Elements for the reform of copyright and related cultural policies

Now that the ACTA treaty has been rejected by the European Parliament, a period opens during which it will be possible to push for a new regulatory and policy framework adapted to the digital era. Many citizens and MEPs support the idea of reforming copyright in order to make possible for all to draw the benefits of the digital environment, engage into creative and expressive activities and share in their results. In the coming months and years, the key questions will be: What are the real challenges that this reform should address? How can we address them?

This text provides an answer to the first question and tables a consistent set of proposals to tackle the second one. It is available in both English and French. The proposals address copyright reform as well as related culture and media policy issues. These elements are intended for being used by reform proponents according to their own orientations. One will have to consider nonetheless the interdependency between various proposals. This text was drafted by Philippe Aigrain, with contributions from Lionel Maurel and Silvère Mercier and was critically reviewed by the co-founders and staff of La Quadrature du Net. It is published in parallel on the author's blog and on La Quadrature du Net's site.

Objectives

The digital sphere[1] carries the promise of new cultural capabilities for everyone, of a new era in which creative and expressive activities will be at the heart of our societies. Despite an often hostile environment, this promise demonstrates everyday that it is robust. New IT-based creative processes develop and enable everybody to share in their products. A new synergy develops between Internet-based activities and sociality on one side, physical-space creativity and face-to-face social interaction on the other side. A reasonable copyright and culture/media policy reform should aim at creating a better environment for fulfilling this cultural empowerment promise. As usual, this has two sides: stopping to hinder the development of the digital culture, and, if possible, helping it by by various means.

The stubborn efforts to impose the scarcity of copies and the control of use in the digital sphere have diverted us away from addressing the real challenges of digital culture. The main one comes precisely from the positive effects of IT and the Internet: more and more people engage into creative and expressive activities. Their productions grow in interest or quality over the full continuum that goes from reception to professional practice. These persons try to build new competency, to construct themselves as individuals in their activities, to free time for their efforts and for the related social interaction. This human development, in the noblest sense, proceeds in part thanks to the empowering properties of information technology and the Internet. However, our social environment deprives many individuals from this potential development, and limits the others to some degree. Remedying this calls in part for general social policy measures that are beyond the scope of this paper. Nonetheless, these general social measures, be them as strong and hard to put in place as the basic income allowance, can not by themselves create the conditions for a many-to-all cultural policy. This is why some of the proposals developed below aim at supporting the specific conditions of existence of cultural activities, including those activities that take place outside markets.

1 Information technology, the Internet and their use.

The components of a reform

The rest of this text list the essential components that could figure in an international platform of digital culture and Internet freedoms groups, with the aim of rallying a wide support from citizens and creative communities. Each proposal is applicable separately, but the intended benefits are often dependent upon putting in place other proposals. The design of these proposals drew much inspiration from the recommendations of the COMMUNIA European network and from the action of many researchers and groups[2]. Below is a synoptical view of the various proposals, organized in four blocks: the non-market activities of individuals, the non-market collective practices, the cultural economy and the technical, legal and fiscal infrastructures.

2 See acknowledgements at the beginning of Sharing for an incomplete list.

1. Giving legal recognition to the non-market sharing of digital works between individuals through the exhaustion of rights doctrine

Fighting against the non-market sharing of digital works between individuals has been a constant obsession during the past fifteen years. All legislative, technological and policy means have been used to eradicate or hinder what is not only unavoidable but legitimate and useful. Peer-to-peer file sharing, a practice that was thought of from the start as culture sharing was stigmatized and repressed. It was described as stealing, despite all evidence that at most a small part of the difficulties of the traditional cultural industries to adapt to the digital era has anything to do with sharing. Since 2002, researchers, civil society organizations and creative communities have been searching for the means of a legal recognition of non-market sharing. Many approaches have been tabled: exceptions to copyright, compulsory collective management, extended collective licences, etc. These proposals face various obstacles, as any innovative policy does, in particular when some specific interests have tried for years to multiply them. To succeed, the legal recognition of non-market sharing of digital works between individuals will have to rest on a simple and clear solution. What better approach is there than to revisit what was and still is widely recognized for works on carriers such as books, and adapt it to the specifics of the digital world?

The exhaustion of rights[3] is the legal doctrine according to which when one enters in possession of a copy of a work, some exclusive rights that previously applied to it no longer exist. It becomes possible to lend it, to give it, to sell it, and sometimes to rent it. The exhaustion of rights is not an exception nor a limitation to copyright, even though it was codified or described as an exception or limitation in some countries[4] through a form of rewriting of the past. Indeed, the exhaustion of rights defines situations where exclusive rights no longer exist.

