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Dogmatic IPR enforcement fails to address the challenges of the Internet-based creative economy

Response to the European Commission's communication[1] on "*Enhancing the enforcement of intellectual property rights in the internal market*" COM(2009) 467

On September 11th, 2009, **the European Commission released a new communication on the enforcement of intellectual property rights (IPR) in the Internal market**. The communication addresses a broad range of issues, notably copyright infringements. In line with the recent leaked information regarding the Anti-Counterfeiting Trade Agreement (ACTA)[2] currently under negotiation, **the document calls for voluntary agreements between Internet Service Providers (ISPs) and rights holders** to deal with copyright infringement over the Internet.

La Quadrature du Net, along with many other advocacy groups across the world[3], believes that the position of the Commission on the matter suffers from **several misconceptions**. These errors, which are discussed below, reflect for the most part the influence of a few corporate interests on IPR public policy. Such inaccuracy in the analysis of the phenomenon of file-sharing is all the more illegitimate given that the Commission and the Member States[4] have failed to consider **alternatives to the repression of non-commercial uses of copyrighted works by Internet-users**. We also take the view that the proposals put forward in the communication, if they are carried on, will inhibit many of the socio-economic benefits that the Internet offers.

This memorandum uncovers the undesirable outcome of the Commission's mention of voluntary agreements between stakeholders (1.). It also outlines how the view regarding copyright enforcement laid out in the communication could eventually severely undermine the rights and freedoms of European citizens (2.). From original analytical mistakes (3.) stems a wrongful assessment of the impact of file-sharing (4.), and so we urge the Commission to reconsider its copyright policies (5.).

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1 The Communication is available at: http://ec.europa.eu/internal_market/iprenforcement/docs/ip-09-1313/communication_en.pdf

2 Since Spring 2008, the European Union, the United States, Japan, Canada, South Korea, Australia as well as a few other countries have been secretly negotiating a trade treaty aimed at enforcing copyright and tackling counterfeited goods.

3 See for instance the resolution of the TransAtlantic Consumer Dialogue (TACD) on enforcement of copyright, trademarks, patents and other intellectual property rights: http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=234&Itemid=40

4 On 25 September 2008 the Council adopted a Resolution on a Comprehensive European Anti-counterfeiting and Anti-piracy Plan. The resolution is available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/intm/103037.pdf

About La Quadrature du Net

La Quadrature du Net is an **advocacy group that promotes the rights and freedoms of citizens on the Internet**. More specifically, it advocates for the adaptation of French and European legislations to respect the founding principles of the Internet, most notably the free circulation of knowledge. As such, La Quadrature du Net engages in public-policy debates concerning, for instance, freedom of speech, copyright, regulation of telecommunications and online privacy.

In addition to its advocacy work, the group also aims to foster a better understanding of legislative processes among citizens. Through specific and pertinent information and tools, La Quadrature du Net hopes to encourage citizens' participation in the public debate on rights and freedoms in the digital age.

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1. How the seemingly innocuous mention of "voluntary" agreements could lead to three-strikes schemes and Internet filtering

> "(...) *Rights holders and other stakeholders should be encouraged to exploit the potential of collaborative approaches and to place more emphasis on joining forces to combat counterfeiting and piracy in the common interest, also* ***taking advantage of possible alternatives to court proceedings for settling disputes***[5]". (Emphasis added).

The soft language used by the Commission in the communication should not hide the real intention of the interest groups that are at the origin of the proposed approach. In the past months, there has been a strong push from rights holders representatives to make technical intermediaries - especially ISPs - liable for the activities enabled by their services. Such liability would amount to dismantling the fundamental principle of **mere conduit**[6] guaranteed by the eCommerce directive, which ensures that an ISP's role is limited to the transport of data. Under this legal shield, they cannot be held responsible for, say, copyright infringements carried on by their customers on the Internet.

By excluding the policing of the network by ISPs, mere conduit is an essential feature of the Internet as we know it, and a pillar of the principle of **network neutrality**. Net neutrality ensures that users face **no conditions limiting access to applications and services**. Likewise, it rules out any discrimination against the source, destination or actual content of the data transmitted over the network. In the words of Tim Berners-Lee, the inventor of the World Wide Web, it is "**the freedom of connection**, with any application, to any party". This principle has been an indispensable catalyst for competition, innovation, and fundamental freedoms in the digital environment[7].

