November 4, 2010

Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC)

The International Federation of Film Producers Associations (FIAPF) is a trade organisation dedicated to the defence and promotion of the legal, economic and creative interests of film and audiovisual producers throughout the world. FIAPF's members are 26 national producers' organisations from 23 countries across the globe from Europe, Asia, Pacific, North America, and Latin America.

The members of the International Video Federation (IVF) - ID 7013477846-25) - are businesses active in all segments of the film and audiovisual content sector in Europe. Their activities include production of films and audiovisual content as well as distribution thereof in the video and online channels.

Many of our members are pursuing the offer of cinematographic and audiovisual works online, either directly to end-users or working in cooperation with service providers or content aggregators deploying different business models (e.g. time-limited viewing, streaming or digital delivery of permanent copies). Such new services bring wider choice to consumers as they involve an increasing variety of content, both on the Internet, but also through other types of networks.

However, the ever-increasing availability and distribution of illegal, unauthorized audiovisual content on the Internet compromises consumer confidence in the safety and security of the Internet in general, and as a consequence thereof in e-commerce. It also results in massive pressure on the broadband network to the detriment of the quality and speed of legitimate access and legal services.

We welcome the opportunity offered by this public consultation to contribute to the reflections on a topic which our members consider crucial to the future development of legal electronic commerce content services. We set out below our reflections on selected questions of particular relevance to our members and their business activities.

19. What are your views on the growth of the economic development of electronic commerce and information society services in Europe, in general and compared to its most important competitors?

The members of FIAPF and the IVF consider recent broadband developments beneficial to promoting increased use of Internet services and electronic commerce. However, public trust and confidence of private and commercial users of the Internet and electronic commerce is crucial to speed up society's acceptance of new online services and opportunities. Unlawful behavior on electronic communication networks is abundant and will continue to deter users' acceptance of and move to legitimate online services, especially where little or no means of civil redress are available.

The rule of law must be respected both in commercial and personal relations on the Internet. This requires not only the protection of the rights and freedoms of those involved in e-commerce transactions, but also maintaining the security of those engaged in such transactions so that all parties are identifiable and responsible for their actions.

20. More specifically, do you have any indications that delivery problems would be an obstacle to the development of your electronic commerce activity? If so, which?

The members of FIAPF and the IVF are businesses active in all segments of the film and audiovisual content sector. They commit significant financial investments and resources to developing, producing and distributing a wide range of audiovisual content offered to the public across various media and platforms, including electronic commerce over the Internet.

In keeping with technological developments, audiovisual content is increasingly being offered in high-definition resolution which better meets consumers' expectations but which also requires more bandwidth and a high level of quality of service. New high-definition services are therefore more susceptible to network congestion and delivery disruptions and require a higher degree of security. 3D and interactive content will require even higher resolutions and bandwidth specifications. In order to ensure the appropriate technical and secure environment, increased action against illegal activities on the Internet, which clogs the networks to the detriment of legal services, is required.

22. Is a lack of knowledge of your legal or fiscal obligations in the context of electronic commerce or of the provision of information society services an element dissuading you from entering into such activities?

A level-playing field between the online and offline worlds should be promoted to ensure a properly functioning e-commerce marketplace. Public authorities should take the necessary steps to ensure that rules applicable in the offline world are also properly enforced in the online environment in ways adapted to such environment.

As regards fiscal obligations, the VAT treatment of e-commerce services should be reviewed, notably in the creative media sector. We consider it inappropriate and unwarranted to discriminate with regard to VAT treatment between cultural goods and services provided offline versus online. Hence, a reduced VAT rate should also apply for the online delivery of cultural products and services.

24. Do you have information according to which payment problems (lack of choice in terms of methods of payment, confidentiality issues, refusal of payment cards from another Member State, etc) would be an obstacle to the development of your electronic commerce activity? If so, can you assess and illustrate these problems?

E-commerce in general and, more specifically, the online delivery of content and services, employs a wide variety of business models characterized by almost as many payment systems, such as subscription fees, pre-paid arrangements, direct payment, advertising-based offerings, etc. In this context, it is our view that greater emphasis should be placed on the development and improvement of current payment systems through innovations facilitating, e.g., micro-payment. Standard means of payment are not always the most convenient for small amounts. This has proven to be the case in some Member States, for example, with regard to payment by SMS.

26. Do you experience problems in accepting payments of small amounts due to the high level of bank charges (for instance merchant service charges) or, in general, due to the scarce availability of payment methods which are suitable for this purpose?

Yes, priority should be given to the development and improvement of current payment systems through innovations facilitating micro-payments.