What to do of it in the digital sphere, where work and carrier become separable? Two opposite approaches exist. The exclusive rights dogmatists aimed at cancelling the whole idea of exhaustion of rights for digital works. The European legal framework went in this direction, restricting in article 3.3 of the 2001/29/CE directive the scope of application of the exhaustion of rights. This article states that *"The rights referred to in paragraphs 1 and 2 [exclusive rights of authors, performers and producers of phonograms, videograms and cinematographic or radiophonic works] shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article."* One should note that this article was in no way made necessary by the 1996 WIPO treaties which the directive was supposed to implement. Accepting to cancel the exhaustion of rights amounts to annihilate the elementary cultural rights of individuals to use as they wish what they have acquired. Recently, the

3 First sale doctrine in the US.
4 The first sale doctrine is treated in the exception and limitation chapter of the US code

European Court of Justice reached an important[5] decision that recognizes the exhaustion of rights for works obtained by downloading, though restricting it to a given file that one would not be authorized to copy but only to transmit under a number of constraints[6].

The alternative approach builds from the activities that justified the exhaustion of rights for works on carriers (lending, exchanging, circulate, in other terms sharing). It explores paths to serve the same activities in the digital world. This calls for recognizing the new potential opened by digital technology, that depends entirely on the possession of a copy of the work and the ability to multiply it through making it available or transmitting it[7]. One is led to a definition of the exhaustion of rights for digital works that is at the same time wider and narrower than for works on carriers. Wider, because one has to apply exhaustion to the reproduction right, narrower because one can restrict the exhaustion of rights to non-market activities of individuals without weakening too much the cultural benefits. It can even be useful to accept this limitation in order to organize a synergy with the cultural economy. One can refer to this blog post for a precise definition of the perimeter of non-market sharing of digital works between individuals.

By this application of a specifically tuned version of the exhaustion of rights to the digital sphere, one obtains some essential results:

- To acknowledge again that copyright has nothing to say of the non-market sharing of digital works between individuals[8].

- To open the door to the recognition of new social rights to remuneration and access to financing for contributors.

Many policy reformers who share the same objectives than us pursue today other approaches, based on an exception to copyright or putting in place a form of compulsory collective management for non-market sharing. These approaches face some obstacles. Contrary to what some opponents state, these obstacles lie not so much in the Bern convention and TRIPS three-step test[9] but rather in the exhaustive character of exceptions and limitations in the 2001/29/CE directive[10]. Moreoever, these approaches would have the adverse effect of importing in a new model many of the undesirable features of the present copyright (capture of a large part of benefits by heirs of rights or players to which they have been transferred, unfair distribution). Despite this, it is important for all reformers to work in synergy: one can not know in advance which paths will be open.

5 Decision for case C-128/11, UsedSoft GmbH / Oracle International Corp. of 3 July 2012.
6 For a detailed legal analysis before the recent ECJ decision, see this paper of the Italian legal scholar Rossella Rivaro.
7 Depending on the situation (posting on a blog, on a ftp server, making available on a P2P network, swapping USB keys, sending an email, etc.) the copy is produced by the sender, the recipient or both.
8 From this viewpoint, our approach has similairities with William T. Fisher's who as early as 2004 proposed in his *Promise to Keep* book to move digital activities out of copyright. Our proposal is more limited, but also more removed from the notion of damage compensation.
9 See the declaration A balanced interpretation of the "three-step test" in copyright law.
10 This closure of the list is an unsustainable absurdity which preempts future policies, and the list will have anyway to be reopended.

2. Legitimacy of referring and linking

The Internet and the Web are what they are first and foremost because of the possibility to make accessible, for instance through a link, any digitally published contents, provided one knows its URL. This possibility is the contemporary equivalent of referencing published contents. Referencing accessible contents through links is an essential condition of the freedom of information and expression. The pretense of some sites that they are entitled to prevent Web users from creating deep links pointing directly on accessible contents are unacceptable attacks against the right to refer and the freedom of expression. It is worrying that some believed they were entitled to limit this right on the basis of possible losses of advertising revenue for sites. Legal cases repeatedly established the indissoluble link between publishing some content and the freedom of others to refer to it.

There is a link between this general freedom of reference and the legal recognition of the non-market sharing of digital works between individuals advocated in the previous section. In the context of such a recognition, creating directories of links to digital files making possible to practice this sharing is a legitimate activity, whether it is conducted by commercial players or not. On the contrary, centralizing digital works on a site remains within the frame of copyright, and is thus submitted to an authorization or a collective license[11].

One could wonder why it is necessary to state that providing information or tools for a legal activity must also be a legal activity. However, some right holders developed a very surprising theory according to which link or reference directories (such as BitTorrent trackers or servers providing links for P2P file sharing under other protocols) would constitute an exploitation of the works themselves, even though they do not store nor reproduce these works. Obviously, one must take in account the cultural or economic impact of services facilitating file sharing. However, why would the market sphere benefit from references and non-market activities be deprived from the same benefits?

11 The treatment of sites providing directories of links associated with the partial reproduction of contents should be based on a modernization of the right of quotation and the suppression of the sui-generis database protection defined in directive 96/9/EC, maintained by mistake while it has proven to be economically useless and harmful for access to information..

