Workshop on Audiovisual Search
Summary of the Discussion

Christina Angelopoulos, Joris van Hoboken
Institute for Information Law (IViR), University of Amsterdam

Introduction

On 12 April 2008, the Institute for Information Law of the University of Amsterdam (IViR) and the European Audiovisual Observatory held a joint expert workshop in Amsterdam on the topic of "Audiovisual Search - Regulatory Challenges for Audiovisual Abundance". The aim of the workshop was to stimulate an exchange of ideas on the future of audiovisual search and the relevant regulatory issues. To this end, eight separate presentations were made, each followed by a round table discussion. The first set of presentations elucidated the current practical challenges facing the content navigation business. The second concentrated on an analysis of the normative and regulatory framework within which this business operates. This workshop report provides a summary of the opinions expressed and conclusions reached during the discussion rounds. A thematic, rather than a chronological, approach has been taken.

What became apparent from the presentations and subsequent discussions on audiovisual search services, the market and the laws governing the audiovisual content value chain was that this is a rapidly developing and extremely dynamic environment. One of the greatest challenges for the future will be to keep existing laws and regulation up to date and to facilitate the still developing market in audiovisual search technology and services. Fundamental questions about the free and effective flow of information between information providers and end-users and the important issue of privacy protection should inform the debate about the possible need to regulate audiovisual search engines. As search services move to the centre of the information environment, future information law and policy will have to address these new entities more adequately.

1. Current Practical Issues in Audiovisual Search

1.1. The Business Models of Search Engines and Evolving Search Technology

One of the first topics to catch the attention of participants was that of the current trends in audiovisual search, as well as in general search services, and the operation, in particular, of the relevant market. Special attention was paid to the question of entry barriers preventing new players from joining. It was agreed that the main barriers are the operational costs of crawling and indexing, on the one hand, and query answering, on the other, as suggested by presenter Ramón Compañó.[1]

1) See the article by Ramón Compañó in this publication.

Following on from this, the theory was put forth that, apart from financial costs, other elements, such as detailed information to better target audiences, might also create added hurdles. Established search engines are compiling what have been called "databases of intentions",[2] that enable them, through profiling, to match an individual's search patterns with those of others, helping them to enhance their efficiency and popularity and offer a compelling way of targeting audiences for the benefit of advertisers. If this emerges as an essential item for providing a successful search tool, newcomers who have not had the chance to gather similar data will find themselves at a disadvantage. Consequently, it was suggested that personalised services might therefore result in locked-in effects: at the moment, changing service provider is only a click away. If, however, a search engine holds personal data on its users, this can entrench them, creating obstacles for competitors to provide comparable services.

Does this mean that the Internet search market is one of natural monopoly? Participants were inclined to reject the idea, particularly in view of the following:

1. Google itself, now the predominant player, was in fact a late-comer. The first search engines, such as AltaVista, were eventually squeezed out of the market.
2. Google is indeed the market leader in the US and Europe, but this is not true for other parts of the world. It is possible that language might be an obstacle preventing expansion to certain regional markets.
3. Finally, subject-specific search engines are currently appearing, indicating niches in the market able to accommodate additional players.

The presentation of Thomas Roukens introduced the business model of the largest Belgian cable network provider Telenet and thus provided a more concrete basis for analysing existing business practices. An initial observation concerned the practice of vertical integration that Telenet has been pursuing. Although some participants were critical of such integration, it was conceded that, due to the linguistically-bounded Flemish market for which the company caters, the case in point is exceptional. It was noted that initially local broadcasters and content producers were wary of such digital services, believing that the Internet would wipe away their viewers and revenue. Telenet tried to overcome this attitude by creating a collaborative model with content providers and broadcasters and highlighting the complementary nature of the additional services it provided. As a result, not only did the transactions for Telenet's Video on Demand (VoD) service, iDTV (Integrated Digital Television), increase, but revenue for local broadcasters and content providers was also boosted and their position safeguarded. It was asserted that, in a small language community, vertical integration through collaboration can be the only way of surviving the competition of bigger broadcasters.