28. Are you aware of information on the types and growth of e-commerce businesses and on whether this substitutes or complements off-line retail services? If so, please specify

The members of FIAPF and the IVF are involved in the production and distribution of audiovisual content both on digital media and online. They are constantly developing new, improved physical carries (most recently Blu-ray) and a variety of different online models, involving either time-limited or permanent access to the work in question. It is clear, though, that the online delivery of content is still a nascent business. In this context, it is worthwhile to recall that the development of a sustainable and profitable online/e-commerce proposition for audiovisual content is seriously hampered by the unfair and illegal competition presented by copyright content offered illegally online, often commercially-driven and often based in Europe – in some cases despite condemnation by national courts. This situation will only improve by ensuring better protection and enforcement of intellectual property rights also in the online environment.

36. In your view, does the purchase and sale of copyright protected works subject to territorial rights and the territorial distribution of goods protected by industrial property rights, encourage or impede cross-border trade in information society services?

The contractual freedom enjoyed by right holders to license creative media content as they see fit from a commercial point of view encourages overall increased production and increased trade in information society services (i.e., the development of e-commerce). The commercial decision to engage in single or multi-territorial licensing is made on the basis of informed decisions by the producers and distributors of creative works, on a case-by-case basis, with due consideration to local sensitivities (cultural preferences, classification regulations, language, etc.) and, above all, the requirement to ensure full consumer satisfaction. Production of new creative works is a precondition to trade, and production requires financing, which is often dependent upon licensing in the manner that generates the highest

contribution to the film's production budget and ensures a return on the distributor's investment. Often, this licensing take places on a linguistic basis in the form of pre-sales of rights before production of the film even begins. This approach has the added benefit of supporting small and medium sized producers/distributors many of whom will not have the financial means or indeed company resources to pursue a pan-European business model.

This contractual freedom is of existential importance for smaller and medium-sized film producers (many European film companies fall into these categories) whose very activity depends on a precarious mix of funding sources including pre-sales of rights for certain business models or in particular territories and co-productions which may give different parties different rights in different territories. Territorial rights, licensing and the rights clearance activities are therefore not potential obstacles to e-commerce in audiovisual works; on the contrary, it constitutes one of the main drivers behind European content production, financing and distribution.

Although international, EU and national law recognise the territorial nature of copyright, the territorial application of copyright does not in any way preclude, from a legal point of view, EU-wide or cross-border licensing models. As a matter of fact, cross-border and pan-European licensing already occurs for the online delivery of audiovisual content in the market place when it makes sense commercially and content providers have sufficient demand from distribution platforms for such a type of licensing. For example, it is not uncommon to find licenses for Germany, Austria and Switzerland in German language or for Italy, Malta and Switzerland in Italian. Multi-territorial licensing is also present in the Nordic region.

Europe-wide or multi-territory licensing of audiovisual content should remain discretionary, thereby allowing right holders to respond flexibly to changing consumer demand and the financial aspects of film production and distribution.

52. Overall, have you had any difficulties with the interpretation of the provisions on the liability of the intermediary service providers? If so, which?

According to the E-Commerce Directive, "service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities."

Thus, the provisions on liability were intended to establish a careful balance between the interests at stake and to encourage the elaboration of mechanisms to deal with illegal activities taking place on ISPs' websites and/or networks, and this in an expeditious manner. These provisions were intended to foster cooperation between the relevant parties, but have so far failed in this regard. Indeed, the Directive was meant to "constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information." However, in the copyright sector, right holders' recourse to prevent or stop infringements has mainly been limited to the courts.

The national implementation of the Directive has been broadly satisfactory, although the situation in some countries is very problematic, e.g. in Spain. However, as regards the case law, the criteria used by the courts differs significantly between the Member States – and sometimes even within a Member State. Thus, it is difficult to derive the necessary guidance from the courts. The criteria used to distinguish between those providers who should benefit from the liability privileges and those who should not differ between countries (for example between France, Germany, Spain, the Netherland and the UK).

Overall, based on case-law from across Europe, with a few exceptions, illegal services do in general not benefit from the liability privileges established by Articles 12-14. This being said, the Directive has in several cases provided a tailor-made defense for illegal services in legal proceedings brought against them - and thereby delayed the possibility for right holders to obtain speedy intervention against piracy. In particular, the national implementation of the knowledge requirement as it has been interpreted has given rise to issues. Right holders have also met difficulties in obtaining meaningful injunctive relief. More generally, the liability regime permits all types of ISPs, whether legal or illegal, to resist any form of cooperation with right holders. Indeed, sometimes ISPs will indicate willingness to act in cases of copyright infringement but then abstain for fear of no longer being able to invoke the liability privileges. These issues could benefit from clarification for example that:

- ISPs that cooperate under appropriate circumstances to prevent illegal activities online are not deprived of the benefit of the limitations on liability in Articles 12-14;
- The knowledge requirement should not be abused to cover for illegal services;
- There is a clear distinction between the liability privileges and the continuing possibility for courts to issue injunctions ordering the cessation of illegal activities – often ISPs are best placed to stop these infringing activities.