3. Solid exceptions for educational and research practices

Education and research practices are deeply transformed in the digital era. Let's consider education. Three major transformations are at work: educational practices do not take place only into teaching organizations; the notion of "educational resource" is meaningless since education practices can and do use any work or information; and finally, students are more and more authors or producers of contents and not just users of pre-existing contents. The present European approach of limited, heterogeneous and facultative exceptions for education is so much unsuitable that the European Commission itself considered in its Green Paper on Copyright in the Knowledge Economy to make education exceptions compulsory in Member States and extend their scope[12].

There is no decent society without education and research exceptions applying in all countries and respectful of the following principles:

- the exceptions must apply to educational or research practices, independently of the frame in which they are conducted. For instance, the educational exception can not be limited to teaching establishments, or to the fact that the participants are registered students. Open education, in all its form, must be included, as well as cultural practice workshops or educational activities in libraries and museums. However, education must remain distinguished from other use by the nature and aim of the activity and by the distribution of roles between teachers, instructors, tutors or mediators on one side and participants on the other side. Research must be defined by the nature and aim of the activity, as it is or should be for R&D tax credits.

- The exceptions must apply to all copyrighted works. Nobody can decide in advance which work or content will make sense in an educational practice. The exclusion of "published education resrouces" from the educational exception in countries such as France would be laughable, it it were not the sign of an undue power of lobbies on public policy.

- Education and research exceptions must not require financial compensation by users. Every author knows that there is no use more rewarding (in all senses) than having one's works used in education, for instance.

- Finally, the general copyright framework must not treat the productions of students or participants in educational activities differently than those from any other authors. The notion of user-generated content is a fiction invented by intermediaries who wish to freely use material for their own purposes while giving no rights to authors and contributors.

12 One can refer to the comments from La Quadrature du Net on this Green Paper.

Other types of exceptions such as for blind and visually-impaired persons, presently in process of being codified in a legally binding treaty at WIPO thanks to the action of Knowledge Ecology International and specialized organisations, must be treated in a similar manner. They must be compulsory[13] but also defined in a suffficientlty effective and wide manner to enable the desired use (here access to reading and writing).

4. Library and archive rights to make available orphan works free-of-charge and with wide use rights

For years, we have known what is the right solution for giving back to our common heritage the very many orphan works[14]. One has only to put in place an extended collective licence mechanism, giving libraries and archives as well as any other player whose mission it is, the freedom to make orphan works available in digital form, and to every person the freedom to access them and use them at least without commercial aim. This scheme would not require payment by users, but could be associated with a guarantee fund (financed by the State or parafiscal resources) which would protect users against claims of reappearing right holders (in general publishers or heirs of deceased artists). In no case should there be any compensation for use prior to the reappearance of right holders. Scandinavian countries have put in place schemes of this type, and their compatibility with the European legal framework does not raise any doubt[15].

A European directive proposal presently in legislative process institutes (as it stands) an imperfect regime for orphan works. On the bright side, it aims at making possible for libraries and archives to make them available to the public[16]. However, the present text has severe flaws. It requires a "diligent search" before an user can consider a work to be orphan. This entails a significant legal uncertainty, and may lead libraries (often risk-adverse) to abstain from exerting their rights[17]. It puts in place compensations for use of works before the reappearance of right holders. This risks leading to ambush behaviour, where some right holders would let use develop and when it it becomes significant ask for compensation (see below point 12). It lists limitatively the permitted uses, including forms of use that are not subject to copyright such as indexing and cataloguing. Finally, the list of possible beneficiaries is limited.

13 As they are already in the EU.
14 Whose authors and other right holders are not known or reachable.
15 Cf. Allard Rignalda, Orphan Works, Mass Rights Clearance, and Online Libraries: The Flaws of the Draft Orphan Works Directiveand Extended Collective Licensing as a Solution.
16 One can refer to the present state of the compromise text in the European Council and this critical analysis by by Paul Keller for the COMMUNIA association.
17 Obviously, one can not permit to consider as orphan any work arbitrarily. Compulsory registration as described in point 12 will solve the problem only in the very long-term. One must thus define simple conditions, if possible implementable through an automated process, that authorize to consider a work as orphan.

Despite these flaws, the European text is infinitely preferable to the French law on out-of-print works, that is entirely focused on commercial exploitation rights under a collective management scheme, despoils authors by leaving them only with an opt-out possibility, de facto forbids non-market uses, and deprives the public from the access to orphan works. Orphan works should be treated completely separately from out-of-print works. For the latter, it is authors who must be empowered, through the imposition of a separate contract for digital publishing and through a systematic return to authors of rights in case a paper book is no long in print (see point 7 below).

5. Freedom of non-market collective use

Besides non-market activities of individuals, non-market collective activities play an essential role for access to knowledge and cultural life. They take place for instance in libraries, museums and archives. Typical activities are the free-of-charge public performance of copyrighted works in sites accessible to the public; the use of digital versions of copyrighted works by non-profit organizations; providing reproduction means to users within non-commercial organizations; and libraries or archives giving access to digitised resources they have in their possession.

