

eircom Limited

Response to The Department of Jobs, Enterprise and Innovation Consultations (“DJEI”) on

(a) Amendment to Copyright and Related Rights Act 2000; and

(b) Review of the Copyright and Related Rights Act 2000

1. Introduction

- 1.1. The DJEI has commenced two separate consultations relating to Irish copyright law. The first consultation relates to an amendment to the Copyright and Related Rights Act 2000 (“CRRA”) by way of Statutory Instrument (the “SI”) and the second consultation relates to a review of the entire CRRA.
- 1.2. While both consultations are welcome, eircom does not understand why the two consultations are taking place separately under two apparently separate review mechanisms. Both consultations are crucially important to the regulation and enforcement of copyright law in Ireland and we believe that the subject of both consultations should be considered together.
- 1.3. Accordingly eircom is submitting a single response to both consultations in the expectation that the DJEI will adopt a considered coordinated and proportionate response to any future legislative changes.
- 1.4. In summary, eircom is of the view that the current CRRA is fit for purpose and not in need of radical reform. eircom believes that any changes to the CRRA (including the current proposed Statutory Instrument) should only be considered following a holistic consideration of all aspects of the CRRA and all relevant legislation. Specifically, a hasty revision of any enforcement mechanisms in the absence of a detailed understanding of the longer-term challenges presented for copyright in the Digital Economy could have significant unintended consequences and could negate the prospects of achieving a long-term sustainable solution to the ongoing problem of copyright infringement.

2. eircom experience and eircom as a stakeholder

- 2.1 eircom believes it is uniquely well-positioned to respond constructively to the consultations. eircom's core business is the provision of telecommunications networks and services including ownership of Ireland's largest Internet Service Provider (ISP) – eircomnet. We operate the largest telecommunications network in Ireland providing services over various technology platforms including copper, fibre, cellular and fixed wireless. eircom is the only Irish ISP to have engaged with and negotiated with copyright holders a creative "Graduated Response" approach to try and reduce the incidents of copyright infringements, something no other ISP in Ireland has wanted to engage in.
- 2.2 The management of copyright is a significant and growing challenge for us as we develop new services in the converged digital media area including on-line distribution and value added broadband services. As this business develops, eircom will itself become a significant player in the creation of copyright and Intellectual Property. In this regard, we will require a regulatory and legislative regime that on the one hand encourages creativity to the greatest extent possible but on the other hand, facilitates commercial business development for the greater economic and social good.
- 2.3 A well-balanced copyright regime is an important enabler for wealth and job-creation in the wider stakeholder community of content creators, intermediaries and OTT players. All these stakeholders are well represented in the Irish economy and can play a significant role in economic recovery and job creation as long as the commercial capabilities of any individual stakeholder is not disproportionately burdened through legal and regulatory obligations.
- 2.4 All stakeholders in the digital economy must be encouraged to invest and innovate and should expect reasonable commercial reward for doing so. The rights of all stakeholders – network operators in investment, creative industry in creating content and new players in digital innovation – are equal and should be seen as such in all relevant legislation and regulations.
- 2.5 On the specific issue of copyright infringement, as has been widely reported, eircom has been subjected to several High Court test cases relating to peer-to-peer file sharing¹ and eircom was also the first and only Irish ISP to implement the a Graduated Response ("GR"). eircom is committed to leading the industry to a long-term

¹ e.g. EMI v eircom [2009]IEHC411; EMI v eircom; Charleton J, 15 April 2010

resolution of this issue and will continue to implement the current arrangements in the interim.

- 2.6 It is eircom's position that a sustainable long-term solution to the issue of copyright infringement must include a combination of legal and commercial measures specifically the availability of user-friendly content offerings that will be attractive to the cohort of consumers who are exploiting the disruptive impact of rapid technology change to the commercial detriment of content providers. eircom has also taken the lead in this regard with the launch of its eircom music hub service a music streaming and download service. The streaming service is available for free to eircom Broadband customer, no eircom customers can use the service for a nominal price, the service allows subscribers unlimited access to eircom's catalogue of songs which is very extensive with over excessive of 3 millions songs.
- 2.7 The telecommunications industry and ISPs in particular has had to respond to massive technology change that has rapidly eliminated traditional revenue streams – ultimately consumer "carrots" rather than legal "sticks" will be the primary basis for a sustainable business.
- 2.8 We also believe, based on our experience of the GR process and the emerging solutions in other jurisdictions that the current arrangements could provide the basis for a sustainable long-term solution in the event that outstanding legal, technical and commercial issues are resolved and that engagement between the relevant stakeholders is facilitated. However, the prospects of achieving this future-proof solution will be significantly compromised rather than facilitated if the proposed Statutory Instrument is introduced for reasons we will go into in more detail below.