Another topic of discussion highlighted the evolving interactive design of Electronic Programme Guides (EPGs). Before launching its own service, Telenet was sceptical, questioning whether the modern consumer would not be more attracted to something more flashy and elaborate. Yet the simplicity of the service offered seemed to be precisely what drew consumers to it. In addition, consumers made enthusiastic use of features enabling the recording of programmes. The EPG eventually became the centre point of Telenet's interactive platform. Participants were puzzled by this development, asking whether it does not in fact transform the EPG into a recording device. Telenet, however, has not gained this impression, since the additional information on programmes is not simply still available through the EPG, but also widely used.

1.2 The Importance of Metadata

Janet Greco's presentation on the need for a consistent supply of metadata for use in EPGs turned the conversation to the relevant intellectual property rights. To what extent do intellectual property rights exist over the metadata, it was asked, and who holds them? Participants quickly pointed to the *Magill* case.[3] The case upheld the imposition of a compulsory license on television companies to remedy the exercise of their exclusive rights under national copyright legislation that prevented publishers of weekly guides from copying their listings. The case indicated that there was indeed

2) See the article by Ramón Compañó in this publication.
3) Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission (Magill)* [1995] ECR I-743.

copyright over metadata in the form of TV listings, but established that, in exceptional circumstances, the exercise of an exclusive right by a proprietor may constitute abusive conduct. As one participant put it, this reasoning amounted to a conclusion that competition law can in some cases "override" intellectual property.

The subject gave rise to an exchange of opinions: on the one hand, it was felt that there are strong incentives to protect intellectual property rights over, for example, descriptions and ratings of audiovisual content. A reference to a programme is valuable since it reinforces society's capacity to compare and choose. The generator of this added value, therefore, should indeed be able to request control over how it is used. Hence, legislation such as the EU's Database Directive, which in essence protects the sweat of the brow that is invested in compiling such information, is justified. On the other hand, however, it was also asserted that from a business perspective, this approach creates complexities. One participant, accordingly, was of the opinion that copyright over such information as the title of a film or the name of its director, as opposed to e.g., a synopsis, should not be recognised, as these are mere points of fact. In an environment where copyright is acknowledged, an aggregator struggling to put together consistent and correct metadata has to juggle the management of business relations with countless diverse publishing information sources. Concerning ourselves with the ownership of the content, ran this argument, is missing the whole point: the goal of enabling consumers to find content that meets their interests and has all the required labelling from the regulatory point of view.

Yet other participants viewed the very idea of consistent metadata as unattainable in an interconnected world. Organising programme producers or distributors to the extent of enabling systematic information input and classification according to international standards is difficult. Moreover, the contents of the relevant databases are constantly changing and the rate of change is increasing. Yet the emergence of the Internet could make these problems irrelevant. Search engines on the Internet operate on an entirely different basis, but are arguably better equipped to deal with the disarranged state in which metadata currently finds itself. Through the use of algorithms, information retrieval is effective, if messy. Small inconsistencies, such as the use or not of an actor's middle initial, no longer compromise search results significantly. As one of the participants explained, search results do not have to be 100% accurate to be serviceable: They simply have to be good enough to enable a robust search tool. In this setting, it was asked whether EPGs are not an artefact of a pre-Internet world.

Ralph Traphöner's presentation, after all, which analysed the workings of the THESEUS project,[4] demonstrated that the ability of new search technology to deal with inconsistent data sets and extract information and metadata from an uncontrolled decentralized information environment is one of the core innovations in modern information retrieval technology. Furthermore, audiovisual data, from a technological point of view, is not fundamentally different to text: in order to obtain metadata that describes text, keywords are extracted from the strings. When it comes to audiovisual material, the paradigm is the same, although more sophisticated algorithms and computer power might be necessary. The irrelevance of traditional EPGs will become even greater, if, as one of the participants believed will happen, it becomes possible not only to search for (moving) images through the input of metadata, but also through the comparison of the images themselves.

The preceding observation turned the discussion to the role consumers themselves can play in categorizing and valuing audiovisual content. The examples of the Compact Disk Database (CDDB)[5] and the Internet Movie Database (IMDb)[6] were cited. In such models, the collection of data is partly placed

4) The THESEUS project is a research programme initiated by the German Federal Ministry of Economy and Technology with the goal of developing a new Internet-based infrastructure, so as to better use and utilize the knowledge available on the Internet. At the current time, 30 reasearch institutions, universities and companies have joined the programme under the coordination of empolis GmbH.