Today, such collective use takes place within constrained, heterogeneous and ill-adapted legal frameworks. Prejudiced views according to which in the digital world, collective use would harm sales to individuals lead right holders to use their prerogatives to prevent libraries from letting users access digital works. In a context where the non-market exchanges between individuals would be legalized, it would nevertheless be paradoxical if we do not recognize extended collective use rights in parallel.

To this effect, one needs to put in place the following measures:

- Non commercial performance of copyrighted works: creation of a non-compensated exception, through the transformation of the exception for public performance within the family circle into a non-commercial public performance exception.

- On-line non-market use of copyrighted works: moral persons developing not-for-profit activities must benefit from the same access rights than individuals within non-market sharing.

- Provision by libraries of reproduction means (including lending digital reading devices) to users: such use must be assimilated to private copies, even when there is a transmission to a distant facility.

Finally, the role of libraries in making available digital versions of non-orphan copyrighted works (beyond lending reading devices) raises important questions. A wide set of solutions can be considered, from libraries becoming the source and provider of a reference copy of all works to an exception with compensation to right holders[18].

6. Resource pooling: new financing sources adapted to digital culture and its many contributors and projects

The increase in the number of creative individuals, observed at every competence or quality level, raises unprecedented challenges for the sustainability of creative activities. Attention or reception time can not grow at a similar pace: only demographic growth and the liberation of time for individuals can contribute to its growth, while other factors (media diversification, investment in producing works) may reduce it. Mechanically, the average compound attention time for a work will progressively decrease, until a new balance is reached between production and reception[19]. Such a situation will impact the financial resources that can be collected by various channels and their respective share in the remuneration or financing of creative activities. These transformations occur in a context where the appreciation of creative and expressive activites is stronger than ever, as a consequence of a growing involvement of individuals in them. The willingness of a great number of citizens to contribute to their sustainability is certain[20]. However, this willingness is accompanied with an at least as strong rejection of the capture of income by distributors, pure financial investors or organizations without added-value for the contemporary creative endeavours. Sources of remuneration or financing that limit individual use, put in place surveillance mechanisms or install transaction costs in the path of use are even more rejected.

Which sources can we use to ensure that the growth of digital culture will be sustainable in the context descrived above? The following table outilines the potential and drawbacks of various mechanisms, with an indication of how they can or not extend to a greater diversity of contributors and works, and how much that can serve to identify and promote interesting works.

18 Cf. discussion in Sharing, subsection on "libraries" of chapitre 6, pp. 87-88 of paper book

19 For a discussion see Ph. Aigrain, Diversity, attention and symmetry in a many-to-many information society, First Monday 11(6). "Work" designates here isolated individual works as well as the collectively elaborated products of creative communities.

20 Contrary to a common discourse on the reluctance to pay, polls or the statistics of voluntary contribution to creative projects demonstrate a strong willingness of citizens to see artists and contributors being rewarded or financed.

Source	Probable evolution of share	Examples and degree of distribution diversity
Public employment (salary and statutes)	↓ or =, cf. point 13	wide distribution
Public subsidies	↓ or =, cf. point 13	diversity variable according to policy
Parafiscal resources with curated management	↓ or =	ex: film funds in France, tax shelter or credit, part of home copying fees used for support to creative activities, limited diversity
TV production obligations (France)	↓	limited diversity
Sales and rental of contents to end-consumers	↓ or =	variable diversity depending on market organization, cf. point 8
Intermediation services financed by advertising	↑ or =	search engines, social networks, concentrated on large audiences
Cultural mediation	?	Limited resources but essential to quality detection in a universe without upfront filters
Commercial licensing	=	limited but extensible diversity
Human services	↑	ex : art teaching, concerts, theater viewings, conferences, etc. Wide diversity for teaching, dependant on market organization for theater viewings and concerts, cf. point 8
Voluntary resource pooling	↑	cooperatives, participative financing, support subscriptions : real diversity but limited by capabilities of platforms to attract donors
Society-wide statutory resource pooling	= or ↑	creative contribution, basic income, wide possible diversity, uncertainty on existence of the schemes

Some statutes of public employment such such as teaching and research positions play a major role in the existence of a diverse culture, including for digital culture. Both their numbers and the freedom of those occupying them are threatened. Their existence merits all our attention. Beyond this, three mechanisms have the potential of significantly contributing to the sustainability of a many-to-all cultural society. Each implements a form of resource pooling, but at a completely different scale. These three schemes are: voluntary cooperative resource pooling, statutory contribution organised by law but managed by contributors and basic income allowance.