3. Review of the CRRA – First Consultation

- 3.1 In broad terms, eircom does not believe that the CRRA is in need of radical reform. The CRRA is fit for purpose and provides all innovators, whether multinationals, large indigenous companies such as eircom, SMEs or start-ups with a comprehensive modern regime which can be utilised to protect original works and which provides a broad range of civil and criminal remedies. The CRRA was, at the time of enactment, one of the longest and most comprehensive pieces of legislation ever enacted by the Oireachtas and eircom believes that it is standing the test of time notwithstanding the pace of online innovation.

- 3.2 eircom nonetheless accepts that it is appropriate to keep the CRRA under review to reflect emerging practices so as to ensure that Ireland offers rights holders meaningful redress. This is particularly important as the Irish economy continues to develop information based goods and services as traditional manufacturing of tangible goods declines. eircom would welcome a more detailed consultation on these issues taking account of key stakeholder views in order to resolve the central policy conundrum: “how do we strike a balance between encouraging innovation based on the creation of new content by having content hosted in Ireland (by having strong copyright laws) whilst at the same time encouraging innovation based on the new and creative of existing content (by having weak copyright laws)”
- 3.3 eircom would also propose that comprehensive consideration of the copyright issue should include assessment of parallel activities of the EU Commission in the copyright area in particular the recently published documents concerning the Intellectual Property Enforcement Directive².

4. Balancing Interests of Rights Holders and ISPs

- 4.1 The complexity of the challenge of correctly balancing the interests of rights holders, communications carriers including ISPs and consumers is widely recognised and Ireland can learn from the experiences of other countries who have sought to address the challenges in a variety of ways. For example, in the recent report by Prof. Ian Hargreaves in the UK entitled “Review of Intellectual Property and Growth”, the challenges are clearly identified and the report recommends that, among other things:
- 4.1.1 the development of the IP system should be driven by objective evidence;
 - 4.1.2 policy should balance measurable economic objectives against social goals; and
 - 4.1.3 policy should balance potential benefits for rights-holders against effects on consumers and other interests.
- 4.2 eircom supports these principles and would encourage the DJEI to carefully consider the interests of ISPs in any proposed reform of Irish copyright laws. Such interests include the following:
- 4.2.1 The integrity of the *mere conduit* exemptions;

² http://ec.europa.eu/internal_market/consultations/2011/intellectual_property_rights_en.htm

- 4.2.2 The need for clarity for ISPs on their obligations, while providing clear safeguards that any proposed changes to the regime are thorough and evidence based;
 - 4.2.3 Ensuring that any new measures can be adopted efficiently and that the burden of administration is not disproportionate;
 - 4.2.4 The possible imposition of additional costs on ISPs without any associated revenue stream;
 - 4.2.5 The principle that costs should be borne by the beneficiaries (rights owners), not by ISPs or their customers;
 - 4.2.6 The proportionality of any potential technical measures which may be adopted to reduce infringement (e.g. measures such as bandwidth “throttling”, suspension of customer accounts, etc need to be balanced against the implications for customer churn, effectiveness in preventing piracy, associated cost of adoption etc); and
 - 4.2.7 Due process for those suspected of infringement.
- 4.3 It eircom’s view that the above complexities are not addressed by the revision to Section 40 of the CRRA as provided for under the proposed amendment