However, ISPs are increasingly pressured to take a more active role in preventing copyright infringements. Indeed, there has been a strong opposition between ISPs and rights holders, the latter wanting to transfer to the former some of the costs associated with the repression of file-sharing. Although it needs not be that way, rights holders feel that **altering the very openness of the communicational architecture**, i.e putting an end to Net neutrality, would be the only efficient way for them to deter people from exchanging music and films over the network.

5 See p. 10 of the communication.
6 Electronic Commerce (EC Directive) Regulations 2002, Regulation 17
7 For a more thorough account of Net neutrality, see La Quadrature du Net's report: *Protecting Net neutrality in Europe.*

The European Commission' Internal Market Directorate General has been responsive to the complaint of entertainment industries. In the weeks leading up to the release of the communication on IPR enforcement (made public in early-September 2009), **a set of meetings took place** between industry representatives in order to consider the specifics of so-called "voluntary agreements"[8]. ISPs were compelled to join in under the threat of legislation[9]. Evidently, the language used by the Commission in the document echoes these meetings and rights holders' calls to eradicate file-sharing through ad hoc provisions in Internet subscribers' contracts.

The risk that ISPs could be forced to implement such measures, even though they are by nature harmful for the development of the Internet-based economy, is aggravated by the fact that a significant number of them (in particular incumbents) are either distributors of content or have entered into exclusive agreements for distributing content. This **vertical integration stands contrary to the very objective of a competitive market** for both access to infrastructures and access to content, which have always been at the core of the Commission's Internet policy.

The communication does not prescribe the **practical measures** that could be implemented through "voluntary agreements" between rights holders and ISPs. However, two measures are currently under discussion at the international level, as the European Union, the United States and a dozen of other countries negotiate the ACTA trade treaty. They could provide a basis for the voluntary agreements the Commission calls for in the communication and would result in:

- the implementation of **blocking and filtering practices** by ISPs, in order to disable the exchange of copyrighted works through the network.
- the implementation of **three strikes policies** – or graduated response – through contract law. The Internet access of suspected infringers would be cut off or restricted after warnings.

2. Uncovering the ambiguousness of the Commission's position

It is quite disturbing to see that, in the communication, the Commission is siding with rights holders to impose liability on ISPs through so-called voluntary agreements. Indeed, the public policy implications of the fight against file-sharing are completely at odds with the position of Commissioner for the Information Society, Mrs. Viviane Reding, during the discussion on the Telecoms Package. It also patently contradicts the Commission's commitment to protecting a free an open Internet[10].

What is more, **these proposals violates Community law**. Rights holders and their political supports in the fight against file-sharing are at least right on one thing: for the current copyright regime to be fully enforced on the Internet without being amended, the very openness of the communications infrastructure would have to be altered, including by enforcing extreme measures such as the deprivation of Internet access for alleged infringers or content filtering. In both cases, it means that restrictions to citizens' free access to the Internet will be imposed, and that **the enhanced freedom of expression and communication granted by this new communications tool will be severely harmed**.

8 See http://www.europeanvoice.com/article/imported/commission-looks-to-pull-the-plug-on-illegal-downloading/65531.aspx

9 The communication refers to legislation by warning that "t*he Commission will carefully monitor the development and functioning of voluntary arrangements and remains ready to consider alternative approaches, if needed in the futur*e" (p. 10).

10 See the Commission's proposed declaration on Net neutrality: http://www.laquadrature.net/wiki/Commission_Declaration_on_Net_Neutrality_20091105
See also the Commission's communication "*Internet governance: the next steps*" COM(2009) 277.: "*The key principles enabling the success of the Internet promoted by the EU remain the open, interoperable and 'end-to-end' nature of the Internet's core architecture must be respected. This was stressed by the Council in 2005 and reiterated in 2008*".