Cooperative resource pooling (artist and author cooperatives, production and publishing cooperatives, participative financing intermediaries such as kickstarter or KissKissBankBank, etc.) undergoes an exciting development. It already plays a key role to federate efforts in creative communities or to pool funds for potentially orphan projects (f.i. documentaries, investigative reporting, useful software without immediate business models, etc.). One can consider that author and artist cooperatives and related editorial and publishing structures are the natural model of development of creative communities in digital culture. It is urgent to provide them with a more favourable tax and regulatory framework. This risks nonetheless not being sufficient to collect the needed resources. Can participative financing scale up to that level? There are significant doubts on this possibility, whether one consider scenarios with many participative financing intermediaries or with a few very large ones. The doubts arise from the fact that only dominant intermediaries can attract large groups of donors, and that their project presentation surface is limited. As a result the great majority of projects are not promoted on front page or by communication mechanisms and can count only on their preestablish networks.

Resource pooling organized by law (with a statutory contribution) is of a fundamentally different nature than tax or parafiscal mechanisms with public or curated management such as public broadcasting fees, the "avances sur recettes" scheme for movie production in France, or the sums allocated to support to creative projects or festivals within the home copying fee systems. In society-wide resource pooling, all funds are allocated by contributors, either through the preferences expressed or as a funtion of voluntarily recorded usage. In the Creative Contribution scheme advocated by the author of this document and supported by various coalitions of musicians, film players, consumer unions and NGOs, the collected sums are allocated:

- to support projects (production of works, project setup) and organizations (cooperatives, cultural mediation),

- to remunerate/reward contributors to works that have been shared outside markets.

The sums are allocated in the first case on the basis of preferences expressed by contributors, in the second case on the basis of data stored by voluntary users about their non-market use in the public sphere (P2P sharing, recommendation, posting on blogs, etc.). The flat-rate contribution is of the order of € 5 per month per household in developed countries. This limited sum (at most 4% of the cultural consumption of households) of course means that the scheme does not aim at replacing the other resources listed above. The aim is to provide an additional resource, specifically adapted to digital culture and its great number of contributors.

This limitation has led other proponents to defend a scheme whose motivations go well beyond cultural activities, but which could play a key role in their sustainability: the inconditional basic income allowance. Also called existence income or citizenship income, it would be a sum distributed without any condition to every adult[21] in some geopolitical or citizenship area. Every person could then allocate freely one's time to work leading to additional income or to non-market activites.

The three schemes just described are three possible compromises between ease of implementation and scale of the results. They also differ by their more specialized or more generic nature. This text's author judges that the creative contribution is particularly relevant for the years to come: it can support voluntary resource pooling and prepare the ground for more general schemes. Other policy proponents have different views. Public policy has the duty to explore how it could put in place or support each of these schemes.

7. Legal requirements for fair publishing and distribution contracts

One must absolutely defend the rights of authors and other contributors to creative works against what copyright has become. Dozens of treaties, directives and laws similarly invoke authors to justifiy measures that despoil the great majority of them and restrict in parallel the rights of the public who appreciates their works. The recent French law on out-of-publication works (pending review by the Constitutional Court) is an extreme case. This law ignores and tries to prevent any form of non-market access, it centers solely on the commercial exploitation of out-of-publication works, submitting them to collective licensing managed by a collecting society dominated by publishers[22]. Authors are left only with the possibility to opt out of the system. The public is deprived of any form of non-market access to works, which is in reality a key purpose of the law as seen by publishers, in particular when orphan works are concerned[23]. This extreme case illustrates a much more general situation. A recent English bill goes exactly in the same direction.

21 Some propose for the basic income to apply from birth to death.
22 The representation of publishers and authors is required to be at parity, which with the presence of heirs of deceased authors amounts to an absolute power for publishers.
23 Fortunately the European directive on orphan works should preempt this.

One must renew urgently with the approach of Jean Zay[24]. In the digital era, one must impose equitable terms towards authors, contributors and the public, not just for commercial publishing but also for commercial distribution. The basis for these equitable terms, to be enshrined in contract law, would be:

- A separate contract for digital publishing rights, with a limited duration corresponding to the reality of fast-changing digital technology and usage.

- In the case of a mixed edition (paper or other carrier and digital edition), the rule of a return to authors of rights as soon as one of the modalities is no longer available (with a reasonable delay after notification by the author, at most six months). It is not acceptable for the simple availability of a digital version to make possible for publishers to keep paper editions out-of-print for as long as they wish.

- Forbidding distribution platforms to impose terms that exclude the non-market distribution of works by their authors.

- Minimum royalty levels for authors and other contributors in commercial exploitation of their work, taking in account the strong reduciton of costs in digital publishing.

None of these conditions would constitute an obstacle for innovation in publishing. On the contrary, it would create a more open ground for experimentation.

24 Minister of education in the French government who authored a Projet de loi du 13 août 1936, in which one finds this (my translation): "The author must no longer be considered as a property owner, but as a worker, to whom the society recognizes specific modalities of remuneration due to the specific nature of the creations arising from his labour. It must be recognized that the protection granted to authors is of the same nature that those granted by the labour law and civil law to all workers. It is under the flag of their work, and not under the umbrella of property that a new legal framework must be built granting authors, for their interest and the collective interest, the legitimate protection deserved by all members of the "Nation of the human mind" according to Alfred de Vigny's superb expression", Documents parlementaires - Chambre, J.O., p. 1707, quoted in Anne Latournerie, Petite histoire des batailles du droit d'auteur, Multitudes (5), mai 2001.

