **Effective resolution of competition cases in the licensing environment** – there must be speedy and effective resolution of the anti-competitive aspects of collecting societies licensing regimes such as those questioned by DG Competition in the Santiago, Barcelona and CISAC cases. This will provide legal security to users and allow users to take advantage of the Internal Market. Users require one-stop-shop pan-European licenses on a non-territorial, country of origin basis.
12. **Defence of the positive aspects in the E-commerce Directive:** the E-Commerce Directive has provided legal certainty for those actors wishing to provide online services since its implementation. Under this legal certainty online services have begun to develop (licensing regime notwithstanding). At the same time, this directive has set a regime of non-liability for ISPs in matters related to piracy, which creates an environment whereby P2P piracy is difficult to combat.
13. **Regional coding** – There being no real justification for regional coding when consumers can access content from other regions in the world online, regional coding of DVDs must be done away with.



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Should you require additional information on any of the above, we would be pleased to meet with you in person to discuss.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Martin de Wilde', written in a cursive style.

Martin de Wilde  
President, GERA-Europe

GERA-Europe  
214d Chaussée de Wavre, 1050 Brussels, Belgium  
Tel: 32-(0)2-626-1991, Fax: 32-(0)2-626-9501  
[www.gera-europe.org](http://www.gera-europe.org)

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