5) The Compact Disc Database (CDDB) is a Internet-accessible database that enables software applications to look up information on audio compact disks. The original software behind CDDB was released under the GNU General Public License and was based on voluntary contributions from users. The project was eventually incorporated as CDDB LCC in 1998. It was then bought by high-tech multimedia electronics manufacturer Escient and, in 2000, renamed Gracenote.

6) The Internet Movie Database (IMDb) is an online database of information and photos related to film, television shows, actors, production crew personnel and video games. The IMDb was launched on 17 October 1990 and was acquired in 1998 by Amazon.com.

in the hands of the consumers, who have a great incentive to provide information and the best knowledge of their needs. Such systems could therefore prove highly operable. Again, however, the question of ownership surfaces: it is indicative that CDDB was eventually incorporated, sold and relaunched as Gracenote, a wholly owned subsidiary of Sony Corporation of America, while the IMDb is now owned by Amazon.

In any case, it was suggested that the solution can only arise from the market. Database companies are likely to take the lead and evolve into the gatekeepers of metadata. One participant even posited that the solution could finally be found in competition: in contrast to the single pan-European PEGI classification system for video-games, in the realm of film Europe boasts 27 different classification boards. Possibly this is an advantage that gives consumers an insight into a more balanced view, instead of obliging them to accept a single perspective as written in stone.

2. Fundamental Rights Perspectives on Audiovisual Search

2.1. Audiovisual Content Online and Privacy

After Michael Zimmer's presentation on the Faustian Bargain we currently face, as audiovisual search technology simultaneously both enhances reach and recall of information and jeopardises users' privacy,[7] an animated discussion ensued. During the discussion, average users' knowledge of the threats to their privacy and their interest in protecting themselves was questioned. The objection raised to this line of thinking, however, was that privacy violations can be difficult for individuals to perceive on an abstract, de-contextualized level. On the contrary, if the problem affects them in a personal manner, i.e., when their own sense of privacy is compromised in reality, privacy concerns are much better understood. After all, search engines have become so integrated into our lives that the average user's sensitivity to the privacy threat they might pose has been dulled due to overexposure. The trust with which search engines inspire us is the key to their success.

It was further suggested that this problem is aggravated in the case of the so-called "information have-nots". The concern was expressed that those who are not connected and who therefore do not enjoy the benefits of technology might find themselves, in addition, in a weaker position vis-à-vis privacy on the net. The notice and take down procedure adopted by the relevant regulatory authorities of most countries quickly reaches its limit where one does not have or cannot master the technical means that enable awareness of invasions into privacy.

Finally, the efficacy of the current trend for user education as a form of defence was debated. It was pointed out that this presupposes a user not only aware of the existence of the problem, but also capable of retaining vast volumes of highly specialised information on everything from copyright and privacy legislation to consumer protection.

Turning to the possible solutions available, certain participants discerned an obligation for both academia and public advocacy to intervene. It was suggested that public advocates ought to raise issues and defend rights that concern all, but offer to no one individual a personal motive for immediate action. Their role could be especially beneficial for the weaker members of the information society. Additional regulatory solutions were also envisioned: the imposition of obligations such as face-blurring for services like Google Street View[8] forms a case in point; such measures, of course, take the process to the opposite pole, establishing protection as the default. The provision of educational information as a public service, to the end of facilitating user self-edification, was also advanced.

It was pointed out that many of the privacy issues that arise from the increasingly sophisticated audiovisual search services relating to people are, in one way or another, covered by EU data protection law. In this context, the recent opinion on data protection issues relating to search engines issued by

7) See the article by Michael Zimmer in this publication.
8) The Guardian, "Google Blurs the Privacy Issue" (May 2008), available at http://www.guardian.co.uk/business/2008/may/13/google.digitalmedia (accessed 15 June 2008).

the Article 29 Data Protection Working Party was mentioned, as having reached noteworthy conclusions, for instance, with regard to the use of facial recognition software by search engines: "Search engine providers that specialise in the creation of value added operations, such as profiles of natural persons (so called 'people search engines') and facial recognition software on images and audiovisual content must have a legitimate ground for processing, such as consent, and meet all other requirements of the Data Protection Directive, such as the obligation to guarantee the quality of data and fairness of processing"[9]. This again places the burden of protection on the service provider. On a relevant note, another solution proposed would involve private companies crawling the web in search of privacy-endangering data. The drawback of this solution, it was noted, is that it might only benefit the financially robust.