8. A preventive competition policy against distribution monopolies and their abuse

Digital technology has enabled powerful non-market distribution channels and it has given an easier acces to publishing and distribution to individuals and small-size organizations. Meanwhile, one has witnessed a considerable reinforcement of distribution monopolies or oligopolies that appeared during the cultural industry era. If the fusion between Universal and EMI is authorized, the resulting group will control 60% of licensing for distribution in volume for musical recordings in the large European countries. Apple controls 70% of the digital distribution for musical recordings. Amazon and Apple hold each a monopolistic control on one of the two segments of eBooks distribution. Netflix has a strong dominant position in the digital distribution of movies in those countries where it is active. Often integrated vertically from publishing to final distribution, entering in agreements with telecommunication operators, these groups:

- impose the economic terms and the conditions of distribution to authors and small publishers,
- restrict usage terms for the public often beyond what is desired by authors and artists,
- block in part the evolution towards an increased diversity of attention to works which should develop in the digital era.

Monopolies or dominant positions in physical distribution or live performance programming, such as LiveNation's for concert tours or Amazon's for paper book, record and DVD sales restrict the ability of artists and authors to cash on the notoriety they have obtained on the Internet.

This situation has developed through a major failure of competition policy. Efficient competition policy must be preventive, in particular in the digital world where once installed, dominant positions are incredibly difficult to challenge, due to network effects. In particular, it is important that any distribution platform can distribute contents under terms that are as favourable than those conceded to its largest competitors. Compulsory collective licensing for digital distribution is the natural instrument to obtain this result. However, one can not stop there. In France, a recent law has been adopted to impose a unique price for eBooks, that can be set by the publisher. It is incredible that the government advisers and the MPs did not understand (or feign to not understand) that this would lead to results exactly opposite to those that were claimed to be aimed at. It will permit publishers to agree among themselves on keeping the price of eBooks high and implementing a policy of higher prices for big sellers. This will institutionalize an unfair competition between these large publishers and their smaller competitors. By presenting the eBook as a substitute to the paper book and not a complement,

one will undermines their potential synergy, that rests on a low price for eBook and on combined offers. Concerning the positive effects on bookstores that had motivated an earlier law on the unique price of paper books, they are non-existent for eBooks, despite efforts of some alternative publishers to reintroduce bookstores in the value chain of eBooks.

9. Reform of collective management

If one follows the approaches tabled in this document, collective management will play an important role for collecting and redistributing sums originating in the commercial exploitation of works by distributors. This can not happen without a radical reform of the governance of collecting societies. The European Commission initiated a reform process recently materialized by a directive proposal with one part on cross-Europe music licensing and one part on the general governance reform of collecting societies. This proposal has some merits, in particular the imposition to allow for a separate management for various types of rights, which will permit authors to regain more power on exploitation rights and the non-market dissemination of their works. However, the governance side of the proposal is very disappointing.

The directive proposal does not solve the structural problems in the collecting societies governance that make them instruments of an unfair distribution of the collected funds:

- The existence of a censal vote system[25] connected to elections by colleges, often separating large benefitters from small. This situation frequently leads to a coalition of publishers (or other assignees of rights), stock owners of rights and heirs of deceased artists holding the majority of votes, with authors or artists contributing to future creation having only a minority of votes. The principle of one person/one vote must apply.

- A total lack of transparency on the statistical distribution of the redistributed sums (ranked sums by decreasing order, distinguishing between sums redistributed to living artists and those distributed to assignees and heirs). This data[26] must be of compulsory publication and auditable by representatives of authors, artists, consumers and users..

- The treatment of the "undistributed" sums due to too small amounts, to a difficulty in localizing the benefitters, or because funds were collected for works on which the society did not hold management rights. These sums are either stored or redistributed to the other members, prorata of their income, which amounts to a significant subsidy of the wealthiest by the poorer or the public. This is not compensated by the measures in favour of small recipients that have been put in place by some societies.

25 Vote according to wealth, property or other assets.
26 It is not the identity of recipients that matters for the general interest (except from a tax viewpoint) but rather the degree of concentration of income and the proportion allocated to living authors and artists.

The Members of the European Parliament will have to amend the proposal text to ensure it achieves at least a proper treatment of the issues listed above.

10. Keeping pollution by advertising under control

Advertising financing is a tempting solution for Internet-related activities, because it permits to go around one important difficulty: when one provides something of real but limited value to a great number of people, how can one consolidate this value in order to ensure the sustainability of one's activity? By selling the attention time of people to a unique player – the advertiser – one no longer has to convince one by one the users of contents or services to pay for them or support them. The problem is that the cost one pays for this convenience is very high. It's not just that the contents are polluted by advertising messages, or that users do pay for the advertising through its inclusion in product or service prices. The highest price lies in the fact that the creative or expressive act targets the advertiser and not or not only the virtual audience of those who may appreciate the work. Finally, advertising is a thief of time, it always tries to retain the attention it has captured and it strives at concentrating the attention of many on a limited number of productions and persons.