53. Have you had any difficulties with the interpretation of the term "actual knowledge" in Articles 13(1)(e) and 14(1)(a) with respect to the removal of problematic information? Are you aware of any situations where this criterion has proved counter-productive for providers voluntarily making efforts to detect illegal activities?

The knowledge requirement in Article 14 has been applied by the courts in different ways. In several recent cases, right holders have been able to meet the requirement of imputing "actual knowledge" to an illegal service and thereby expose that service to liability (usually for contributory or secondary copyright infringement). However, the instances where "providers voluntarily make efforts to detect illegal activities" are few and far between. As mentioned above, their own interpretation of the liability regime could even encourage them to resist any form of cooperation.

We consider the Spanish implementation particularly problematic (actual knowledge replaced by effective knowledge). The French implementation which implies a specific notification procedure before actual knowledge is considered to be established is also particularly cumbersome.

54 - Have you had any difficulties with the interpretation of the term "expeditious" in Articles 13(1)(e) and 14(1)(b) with respect to the removal of problematic information?

This provision is essential to deal with illegal content rapidly and effectively. However, in Spain, expeditious actions simply do not take place due to the time-consuming and cumbersome procedures which must be followed. Another example is the Italian implementation which requires the intervention of a competent authority (judicial authority) with resulting time delays.

55. Are you aware of any notice and take-down procedures, as mentioned in Article 14.1(b) of the Directive, being defined by national law?

Some countries (including Finland, Italy, and Hungary) have adopted statutory notice and takedown procedures – the Italian implementation refers to a specific authority. Some of these procedures are particularly cumbersome for right holders.

56. What practical experience do you have regarding the procedures for notice and take-down? Have they worked correctly? If not, why not, in your view?

Notice and take-down procedures can only work properly if they are not too cumbersome and if ISPs are encouraged to react immediately. The purpose of the E-Commerce Directive was to encourage voluntary agreements; however, very few agreements have been concluded.

57. Do practices other than notice and take down appear to be more effective? ("notice and stay down", "notice and notice")

The cooperation mechanisms envisaged by the E-Commerce Directive are intended to deal with illegal activities in an effective manner. Procedures can only be effective if they are not cumbersome and if they are executed strictly/rapidly by the provider. The incidence of other types of co-operation models is extremely rare. It should be noted that where pro-active measures have been deployed, they have proven to be more effective: e.g., content recognition tools, notice and stay down, etc.

58. Are you aware of cases where national authorities or legal bodies have imposed general monitoring or filtering obligations?

We are not aware of cases where national authorities or legal bodies have imposed general monitoring or filtering obligations. The Brussels Court of First Instance, in a case now pending before the Court of Justice of the EU, has ordered filtering in the specific case of the SABAM repertoire. The ISP in question has not complied with the order which was the subject of an appeal and then a reference to the CJEU.

We recall that as regards monitoring/filtering obligations, the E-Commerce Directive does not preclude a Member State from imposing a monitoring obligation applicable to a particular case (recital 47), nor does it preclude – in a particular case - monitoring measures in the form of filtering (identifying and blocking) specified information that constitutes an illegal activity. Recital 45 stipulates that the limitations of liability do not affect the possibility of injunctions of different kinds requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it. Recital 40 refers to the development and effective operation by service providers of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology.

We also recall that ISPs already use filtering techniques to deal with malware and spam – see also the ENISA report on anti-spam measures implemented by European ISPs at: http://www.enisa.europa.eu/act/res/other-areas/anti-spam-measures/studies/spam-survey).

59. From a technical and technological point of view, are you aware of effective specific filtering methods? Do you think that it is possible to establish specific filtering?

Yes it is possible to establish specific filtering tools. Content-recognition technologies are available in the audiovisual sector and take multiple forms, including fingerprinting, audio and video watermarking, and various combinations.

Filtering could be one of several means to deal with illegal content on the Internet, under specific conditions, in line with the "copyright principles for user-generated content (UGC) services" agreed by several of the world's leading Internet and media companies (see http://www.ugcprinciples.com/).

60. Do you think that the introduction of technical standards for filtering would make a useful contribution to combating counterfeiting and piracy, or could it, on the contrary make matters worse?

A multitude of content-recognition tools and technologies are available in the marketplace and their number and efficiency is increasing. In this context, we do not support mandating a specific technology at this stage through specific technical standards as this could potentially have stifling effects on competition and innovation.