In a more technical realm, solutions for control over personal data and its processing can also be anticipated. Along this line of thought, a personal type of encryption and DRM that enable control of uploaded content without limiting the ability of sharing information with a community of online contacts was proposed. In the meantime, the application of machine readable licenses that protect data may also emerge (in the same way, for example, that the Creative Commons licensing suite is designed to protect copyrighted content). Nevertheless, multiple challenges were foreseen. Enforcement represents one stumbling block (how to oblige the end-user to respect designated restrictions?), while achieving the necessary level of regularity also seems difficult (how can one imagine every context in which an image might be used in order to encode that into a protective information system?). In the long run of course, if the idea is that privacy is becoming increasingly contextualised, then patterns might eventually be discerned that allow for some degree of automation.

On a different note, excessive privacy protection should also be avoided and the free flow of information respected, given that online content constitutes part of our public sphere. As a matter of fact, the view was also posited, during the discussion, that no type of privacy-protecting design is warranted: search engines may enable insight into another's private life, but, at the same time, users should be aware that information posted online is posted into a public realm. Detailed regulation might be an excessive reaction with only minimal gains for actual privacy rights, where a simple behavioural adjustment could achieve more effective results.

Finally, it is worth noting that the aforementioned concept of a "database of intentions"[10] also caused disquiet around issues of privacy. The reply offered was that trade-offs of this type are a necessary feature of the information society. At the end of the day, a balancing act has to take place between the value of effective information provision and the invasion of privacy that this might involve. In mobile search, for example, at the moment, the most popular queries relate to the weather, other local information and maps, which obviously have the capacity to reveal the person's location, yet equally provide valuable information on an immediate basis. The suggestion, therefore, was that our concept of privacy will in the future evolve, in order to accommodate possibilities that technology is only now enabling.

In fact, it seemed apparent to the majority of participants that the protection of privacy and data protection in particular should not focus on a block mode of protection, but rather a more flexible approach. An over-arching legal or even technological regime that accommodates all different kinds of interaction between people is difficult to envision, especially in the face of search functions which ignore the traditional barriers that allow for this differentiated interaction, thus doing away with "privacy through obscurity".[11]

2.2. Audiovisual Content Online and Freedom of Expression

In view of the above, the need for a clarification of search engines' legal position as concerns freedom of expression provisions becomes all the more pressing. Joris van Hoboken's presentation opened the debate on these issues.

9) Article 29 Working Party, Opinion on data protection issues related to search engines, WP 148, 4 April 2008.
10) See above, page 1.
11) See the article by Michael Zimmer in this publication.

Firstly, questions were raised as to the current legal framework's suitability to deal with freedom of expression issues in the online context. After all, Art.10 ECHR[12] has often been accused of being anachronistic; As much as the European Court of Human Rights has striven to maintain a dynamic and evolutive approach, it has not always been able to keep up with technological changes. With regard to the question of the protection of access for information providers to search engines, it was pointed out that Art. 10 does not entail a general right to reach an audience.[13] Yet this approach arguably could exclude some information providers from equitable access to some of the most effective means of communication, i.e., search platforms. After all, access to a willing audience is, in the final analysis, a premise for the exercise of freedom of expression: without it, your voice falls into the void. As an alternative to strict legal rules on access, the idea was put forth that value might be had in considering various soft law sources, such as Council of Europe recommendations.[14] Finally, the conjecture that the duties and responsibilities with which freedom of expression is coupled in Art. 10 might provide a basis for establishing search engine liability, at least in a co- or self-regulatory manner, was proffered.

Secondly, attention was paid to the recent Council of Europe's recommendation on Internet filters.[15] The suggestion, at the beginning of the very first guideline listed, that "users must be informed that a filter is active and, where appropriate, be able to identify and to control the level of filtering the content they access is subject to" caused some perturbation. One participant felt that such a requirement would be excessive, particularly in view of the widespread use of, for instance, spam filtering. It was asserted that much of such filtering is undertaken without the user's awareness or consent. Nevertheless, for the most part, it is considered a beneficial service. No reasonable need could therefore be discerned for user briefing on the operation of such filtering.