The matter is not of course to forbid to have recourse to advertising. One must however keep it under control, by authorizing without condition to put in place software for removing advertising from content flows on the user side and by requiring the proper signaling of advertising. Finally, one could consider a specific taxation of advertising, that should target equally all providers of advertising, regardless of their nationality or technology.

11. Effective norms for the enforcement of network neutrality

For digital culture to deliver its potential, it must build on an infrastructure that is up to the challenge. We often take for granted what was actually a contingent opportunity: for 15 years, we were able to use reasonably open personal computers and a more or less neutral Internet[27]. As information technology and the Internet disseminate in new domains and new use develops, these properties of openness and universality are seriously endangered by:

- the multiplication of devices that are controlled by proprietary players (in particular for mobile devices),

27 Transmitting equitably information independently of what it represents, of its source or destination, of the protocols used on top of TCP/IP and of the services it implements.

- the recentralization of services and applications,

- the attacks against network neutrality: discrimination against protocols, applications or sources; filtering and censorship; closure of devices in order to make it impossible or more difficult to go around these discriminations.

Network neutrality must now be understood as an exigence for all the chain that goes, for instance, from a mobile device such as a smartphone to a server operated by an end-user or under his or her control. European policy-makers and regulators made the disastrous choice of an attentist policy, while the evidence of harm is already present and acknowledged. Such an attentist policy amounts to accept the capture of the Internet as a common resource by the first comers or the more powerful. Up to now, only the Dutch Parliament (and in other geographic zones, Chile and Peru) adopted a network neutrallity law.

Maintaining and expanding a free common infrastructure, combining open devices and a neutral Internet, will require all the attention of the policy-makers and each of us. The lobbyists and the tears of the dominant operators of mobile telecommunication have up to now obtained the leniency of policy-makers. Let's not forget that they are responsible for a true predation on the budget of disavantaged households. The orientations of the European growth plan, elaborated in total improvisation, include a chapter on "smart networks" which should ring all the alarm bells. What we need are networks which it is smart to build, that is networks that stay efficiently stupid so that users can develop their creativity, their innovations, their sociality and their democratic processes without asking for permission to gatekeepers. As citizens, we must rise up against the resignation or leniency of policy-makers, make them accountable at each instant on what they do and what they don't do in these matters.

The intervention of legislators and regulators, as important as it is, will not suffice if we do not help it by our own choices. Let's not buy closed devices when there is a more open alternative, even if this means renouncing for a small time to some benefit in functionality or comfort (for instance for eBook readers). Let's host our precious contents and data only on our own servers or servers of trusted players who give us an excluive control on the data. Let's support projects such as the Freedom Box, and, if we feel like it, become pioneers of its usage. None of this should deprive us of the forms of use that give us new capabilities, but it means we must be more selective (ex: abstain from any presence on Facebook, make a relevant use of microblogging while keeping an open eye on alternatives to Twitter).

12. Compulsory registration or copyright 2.0

At the other extreme of the infrastructure, one finds the legal foundations of copyright (or the economic rights part of author rights). Renowned legal scholars in many countries have searched for limited modifications that could correct the main perverse effects of the present framework:

- the captation of copyright benefits by players who do not contribute to future creative activity (heirs, managers of stock of copyright, those assignees who have little consideration for the rights of authors and artists),
- the multiplication of orphan and out-of-publication works,
- the scarcity and weakness of the public domain for some media, and limitations to its accessibility and its use.

Part of these efforts converged on a proposal for rendering the benefit of the economic rights part of copyright[28] dependent on a compulsory registration of works by their authors. This registration would be valid for a reconducible limited period (a few years). This proposals faces some difficulties: its requires a modification to the Bern convention[29] and may be rejected by digital authors who are littled inclined to formalities. The commercial exploitation and in some cases reproprietarization of their works would become possible when they abstain to register them.

With a focus more directly connected to the digital world, Marco Ricolfi proposed a copyright 2.0 model, according to which works would be placed by default under a regime similar to a Creative Commons licence, except when their author would opt for the classical model of copyright. To prevent the risk mentioned above of undesired commercial exploitaiton or possible reappropriation, the licence could be of the By-NC ou by-NC-SA type, permitting reuse, but submitting commercial exploitation to an authorization. Both approaches (limited duration registration and copyright 2.0) can be combined, as suggested by Marco Ricolfi himself. The adoption of copyright 2.0 would not dispense from the recognition of non-market sharing of digital works between individuals (cf. point 1.) as this right can not depend on the will of a particular author, it is a direct consequence of the fact of having published a work in the digital sphere. However, copyright 2.0 would provide an elegant solution for remix rights (fair use type of rights such as quotation, parody, etc. remaining of course applicable even in the case of opting for the classic copyright).