The application of content-recognition technologies should play an important part in any larger effective strategy against not only online piracy of creative content, but also to stimulate the continued development of legal content online services. We do not believe that filtering will, on its own, be the solution to counterfeiting and piracy. But it is one of the many tools which should be part of any coherent and comprehensive approach to address online copyright infringements. The application of content recognition technologies is a cooperative venture requiring content owners to play an important role in cooperation with access providers and/or platform operators. One of the main merits of content recognition technologies is that they can deal with Internet piracy like other content-recognition tools treat spam and viruses. In this regard, the rationale behind filtering measures is underpinned by four main acknowledgements about online copyright infringement, namely that: (i) it constitutes a violation of the ISP's terms of service, (ii) it degrades network performance, (iii) it cannibalizes resources in terms of bandwidth, labour and liability, and (iv) it can be automatically addressed without compromising privacy. It is not about identifying individuals engaged in acts of copyright infringement nor is it about determining the details of their communications.

61. Are you aware of cooperation systems between interested parties for the resolution of disputes on liability?

We are not aware of such systems.

62. What is your experience with the liability regimes for hyperlinks in the Member States?

A number of countries have introduced specific provisions in their laws and in particular in Spain, courts have had a tendency to absolve linking sites from liability (the rules follow closely the liability regime for host providers).

63. What is your experience of the liability regimes for search engines in the Member States?

Again, a number of Member States have introduced specific rules, for example Austria, Portugal, Spain, Hungary, and Liechtenstein. The specific legal regimes do not appear to have had much practical impact either on the positive or on the negative side - except in Spain where the liability regime for search engines follows that of host providers with the deficient system of "effective knowledge". The result is therefore also problematic.

64. Are you aware of specific problems with the application of the liability regime for Web 2.0 and "cloud computing"?

Web 2.0 platforms have generated complex legal issues and the resulting case law arrives at varying conclusions. Cloud computing has the potential of generating complex issues.

65. Are you aware of specific fields in which obstacles to electronic commerce are particularly manifest? Do you think that apart from Articles 12 to 15, which clarify the position of intermediaries, the many different legal regimes governing liability make the application of complex business models uncertain?

The lack of effective stakeholder cooperation to improve respect of the rule of law and protection of intellectual property combined with the lack of willingness to implement tools to tackle illegal and unauthorized activities threaten the launch and sustainability of new online business models.

66. The Court of Justice of the European Union recently delivered an important judgment on the responsibility of intermediary service providers in the Google vs. LVMH case. Do you think that the concept of a "merely technical, automatic and passive nature" of information transmission by search engines or on-line platforms is sufficiently clear to be interpreted in a homogeneous way?

The four cases which were the subject of the reference by the Cour de Cassation to the CJEU were sent back to the Court of Appeal in July 2010 with a view to determining whether Google played an active role as defined in the judgment of the CJEU. Other French courts have increasingly concentrated on the question of whether providers have played an active role in their service with regard to the content offered, in particular in the eBay and the Dailymotion cases. The judgment of the CJEU does not appear to have played a role in other jurisdictions at this stage.

67. Do you think that the prohibition to impose a general obligation to monitor is challenged by the obligations placed by administrative or legal authorities to service providers, with the aim of preventing law infringements? If yes, why?

No, the prohibition of general monitoring does not prevent the implementation of mechanisms that are intended to prevent law infringements. The E-Commerce Directive, the Copyright and Enforcement Directives, are consistent in the sense that they establish tools for relevant parties to deal with illegal activities and to ensure that the rule of law is respected. The possibility to implement a filtering system when necessary and the possibility to request injunctions in order to stop illicit activities are essential means to promote effective cooperation between stakeholders. The notion of general monitoring goes much further than

the implementation of these technological tools, which are merely intended to promote a safe environment and to protect end-users.

68. Do you think that the classification of technical activities in the information society, such as "hosting", "mere conduit" or "caching" is comprehensible, clear and consistent between Member States? Are you aware of cases where authorities or stakeholders would categorise differently the same technical activity of an information society service?

The classification of the technical activities does not appear to be as clear in practice. Some courts, particularly in France, have attempted to find ways to deal with mixed activities. For example, courts in France have traditionally distinguished between the "éditeur" (publisher) and the host activity and sometimes apply different liability regimes side by side for the different aspects of the service.

69. Do you think that a lack of investment in law enforcement with regard to the Internet is one reason for the counterfeiting and piracy problem? Please detail your answer.

In our view, there is a general lack of manpower/resources and expertise of law enforcement authorities. Improved public-private partnerships can help address part of this problem. However, governments must also make addressing counterfeiting and piracy online a priority for law enforcement and provide the necessary resources for law enforcement to enhance its role.

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We urge the Commission to focus on how to ensure a sustainable European content production and distribution industry in the emerging digital future. It is creative boldness, innovation and excellent marketing skills that help film and audiovisual content find its way on the Internet and gradually build up consumer demand for new innovative online content services. The future sustainability of online content services will depend not only on individual creativity, innovation and entrepreneurial vision but also on a supportive European legal regime which ensures a level playing field on all distribution platforms for legally distributed content.

We remain available for further information where necessary.

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