Finally, from the user side of the equation, the right to access information freely gains added importance in an online environment. In fact, Article 19 of the Universal Declaration of Human Rights[16] provides for a right to "seek [...] information and ideas through any media", an underdeveloped element that is often overlooked. Obviously, the user has an interest in freely searching the information that is available online. What is important to understand, however, is that what Art.19 guarantees, i.e., the freedom to seek information without hindrance, differs significantly from an actual right to access information. As one of the participants observed, the importance of this distinction becomes clear when one contemplates the main elements of the privacy discussion outlined above: when a society has developed such sophisticated search tools so as to enable logging of its members' every move, a right to actual access can emerge as a powerful and harmful weapon. Tensions between freedom of information and privacy thus emerge: each right, in an optimal situation, providing the necessary counter-balancing mechanisms to rein in the excesses of the other.

3. Regulatory Aspects of Audiovisual Search

3.1. The Place of Audiovisual Search in Current Laws and Regulation

As far as the regulatory treatment of search and navigation tools is concerned, a number of proposals were put forward as to the appropriate method of approaching the subject. Peggy Valcke's presentation elucidated the fragmented treatment that is currently in force: The current EU Regulatory Framework for Electronic Communications (ECNS – Electronic Communications Networks and Services

12) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (signed 4 June 1950, entered into force 3 September 1953) (hereinafter: ECHR) Art 10.

13) See *Stafford v. the United Kingdom*, Judgment of the European Court of Human Rights (Grand Chamber) of 28 May 2002, para. 68; *Appleby and Others v. the United Kingdom*, Judgment of the European Court of Human Rights (Fourth Section) of 6 May 2003, paras. 47 and 48; In addition, similar issues arise in respect of broadcasting in, *inter alia*: *VgT Verein gegen Tierfabriken v. Switzerland*, Judgment of the European Court of Human Rights (Second Section) of 28 June 2001; *Haider v. Austria*, Decision of inadmissibility of the European Commission of Human Rights (First Chamber) of 18 October 1995, Application No. 25060/94.

14) See the article by Joris van Hoboken in this publication.

15) Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters, available at https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2008)6 (accessed 1 July 2008).

16) Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III), Art. 19.

Directives) is inappropriate for the regulation of audiovisual search engines and search engines in general. Art. 2 (c) of the Framework Directive states categorically that the term "electronic communications services" excludes information society services. Search engines, therefore, are not covered. Likewise, they cannot be considered associated facilities, which Art. 2 (e) Framework Directive currently defines as "facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service."[17] EPGs, on the contrary, are specifically mentioned by the Directive as constituting associated facilities. In any case, the ECNS, in terms of its broadcasting aspects, was intended for the regulation of vertically integrated TV platforms, where one operator controls a series of facilities. In the case of the Internet, on the contrary, the value chain is structured differently.

One place in the current regulatory framework was identified where room for search engines might exist, at least as concerns consumer protection. The proposed text for a revised Art. 20 (5) of the Universal Service Directive[18] as it stands would read as follows: "Member States shall ensure that where contracts are concluded between subscribers and undertakings providing electronic communications services and/or networks, subscribers are clearly informed in advance of the conclusion of a contract and regularly thereafter of any limitations imposed by the provider on their ability to access or distribute lawful content or run any lawful applications and services of their choice." The suggestion was that, with the opportunity of the ongoing reform of the ECNS, legislative changes could be made to the effect of broadening the notion of associated facilities, as defined above, so as to include search engines. In addition, the proposed Art. 20 (5) should be rewritten to apply also to the situation where no contract exists as such, but an individual is making *de facto* use of a service. The way would then be open to oblige search engines to provide added transparency concerning e.g., ranking methods or sponsored links. Reactions to this suggestion were hesitant, especially in view of the fact that the same effect could be achieved through search engine self-regulation.

Finally, the extent to which the terms of the E-Commerce Directive[19] can influence search engines was also investigated. As was remarked, however, although this Directive does in general apply to search engines, in fact it offers very little in terms of actual obligations. Articles 12 to 14 of the E-Commerce Directive provide safe harbours for three types of intermediaries: caching, hosting and mere conduit.[20] Art. 21 of the Directive makes it clear that these provisions do not cover "the liability of providers of hyperlinks and location tool services". On the contrary, the Article dismisses search engines to further examination in a biannual report on the application of the Directive, in which particular consideration shall be paid to "the need for proposals concerning the liability of providers of hyperlinks and location tool services, 'notice and take down' procedures and the attribution of liability following the taking down of content." [21]

At this point it was put forward that, notwithstanding the E-Commerce Directive's safe harbour for caching in Art. 13, some of the caching by search engines could involve liability, especially considering the habit of search engines of storing caches of webpages for the exact purpose of offering them when access to the original page is cut off. Analogies were made at this point in the discussion to similar provisions in the Copyright Directive, which contains a provision on caching as well.[22] In this context, reference was made to the *Copiepresse* case, currently winding its way through the Belgian courts. It was pointed out that the Belgian Court of First Instance[23] has held that caching on the part of Google amounts to unauthorised reproduction and communication to the public and is, therefore, a violation

17) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L 108/33.
18) Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L 108/51.
19) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1 (hereafter: E-Commerce Directive).
20) E-Commerce Directive, Arts. 12-14.
21) E-Commerce Directive, Art. 21.
22) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10, Art 5.
23) *Google Inc v. Copiepresse SCRL* (RB (Brussels)) Tribunal de Première Instance (Brussels) 13 February 2007; [2007] E.C.D.R. 5 2007 WL 1623283.

of copyright. The court did find that, to the extent that caching by a search engine consists of the "automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request"[24], the E-Commerce Directive's safe harbour in general does apply. Nevertheless, the ultimate conclusion was that, in the particular case, the issue at stake was not the temporary storage of cached pages as part of the indexation process, but the visibility of the cached pages for users, which was held to be a breach of copyright.

Of course, the obvious place for audiovisual search engine regulation, if necessary, would be as part of the Audiovisual Media Services (AVMS) Directive's regulation of audiovisual services.[25] After all, it is this that governs cultural and content issues, as opposed to the ECNS framework that deals with questions of transmission and competition. The problem here is that the AVMS Directive currently does not cover audiovisual search engines,[26] has only very recently, in December 2007, been reviewed and is unlikely to be revisited by the Commission for some time to come. Nevertheless, a theoretical discussion on the topic ensued. This mainly revolved around the interpretation of the term "editorial responsibility".

Editorial responsibility is that requirement for an audiovisual media service, as defined by Art. 1 of the AVMS Directive, which was mentioned as providing the main stumbling block for including search engines within its remit.[27] The same article defines editorial responsibility as "the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule [...] or in a catalogue [...]". During the course of the discussion, it was established that the intention at least of the law-maker when drafting the Directive was to exclude search engines from this definition. The preparatory works, it was felt, made this clear: what was aimed at was the activities of broadcasters, i.e., the selection of programmes and their inclusion in a chronological scheme or catalogue. This is distinct from the automatic generation of a list through the use of an algorithm. Recital 19 of the AVMS Directive states that "the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties." "Carriers", therefore, including search engines, were argued to be unavoidably excluded.

Nevertheless, some of the participants held the view that this definition should be sufficient to encompass search engines. According to this position, the use of an algorithm is in fact a demonstration of effective control: after all, it was pointed out, an algorithm that does not take into account the exclusion of incitements to hatred would have to be modified accordingly. As opposed to hosting providers, who need not take heed of the content of the information stored on their servers to the extent that it is legal,[28] search engine algorithms do take an interest in the nature and content of the information contained on the websites to which they provide references. If not for any other reason, then this would be because it is precisely their mission to furnish their users with information relevant to their query.