28 And not moral rights such as attribution or divulgation

29 The Stockholm protocol – which the US ratified in 1988 while they lived before under the regime of compulsory registration – forbids *formalities* as a condition of exercising copyright.

13. Cultural public funding and tax reform

Among the infrastructures that make possible cultural activities, the resources of public action play a key role. They represent 30 to 50% of the financing of cultural activities depending on countries, maybe more if one accounted better for the contribution of indirect financing through statutes of teachers, researchers or similar jobs. Local government plays an increasingly important role, even though in some countries, the State continues to establish frameworks and models. The recent evolution of public financing raises serious questions. Public financing in the strict sense is at best stagnating, with a parallel multiplication of specific parafiscal fees feeding funds whose allocation is trusted to private or institutional players or expert committees.

Public financing plays a key role in making possible diffuse cultural activities through education, support to places and spaces, cultural mediation, long-lasting support to artistic networks. For all of this, resources are lacking. The parafiscal funds are often captured by instutionalized players, in a context that is not favourable to a renewal of forms and styles. This contributes to a distrust or rejection of specific cultural levies. Finally, in centralized countries such as France, the concentration of public aids on some large structures in the capital city constitute a major injustice.

Beyond the new mechanisms discussed in point 6, one needs to:

- Drop the inefficient gesticulations such as the Google tax once proposed in France, and act on the fundamental parameters of tax resources in general.

- Clarify in which domains public financing plays a key role and must be maintained or amplified.

For the first point, it is absolutely necessary to revisit the definition of the country of origin that establishes the location of tax for the profits of transnational companies (whatever is their assumed nationality). Tax on profits as well as VAT must take place in the country of consumption (acquisition of licences, distribution of advertising messages, access to an on-line service), as soon as the turnover in this country is above a threshold chosen to make sure that these provisions will not harm the international development of SMEs (for instance one or several millions euros). This approach is motivated by considerations that go well beyond the cultural domain, but it will be much more beneficial for culture than efforts to tax specific companies chosen for their nationality while trying ot protect their national equivalents.

For the second aspect, long debates will probably be necessary for outlining a new perimeter of public action, but one can already identify three domains where it is particularly relevant:

- To contribute to the basic conditions of cultural activities, in particular those conditions that enable individuals and small groups to engage into a durable exploration of creative paths without managerial constraint. The keyword is decentralization (towards local government) provided that resources are also decentralized (not just responsibility) and that the local actions are not small imitations of the central ones.

- To preserve and make available and usable the cultural heritage in all its facets. This task can and must today proceed in collaboration with the many societal projects for digitizing and making available the digital heritage. This collaboration will require the adoption of free use terms for the digitized works, including for commercial uses. Its impact will be as positive than the present public-private partnerships' is harmful: it will prevent the rampant reproprietarization of the public domain, and turn the public cultural institutions into trustees of the public domain instead of driving them towards participating into its privatization.

- To make possible for some costly projects and structures to exist, distributing them on various territories and submitting their activity to a critical debate.

14. A positive statute for the public domain and the voluntary commons

These last 30 years, the most important debates on culture and innovation regarded the respective definition of what can be made an object of private property or exclusive rights, and what must be considered as common. Examples of such debates were:

- the definition of the scope of patentability,
- the delineation of the use rights that must be recognized to everyone even for copyrighted works,
- the enforcement of exclusive rights and the burden of proof of either infringement or the legitimacy of use[30],
- the ability to share voluntarily one own'w works without being punished by losing some resources[31].

Such conflicts arise in an unequal playing field. Exclusive rights invoke property rights, identifying intellectual rights with physical property despite all evidence of their different nature. They are also powered by the thick wallet of right holders. In contrast, the rights of each of us are dispersed interests, which can invoke fundamental rights, but without the public domain and communs being granted per se a legal standing.

For these reasons, researchers and legal scholars formulated the project of a positive statute for the public domain, voluntary commons and essential user prerogatives towards works, including the prerogatives of creative workers who need to access and reuse existing works[32]. The aim is to revert, or at least rebalance the situation where the public domain is at most considered as residual or as a market failure, the commons are considered as a territory that one has not yet been privatized, and the user prerogatives are considered as a tolerance that one has consented to because one had not yet found ways to annihilate them. On the contrary, as soon as a positive statute for these common entities will be in place, one will have to consider the impact of any measure on their perimeter, their growth, their maintenance and their effective accessibility.

30 Traditionally, author rights and copyright have been associated with an a posteriori enforcement, usage remaining free but subject to a possible sanction by a court. DRMs, preventive measures, filtering and censorship have de facto reversed this presumption of legitimacy and created a presumption of infringement of exclusive rights.

31 Example: many collecting societies refuse to manage commercial rights when an author or other contributor authorizes non-commercial digital use, though this might change (see above point 9) and the fact that some manufacturers and eBook platforms forbid any parallel non-commercial dissemination of the files they commercialize.

32 See the Public Domain Manifesto and more detailed proposas of Sévérine Dusollier and the author of this text.