5. Proposed Amendments to Section 40(4) of CRRA by Statutory Instrument – Second Consultation

- 5.1 DJEI has not provided any detailed substantive explanation of why the proposed amendments to Section 40(4) of the CRRA are required at this time except for a general implication that the State is in some way exposed for failing to correctly transposed relevant EU Copyright Directives into Irish law. DJEI would appear to be basing its decision on certain comments of Charleton J in the course of his judgment in *EMI Records (Ireland) Limited v UPC Communications Ireland Limited* (the “UPC Case”). However it is unclear from those comments where exactly the Irish State was incorrect in its transposition and it is also arguable that the transposition was entirely correct within the discretion afforded by the terms of the Directive. This does not mean that legislation should not be reviewed and amended as appropriate; however this should be done for reasons based on clear evidence and should be done in a considered way which fully considers all potential consequences.
- 5.1.2 eircom regrets that the focus of the content industry appears to have turned away from the proportionate and creative responses which are required to address the serious issue of online copyright infringement in a meaningful way (such

as the GR initiative). Instead, it appears that the DJEI is being actively lobbied to impose a potentially ill-conceived, disproportionate and “quick fix” response by imposing the legislative burden of reducing online infringement solely on the shoulders of ISPs. eircom does not believe that this is a rational or appropriate response, particularly in circumstances where eircom has always acted in a manner that respects the intellectual property rights of others and where it plays no active role in the underlying infringement.

5.2 The Integrity of the Mere Conduit Exemption

5.2.1 For the past 11 years, a key pillar of EU Communications law has been the E-Commerce Directive (2000/31/EC) which limits the liability of ISPs where they act as mere conduits (*Article 12*), caches (*Article 13*) or hosts of information (*Article 14*). The mere conduit principle is integral to the proper functioning of the EU communications market. At its simplest, none of the creative innovations around the Internet would make it to market without a competitive ISP network and, with good reason, European Law has therefore broadly exempted ISPs from the legal wrongs of users of their networks.

5.2.2 Other EU legislation, such as Article 12(a) of the Authorisation Directive (2002/20/EC) reflects similar principles by providing limits on the administrative charges which can be imposed on undertakings providing a service or a network under a general authorisation.

5.2.3 eircom is concerned that DJEI’s consultation seeking to amend the CRRA, in a well-intended effort to remove perceived barriers to innovation, could result in a marked change to the mere conduit principle, particularly if the interests of rights-holders are deemed to override the parallel interests of ISPs such as eircom. The financial, operational and legal implications of such a measure should not be underestimated.

5.3 Existing Remedies under CRRA

5.3.1 eircom does not agree with the assertion of Charleton J. in the *UPC Case* that there is a “paucity” of remedies available under the CRRA. In this case, Charleton J repeated *verbatim* many of the relevant provisions of the UK Digital Economy Act which include detailed provisions dealing with the rights of content-owners and the obligations of ISPs and simply observed “there is nothing like these provisions in

Ireland” and that the law in the UK seems to be “practical and workable” at which point his judgement turned to a consideration of the French HADOPI (graduated response) law, the Belgian laws and the US Digital Millennium Copyright Act.

- 5.3.2 It seems however that even if the proposed amendments to Section 40 of the CRRA are enacted, the concerns raised by Charleton J in the UPC Case will still not have been addressed. The detailed UK approach will remain in stark contrast to the far more simplistic approach proposed by the amendments to Section 40 of the CRRA.
- 5.3.3 Furthermore, in the UPC Case, Charleton J did not explore the provisions of Section 127(1) of the CRRA which, entirely separately to Section 40, provides that “an infringement of the copyright in a work is actionable by the copyright owner”. Further, Section 127(2) provides that:

“In an action for infringement of the copyright in a work under this section, all relief by way of damages, injunction, account of profits or otherwise is available to the plaintiff as it is available in respect of the infringement of any other property right”.

- 5.3.4 In eircom’s view, the CRRA is compliant with Ireland’s obligations under current EU and international law³ and any new measures will need to be carefully balanced against Ireland’s obligations under existing and proposed EU law. A significant issue raised in the current GR arrangement in Ireland is the alleged absence of adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the general principles of Community law, including effective judicial protection and due process. It is notable that in other jurisdictions where a GR type mechanism has been introduced, an independent 3rd party is involved in ensuring that the measures are appropriate, proportionate and necessary.