The opposition to this train of thought turned on a technical understanding of the way in which search engines actually function. The observation was thus made that it is actually the content that controls the search engine, rather than the other way around. Consequently, a search engine is different from a catalogue or directory behind which a human editorial team, which definitely does exercise editorial responsibility according to Art. 1 AVMS Directive, can be found. Similarly, a distinction should be made with regard to vertical search platforms, as, for example, Google News, seeing as there the engine operator makes a decision as to what particular type of content the search engine is searching. Accordingly, it was suggested that a case can be made for the position that platforms such as YouTube do exercise editorial responsibility. Once again, an analogous perception in

24) E-Commerce Directive, Art. 13.
25) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 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 [2007] OJ L 332/27.
26) See the article by Peggy Valcke in this publication.
27) See the article by Peggy Valcke in this publication.
28) E-Commerce Directive, Art. 14.

the field of copyright could have severe implications for search engine liability. The *Viacom* case,[29] for example, was mentioned: if it is accepted that a specific service provider actually does exert editorial control, then it would be eliminated from safe harbour provisions in the DMCA or similar legislation in Europe, making it responsible for the prevention of possible copyright infringement by, and the illegal or harmful nature of, the content to which it links.

Finally, from the business perspective, Telenet's approach to editorial responsibility was also discussed. To begin with, it was noted that, due to the broad Belgian definition of broadcasting in the law, on-demand services are indeed included; meaning that for Telenet editorial responsibility can in any case not be avoided. Within this legal framework, Roukens also explained that Telenet has tried to balance the expectable desire of a company to minimize accountability with customer expectations. Research indicates quite clearly that people are not familiar with on-demand services. They expect the same kind of service, therefore, on their IDTV platform that they receive from a film rental. Telenet has responded to such expectations, through, e.g., systems fitted into their set-top boxes limiting access to films rated as unsuitable for children.

3.2. Self- and Co-regulation and Search Engines

As a result of the current lack of centralized and clear regulation on the part of the state, search engine providers are obliged to set a standard for themselves. Yet, as Wolfgang Schulz asserted in his presentation, this self-regulatory practice is far from transparent and of questionable efficacy. Especially from the point of view of the smaller providers, the resulting legal uncertainty can be difficult to manage. In general, it could produce a chilling effect.[30] The observation was made during the workshop that search engines themselves have actually expressed a desire for more precise regulatory stipulations that would provide them with a more stable footing for questions such as whether or not, for example, picture previews in search results can constitute copyright infringement in and of themselves.

In any case, to the extent that it exists, search engine self-regulation mainly involves notice and take down procedures. It is worth noting that no put back provision is at the moment in effect, something that could prove problematic. However, during the discussion, the desirability of this notice and take down method as a defence against objectionable material on the Internet was brought into question. After all, one participant remarked, if the target is limited to the mere reference, which is automatically generated using third party information, while the original material remains online, what we are engaging in remains at best an exercise in futility. Targeting the original website would surely be more effective. In this context, the proposal of approaching search engines as being similar to caching services, rather than hosting ones, was put forth.

These reflections aside, one question raised concerned the German *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter (FSM)* code.[31] This involves a self-regulatory code of conduct, which the major search engines in Germany have adopted since 2004. Some confusion seemed to exist among participants as to the voluntary nature of the scheme. The search engines themselves appear to claim the contrary in certain contexts, i.e., that the self-regulatory scheme is State-imposed. So, although a number of the websites deemed inappropriate under the scheme are to a great extent still accessible

29) The Viacom case (*Viacom International Inc, vs. YouTube, Inc,* No. 07 Civ. 2103 (S.D.N.Y., 13 March 2007)) is a closely-watched case currently pending before the U.S. courts, which deals with the USD 1 billion lawsuit for massive copyright infringement filed, in March 2007, by the media conglomerate Viacom ("Video & Audio Communications") against YouTube and its parent company Google. Viacom claims that YouTube hosts numerous unauthorized copyrighted clips of its entertainment programming uploaded by users. YouTube, on the other hand, asserts applicability of the safe harbour provision of the Digital Millennium Copyright Act (17 U.S.C. § 512(c)(1) (2000)), under which ISPs are not required to monitor their sites for infringing material, but must remove such material promptly once its existence has been brought to their attention. Viacom maintains that the requirements for the exercise of the safe harbour exception are not met.

30) See the article by Joris van Hoboken in this publication.