Recent case law in France provides a highly relevant explanation for why such restrictions threatens civil liberties. In June 2009, in its decision against the HADOPI law implementing "three strikes" policy against file-sharing[11], the French Constitutional Council found that the law, by granting to an administrative body the power to ban people from the Internet, disrespected the 1789 "Declaration of the Rights of Man and of the Citizen". The Council underlined that Article 11 of the Declaration:

> "*proclaims: 'The free communication of ideas and opinions is one of the most precious rights of man. Every citizen may thus speak, write and publish freely, except when such freedom is misused in cases determined by Law'. In the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for* ***the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services****. […] Freedom of expression and communication are all the more precious since they are one of the cornerstones of a democratic society and one of the guarantees of respect for other rights and freedoms. Any restrictions placed on the exercising of such freedom must necessarily be adapted and proportionate to the purpose it is sought to achieve.*" (Emphasis added).

As a consequence, Internet access is now clearly acknowledged as a condition for the practical exercise of the freedom of expression and communication. As such, in a country that obeys the **rule of Law**, **any penalty leading to a restriction of the Internet access falls under the regime of a judicial process**[12]. Indeed, no one other than the judicial authority can guarantee that the rights and freedoms of the suspect - most notably the right to a due process and presumption of innocence - will be protected, that evidence is valid, or that the sentence will be **proportionate** to the original offense. Hence, contrarily to the assertions made in the communication[13], there is no way for contractual three-strikes policies and content filtering practices to be assuredly respectful of citizens' rights and freedoms, especially the freedom of expression and communication and the right to privacy.

The original "**amendment 138**" of the Telecoms Package – aimed at forbidding extra-judiciary three-strikes policy and voted twice by an 88% majority of the Parliament - recognized the importance of the Internet for the freedom of communication in an even more comprehensive way than the French Constitutional Council's groundbreaking decision. "Amendment 138" provided that: "*no restriction may be imposed on the fundamental rights and freedoms of end-users, without a* ***prior ruling by the judicial authorities***". Interestingly, the Commission agreed with the European Parliament's position. In a press release, the EU's executive body said that it: "*considers this amendment to be an important restatement of key legal principles of the Community legal order, especially of citizens' fundamental rights"*[14]. It is therefore quite disturbing to see that it now proposes to introduce three-strikes policies through contractual arrangements.

After a strong opposition on the part of the Council of the European Union, "amendment 138" was eventually abandoned and replaced by a weaker provision that nonetheless includes important safeguards. However, it also has important loopholes, which prompted La Quadrature to react to its adoption with skepticism, pointing out that "*the text only relates to measures taken by Member States and thereby fails to bar telecom operators and*

11 Decision rendered on June 10th, 2009: www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009_580dc.pdf

12 For further legal arguments on the exclusive competence of the judiciary regarding restrictions of Internet access, see the 3) of our memo *Improving Amendment 138 While Preserving its Core Principle*: http://www.laquadrature.net/en/improving-amendment-138-while-preserving-its-core-principles

13 "A*ny voluntary inter-industry solution has to be compliant with the existing legal framework and should neither restrict in any way the fundamental rights of EU citizens, such as the freedom of expression and information, the right to privacy and the protection of personal data*" (p. 10 of the communication).

14 See the Commission's press release of November 8th, 2008: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1661&format=HTML&aged=0&language=EN&guiLanguage=en

entertainment industries from knocking down the founding principle of Net neutrality"[15]. Whereas the Telecoms Package is just about to become Community law, the communication shows that the Commission's services in charge of IPR enforcement have been working on contractual three-strikes schemes for months, in total contradiction with the Commission's official support of "amendment 138". Even more shocking: **the Commission's plan is actually to exploit the one real loophole of the provision that now replaces "amendment 138"**, which proves that it not as protective of citizens' freedoms as some pretend.

In the end, what is being laid out in the communication is a potential blackmail situation whereby ISPs would be forced to alter the very nature of the Internet without any respect for their subscribers' rights. It is time for the European Commission to be honest with EU citizens. Its role is first and foremost to protect them rather than the outdated business models of a few big corporations. It is **copyright law that has to be made more flexible, not civil rights**.