³ e.g. (1) The Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris on July 24, 1971 and amended on October 2, 1979. (2) Universal Copyright Convention, as revised at Paris on July 24, 1971. (3) EEA Agreement. (4) Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. (5) International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on October 26, 1961. (6) World Intellectual Property Organisation (WIPO) Copyright Treaty, adopted by the Diplomatic Conference at Geneva on December 20, 1996. (7) World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty, adopted by the Diplomatic Conference at Geneva on December 20, 1996. etc

5.3.5 eircom would draw attention to Article 1, Clause 3(a) of Directive 2009/140/EC of 25 November 2009 on a common regulatory framework for electronic communications networks and services (the Framework Directive). The Framework Directive provides that:

“Measures taken by Member States regarding end-users access’ to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.

Any of these measures regarding end-users’ access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed.”

5.3.6 While the recent transposition of the Framework Directive by the Minister for Communications, Energy and Natural Resources was silent in respect of this article, any sustainable solution to the copyright infringement issue must include consideration and agreement on how these specific obligations can be met in a reasonable way. Introduction of the current

proposed change to the CRRA with the inevitable disruptive and litigation consequences that will follow, in the absence of a whole-of-Government approach in conjunction with the Department of Communications, Energy and Natural Resources would be a significantly retrograde step.

5.4 Legal Considerations of the Proposed Amendment to the CRRA

5.4.1 Currently, Section 40(3) of the CRRA provides that the provision of facilities for enabling the making available to the public of copies of a work shall not of itself constitute an act of making available to the public of copies of the work. On this basis, the provider of ISP facilities is *prima facie* not liable for the copyright infringement of its customers. However, this is subject to Section 40(4) which provides that where a person who provides such facilities is notified by the owner of the copyright in the work concerned that those facilities are being used to infringe the copyright in that work and that person fails to remove that infringing material as soon as practicable thereafter that person shall also be liable for the infringement.

5.4.2 The original purpose of Sections 40(3) and 40(4) was to ensure that ISPs and other providers of facilities adopted appropriate “Notice and Takedown” procedures so as to avoid contributory liability for copyright infringement. The proposed amendment to the CRRA would insert a new s40(5A) as follows:

“(5A)(a) Without prejudice to subsections (3) and (4), the owner of the copyright in the work concerned may apply to the High Court for an injunction against a person who provides facilities referred to in subsection (3) where those facilities are being used by one or more third parties to infringe the copyright in that work.”

5.4.3 The proposed amendment therefore leaves Section 40(3) and Section 40(4) unchanged. In particular, Section 40(4) still provides that in order to be liable for infringement, an ISP must have been notified by the copyright owner that those facilities were being used to infringe their copyright, and must have failed to remove that infringing material as soon as practicable thereafter.

5.5 Background to Section 40 (5A)

- 5.5.1 In the *UPC Case*, Charleton J. considered that the wording of Section 40(4) would only apply where an ISP was required to *remove* the infringing material. However, “*cutting off access to the computers holding pirated copyright songs is not to remove infringing material; it is to stop the transit of that material*” (para.100 of the judgment, emphasis added). Thus, Charleton J. found that Section 40(4) did not extend to Internet blocking for infringers.
- 5.5.2 As mentioned above, it is surprising that Charleton J. did not explore the provisions of Section 127(1) of the Copyright and Related Rights Act 2000 which provide broad remedies for copyright owners in the case of infringement of the copyright in a work (“*all relief by way of damages, injunction, account of profits or otherwise is available to the plaintiff*”). eircom believes that the court could therefore have made an order pursuant to Section 127, including an injunction. This power was not, however, exercised by Charleton J. in the *UPC Case*.

5.6 Implications of Section 40 5A (a)

- 5.6.1 Section 40(4) is predicated on a requirement for notice and a failure to take-down - it involves an act or omission on the part of an ISP, once it has been notified of infringing activity.
- 5.6.2 The position in Section 40(4) can be contrasted to the proposed Section 40(5A) (a). This new section simply provides that a right holder may apply for an injunction against a person who provides facilities, where those facilities are being used to infringe the copyright in a work. Thus, the injunctive relief contemplated in Section 40(5A) (a) is based upon a mere provision of services and does not involve an act or omission on behalf of an ISP. While Section 40(4) involves some element of “guilt” on the part of a service provider, that requirement is absent from the proposed amendment.
- 5.6.3 It appears that Section 40(5A) (a) will put ISPs such as eircom in a difficult position. It is unclear how an ISP could defend proceedings under the proposed subsection. The available defences appear to be limited by the fact that the provision is predicated, not on an element of “guilt”, but rather on the mere provision of facilities by an ISP.