31) Subcode of Conduct for Search Engine Providers ("VK-S") of the Association of Voluntary Self-Regulating Multimedia Service Providers (*Verhaltenssubkodex für Suchmaschinenanbieter,* "VK-S", *der Freiwilligen Selbstkontrolle Multimedia-Diensteanbieter*) of 21 April 2004, available in English at:
http://www.fsm.de/en/Subcode_of_Conduct_for_Search_Engine_Providers (accessed 1 July 2008) and in the original German at: http://www.fsm.de/de/Subkodex_Suchmaschinenanbieter

via some participating search engines, Google, on the other hand, states on its search result page that the removal of search results is as the consequence of a legal request. The participants' conclusion was that the answer lies in the interpretation of the word "voluntary": When providers filter on a self-voluntary basis, measures such as the founding of self-regulation initiatives, the adoption of a code of conduct and the operation of a complaints office (as happens in the case of the FSM) serve to externalise the responsibility. In this manner, compulsion to conform would seem to derive from an external body, which the parties themselves experience as external pressure. That, however, is not to say that an actual legal obligation exists as such.

3.3. The Actual Need for Regulatory Intervention

In the final analysis, however, the conclusion seemed to be that the very need for regulation of search engines should not be taken for granted. When faced with Wolfgang Schulz's detailed list of the risks triggered by search engines,[32] one participant objected, claiming that this might constitute an overly gloomy approach. For example, the precise meaning of, and dangers presented by, the fragmentation of the public sphere was inquired into. The answer referred to studies that have indicated that the use of so-called "research media" shortens the agenda of issues upon which an individual gathers information. Traditional media, on the other hand, bring readers face to face with subject matter that they would not necessarily have pre-selected themselves, but which might, in effect, be of interest to them or of relevance to their needs.[33] The counter-argument presented was that search media could be viewed as facilitating the creation of communities of common interests, thereby increasing social cohesion.

What was agreed upon by all participants was that the way in which people approach information is changing in a radical manner. Jane Buckingham, founder of the Intelligence Group, has reported a college student's conviction that, "if the news is that important, it will find me."[34] Some participants therefore felt that the problem with regulating search engines could be that, at the moment, we reside only in an interim phase: the consequences and effects new media will have and the pitfalls they may contain are as yet unclear. In a similar vein, the idea was also introduced that the use of search engines could actually help reduce the overall need for regulation. For example, in the field of consumer protection, search engines can help strengthen the position of users through easy access to knowledge about the products presented to them. Likewise, when it comes to media pluralism, search engines have the power to guide their users precisely to a pluralistic supply of services. Transparency is thus increased and the need for regulatory intervention abated. Such benefits, however, although real, should not blind one to the need to address the separate question of the possible reasons for regulatory intervention presented by search engines themselves.

Accordingly, other participants saw a rosy, not a gloomy, picture in the aforementioned list of risks. According to this view, most of the dangers it includes are either already covered by existing legislation, by self-regulation or by self-organisation on behalf of users. So, the danger of distortion of competition is a question for competition law and access to harmful content can be limited through self-regulatory codes of conduct. Finally, issues such as the fragmentation of the public sphere can be counterbalanced through the potential of the Internet for bringing common interest groups together. In the final conclusion, it was suggested that a much better use of regulators' time and effort would be, in relation to both broadcasters and any associated facilities (such as EPGs) that are available on a given platform, to make them deliver complete information about their programmes, properly tagged. In this way, the information accessed through audiovisual search tools would be correct and no call for an *ex ante* regulation of these tools themselves would present itself.

32) These would include the following: Access to harmful content, Access to illegal content, Discrimination of content, Misleading consumers, Influence on opinion making, Fragmentation of the public sphere, Exploiting protected works, Exploiting personal data, Distortion of competition, including transfer of market power to other markets (e.g., advertising). See the article by Wolfgang Schulz in this publication.

33) Klaus Schönbach et al., *Online Newspapers: A Substitute for Print Newspapers and Other Information Channels?* 6th World Media Economics Conference, Centre d'études sur les médias and Journal of Media Economics, HEC Montréal, Montréal, Canada, 12-15 May 2004, available at http://cf.uba.uva.nl/nl/handl/googlescholar/ (accessed 9 July 2008).

34) Brian Stelter, "Finding Political News Online, the Young Pass It On", available at http://www.nytimes.com/2008/03/27/us/politics/27voters.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1215003699-5hhJsU3ewQ+YzGMGjWskOQ (accessed 2 July 2008).