3. Dangerous confusions explain fundamental analytical flaws

Not only is the Commission's push for "voluntary agreements" illegitimate from a democratic and legal point of view. It is plain bad policy-making, since **the justifications laid out in the communication are based on erroneous assumptions**.

It is wrong to equate file-sharing – referred to as "piracy"– with the counterfeiting of physical goods. Counterfeited goods, such as fake medicines, deceive the consumers who buy them by giving the impression of quality and reliable products when they are usually not. They thus put people's security and health at risk. There is **no doubt that counterfeiting is bad for society** as a whole, not just rights holders. This is an area where tough IPR enforcement and criminal sanctions of the kind suggested in the communications seems legitimate.

When it comes to file-sharing however, IPR infringements are of different nature. Digital technologies have separated informational goods, such as music or films, from their physical supports. As a consequence, they can be reproduced an infinite number of time at negligible cost without perceptible loss of quality (i.e digital goods are non-rival goods). The direct consequence is that the distribution channels associated with file-sharing, such as peer-to-peer networks, enable consumers to access an unlimited amount of a vast array of cultural works, and even to become content publishers themselves by sharing their own creations. Hence, **file-sharing provides consumers with many advantages compared to traditional distribution channels**, and low price is far from being the only one. Furthermore, as explained below, the economic impact for the cultural industries is not necessarily negative[16]. For that reason, it is pointless to incorporate – as the Commission does in the communication – file-sharing and the counterfeiting of physical goods in a single IPR enforcement strategy. In fact, the change of paradigm brought about by new technologies should result in the development of **new business-models for cultural goods, ones based on abundance as opposed to scarcity**.

Equating file-sharing and the counterfeiting of physical goods is all the more abusive when one considers that **file-sharing does not have any commercial purpose**. There is no issue of unfair competition, since no one is making money for putting a music or a movie file on exchange. The European Parliament has understood this other important distinction between the activity of file-sharing and the commercial malpractices of profit making

15 See La Quadrature du Net's press release of November 5th, 2009, *Europe only goes half-way in protecting Internet rights*: http://www.laquadrature.net/en/Europe-only-goes-half-way-in-protecting-internet-rights

16 See *4. File-sharing as it is, not as special interests say it is.*

infringers, often criminal organizations. In a resolution[17] voted in 2008, Members of the European Parliament condemned the current negotiations on the ACTA on this ground, stating that:

> *"[The Parliament] believes that **the Commission should take into account certain strong criticism of ACTA in its ongoing negotiations**, namely that it could allow trademark and copyright holders to intrude on the privacy of alleged infringers without due legal process, that it could further criminalize **non commercial copyright and trademark infringements**, that it could reinforce Digital Rights Management (DRM) technologies at the cost of **'fair use' rights** (...)*".

With this new communication, the Commission shows that it has chosen to ignore the call of elected representatives for a moderate stance on file-sharing.

Yet, this distinction between the commercial and non-commercial nature of infringements is essential to IPR enforcement policies. **Criminal penalties should be limited to intentional commercial infringements**, that is to say carried on with motivation of financial gains. In coherence with this principle, policy-makers should rule out the implementation of three-strikes schemes and Net filtering against Internet-users.

4. Facing file-sharing as it is, not as special interests say it is

Communication technologies bring about **new affordances**[18] **for consumers**, among which that of freely sharing cultural works in a non-commercial purpose. Unfortunately, the communication does not acknowledge the true distinctiveness of the new modes of cultural consumption and production enabled by the Internet. It exhibits the dogmatism that is responsible for the flaws of the European copyright enforcement strategies.

Dozens of studies show the positive side of having people freely sharing cultural works[19]. But they have been ignored by the Commission, just as they are ignored by the many policy-making arenas that chose to pursue repressive policies against this new and positive form of cultural production and circulation. Like all the policies aimed at tackling file-sharing, the reasoning behind the Commission's communication suffers from important analytical errors, which only serve to mask the fact that policy-makers – whether purposefully or not – **fail to apprehend the broader social significance of file-sharing**.