5.7 Proposed Amendments to Section 40 (5A) (a)

- 5.7.1 At a minimum, ISPs and other persons who provide facilities for the purposes of Section 40(5A) (a) should have a statutory indemnity against rights holders should it transpire that there was no infringing activity and/or if the ISP incurs a costs or loss in responding to any injunction which has been granted to the copyright owner.
- 5.7.2 Further , this proposed subsection does not explicitly provide for the extent of the injunctive relief that the court may order. Would these orders include “blocking” injunctions, orders to disconnect customers and orders to slow down customers’ internet connection speeds or any of the other measures which are permitted under the UK Digital Economy Act (see paragraph 6below) . The lack of detail in the proposed Section 40(5A)(a) when contrasted with, for example, the provisions in the UK Digital Economy Act, give grounds for concern that the scope of any injunctions awarded by courts under Section 40(5A)(a) will be wide, varied and unpredictable.

5.8 Compliance with the EU Charter of Fundamental Rights

- 5.8.1 The proposed wording of Section 40(5A) (a) may also fall foul of EU Law. While this matter continues to evolve before various EU courts, one notable case is that of *Scarlet Extended SA v Société Belge des auteurs, compositeurs et éditeurs (SABAM) (Case C-70/10)*. While the decision of the Court of Justice of the EU (CJEU) is not expected until the Autumn, the Advocate General’s decision in April 2011 raises a number of relevant considerations. (This case was referred to in Charleton J’s judgement in *UPC* although the Advocate General’s decision issued in April 2011, subsequent to Charleton J’s decision in October 2010). In the Scarlet case, Advocate General Cruz Villalon questioned the compatibility of a system for filtering and blocking electronic communications with the Charter of Fundamental Rights. A more detailed consideration of Advocate General Cruz Villalon’s comments is presented at Appendix 1 to this document.
- 5.8.2 The concerns raised in the Scarlet case highlights issues that are also being considered in various other jurisdictions around the world. What is clear is that there are divergent views emerging among different member states and caution should be exercised in making

assumptions as to what any eventual consensus will emerge including at EU member State level.

5.8.3 Section 40(5A) (a) fails in our view to address the subtleties which have been highlighted by Advocate General Cruz Villalon and would raise questions with regards to its compatibility with EU Law.

5.9. **Proposed Amendment to Section 40 (5A) (b)**

5.9.1 The proposed amendment to the CRRA also includes the following provision:

“(5A) (b) In considering an application for an injunction under this subsection, the court shall have due regard to the rights of any third party likely to be affected and the court shall make such directions (including, where appropriate, a direction requiring a third party to be put on notice of the application) as the court may deem necessary or appropriate in all the circumstances.”

5.9.2 The terms of this subsection are ambiguous. The proposed wording suggests that the court need only have “due regard to the rights of any third party likely to be affected” before granting whatever direction “the court may deem necessary or appropriate in all the circumstances”. We suggest that a fuller statement of what the court should consider and the directions it may make is required. The UK Digital Economy Act 2010 may be instructive in this regard although the complexities of such a regime, such as those identified in the *Scarlet* case and in the recent Hargreaves Report should not be underestimated.

6. **UK Digital Economy Act**

6.1 In the UPC Case, Charleton J observed “there is nothing like these provisions in Ireland” referring to the provisions of the UK Digital Economy Act and that the law in the UK seems to be “practical and workable”

6.2 The provisions of the UK Digital Economy Act referred to by Charleton including the following:

- 6.2.1 Owners have an entitlement to report infringement to ISPs once an “Initial Obligations Code” is brought into force by the industry;
 - 6.2.2 The report must include minimum evidential information and be provided to the ISP within 1 month of the evidence having been gathered;
 - 6.2.3 Subject to the Initial Obligations Code, the ISP should then provide the report to the subscriber who is alleged to be infringing;
 - 6.2.4 The Secretary of State is empowered to impose technical obligations on ISPs for the purpose of preventing or reducing copyright infringement;
 - 6.2.5 “Technical measures” can include capacity/speed limits, prevention/limitation of use or access to material, suspension or other limits;
 - 6.2.6 ISPs must cooperate with OFCOM in complying with any direction;
 - 6.2.7 The Secretary of State is also empowered to make regulations allowing courts to issue blocking injunctions. However, blocking injunctions are subject to detailed conditions including that the Secretary is satisfied that the infringing use is having a serious adverse effect on businesses or consumers and subject to a proportionality test. The level of infringement at the blocked location (e.g. a peer to peer website) must relate to a “substantial amount of material”. Before granting an injunction, the court is required to take account of the preventative measures attempted by the ISP, the steps taken by the rights holders to make the material available through lawful channels, the “legitimate interests” of any person and the importance of freedom of expression. Further, the infringing site must be served with advance notice of the injunction application.
- 6.3 It seems however that even if the proposed amendments to Section 40 of the CRRA are enacted, the concerns raised by Charleton J in the UPC Case will still not have been addressed. The detailed UK approach will remain in stark contrast to the far more simplistic approach proposed by the amendments to Section 40 of the CRRA.

7. Conclusion

- 7.1 While eircom believes that the CRRA is generally fit for purpose, we accept that a review is appropriate and welcomes the opportunity to engage with DJEI in the context of further consideration of the responses to the Consultations.
- 7.2 The implications of the immediate proposed amendments to Section 40 CRRA require further consideration. In eircom's view they fail the Hargreaves principles (e.g. objective evidence, balance measurable economic objectives against social goals; balance rights-holders benefits against effects on consumers and other interests)
- 7.3 As a matter of fairness, the rights of eircom and other intermediaries must be given equal status in any review of the CRRA in particular with regard to any proposed remedies. As currently proposed, the proposed amendments impose a disproportionate burden on ISPs [and potentially consumers] in circumstances where the benefit of the burden accrues only to rights holders.
- 7.4 eircom is concerned that the amendments to CRRA which have been published to date (amendments to Section 40) would bring no additional legislative clarity as to how far a court direction can go (e.g. filtering, blocking etc). Given the existing broad remedies available under Section 127 CRRA, the consequences of the proposed amendments, and how they would be interpreted by the Irish courts are therefore unknown.
- 7.5 This lack of predictability makes it impossible for ISPs to plan and resource themselves for any change in the current regime and this calls into question the potential practical effectiveness of any changes.
- 7.6 It also seems that the legislation would be silent on the cost implications of meeting any court direction which leaves a serious cost risk with eircom if sweeping injunctive measures are sought by rights-holders and granted by the High Court.
- 7.7 eircom would be concerned at the consequences of such measures being adopted and would caution the Copyright Review Committee against adopting any similar measures without first carefully considering the practical, commercial and legal implications for the ISP industry.
- 7.8 eircom would urge the DJEI to adopt a whole-of-Government approach to the resolution of the copyright infringement issue in particular by ensuring that parallel obligations that may be imposed

on the State through the relevant EU Regulatory Framework for Communications will be reflected in its consideration of the matter.

Appendix 1 - The Scarlet Case

In the *Scarlet* case, Advocate General Cruz Villalon noted the following:

- i. a court order of the nature sought would have a lasting effect for an unspecified number of persons irrespective of whether they have a contractual relationship with Scarlet and regardless of their State of residence;
- ii. The system must be capable of blocking any file sent by an internet user who is one of Scarlet's customers to another Internet user – who may or may not be one of Scarlet's customers and who may or may not live in Belgium – where that file is thought to infringe a copyright managed, collected or protected by Sabam. It must also be capable of blocking receipt by an internet user who is one of Scarlet's customers of any file infringing copyright which has been sent by any other internet user;
- iii. Such a court order would apply *in abstracto* and as a preventive measure, which means a finding would not first have been made that there was an actual infringement;
- iv. Such a court order would be a “new” obligation which would largely delegate the legal and economic responsibility for combating illegal downloading of pirated works from the internet to ISPs;
- v. The installation of a filtering and blocking system is a restriction on the right to respect for the privacy of communications, the right to protection of personal data and the right to freedom of information, all of which are rights protected under the Charter of Fundamental Rights. While these rights and freedoms guaranteed by the Charter of Fundamental Rights may be restricted, such restriction must be “in accordance with the law”;
- vi. Such a restriction on the rights and freedoms of internet users would be permissible only if it were adopted on a national legal basis which was accessible, clear and predictable and coupled with adequate safeguards. The Belgian law did not meet this test.