This wrongful assessment can be explained by the influence of special interests on policy-making, but is nonetheless increasingly **criticized in open and democratic political forums**. Just when a few countries, including the European Union, the United States, Japan and Canada, were negotiating the Internet chapter[20] of ACTA, from November 4th to November 6th, 2009 [21], other governments – backed up by a team of experts – voiced their skepticism regarding global IPR policy-making during a meeting of the WIPO Advisory Committee on Enforcement. For instance, in a study commissioned by the committee and discussed during the meeting, the economist Carsten Fink[22] criticizes the idea that, in the absence of piracy, all consumers would switch to legitimate copies at their current prices:

> *"This outcome is unrealistic—especially in developing countries where low incomes would likely imply that many consumers would not*

17 See an excerpt of the resolution: http://www.laquadrature.net/wiki/EP_Resolution_on_ACTA
18 An affordance is a quality of an object, or an environment, that allows an individual to perform an action (source: Wikipedia)
19 See an index of these studies: http://www.laquadrature.net/wiki/Documents
20 The content of which is available at http://www.laquadrature.net/wiki/ACTA_Draft_Internet_Chapter
21 See the press release of the Swedish presidency of the EU Council regarding the round of negotiation: http://www.se2009.eu/en/meetings_news/2009/11/6/the_6th_round_of_negotiations_on_anti-counterfeiting_trade_agreement
22 Background on Mr. Carsten Kinks is available at: http://www.wipo.int/academy/en/meetings/iped_sym_05/cv/fink.html

demand any legitimate software at all. Accordingly, ***estimated revenue losses by software producers are bound to be overestimated***"[23].

Likewise, even in rich countries, the notion that every song downloaded off a peer-to-peer network equates to a net loss for the music industry is ludicrous[24]. Undoubtedly, current IPR enforcement policies are characterized by an **indisputable lack of evidence**.

The general bias regarding the damages supposedly caused by file-sharing should discourage us from supporting the Commission and the Members States' initiative in favor of a European Observatory on Counterfeiting and Piracy[25]. **The Observatory will put IPR industries representatives in position to influence statistics** and other empirical information regarding file-sharing. Thereby, it will pave the way for more over-estimated evaluations regarding the profit losses of rights holders, and will once again account for the "tough stance" taken by public authorities against Internet users. Instead, public policy should be based on credible evidence, transparent assumptions as well as objective and independent peer reviewed analysis. It is now time for the Commission to start thinking about funding truly independent studies, or at least to pay attention to the ones that already exist.

5. New rights as an alternative to repression

The European Union should move toward embracing the new uses made possible by digital technologies while ensuring fair funding for authors and other right-holders. It can achieve this goal by answering the following question: Which system of copyright protection is likely to serve the aims of **rewarding creators at large**, of ensuring investment in a **wide variety of creative works**, and of **enabling an empowering access to knowledge and culture**?

What is for certain is that today's copyright regime is by far too rigid, and fails to achieve this goal. Accordingly, **copyright reform should be a priority for European lawmakers**. In particular, new exceptions to copyright must be created. It requires Member States adopt an open approach regarding instruments of limitations and exceptions. For instance, the EU could stress the potential of extended collective licenses or other collective licensing mechanisms for **non-commercial peer-to-peer exchange** between individuals of digital works on the Internet as a possible strategy for ensuring effective remuneration and funding of creation in a way that is compatible with the rights and freedoms of all.

To that aim, the EU should promote a **reasonable interpretation of the three-step test** (in line with the declaration of European copyright scholars, *A Balanced Interpretation of the Three-Step Test in Copyright Law*[26]) as a basis for future reforms of the European copyright framework. Europeans should also defend this sensible approach in the relevant international arenas, especially the WIPO and the WTO.

Finally, the EU must oppose the inclusion in the **trade agreements** under negotiation - such as ACTA - of any provision that could directly or indirectly further limit the existing or possible exceptions, or otherwise restrict directly or indirectly the rights of users of knowledge in its broader sense.

23 Study available at: http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_6.doc

24 See, for instance, this study commissioned by the Dutch government: *http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorised_translation.pdf*

25 The first meeting of the Observatory took place on September 4th, 2009. See the Observatory web page: http://ec.europa.eu/internal_market/iprenforcement/observatory/index_en.htm

26 See the declaration on the three-step test: http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf