LA QUADRATURE DU NET

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Creative Content in the Digital Age: Reasserting the Rights of the Public

Comments on the European Commission's reflection document:
Creative Content in a European Digital Single Market: Challenges for the Future[1].

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1 Available at: http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf

Overall Position / Executive Summary

Cultural rights. The 1948 Universal declaration of human rights, article 27 :

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The Internet and other information and communications technology bring about a **fundamental change in the political economy of communications** and, through the development of new modes of production and distribution of cultural works, represent an opportunity for a more inclusive and democratic cultural sphere. Given these structural changes, the overall objective of cultural policy in the digital age should go back to the founding principles of copyright: **increasing access to creative content** such as music, books, and movies while **rewarding artists and ensuring investment in a wide variety of works**.

The result of more than three decades of expansion of informational property rights, **today's copyright regime is by far too rigid and is in practice profoundly at odds with the digital environment**. If our societies are to fully benefit from the Internet, lawmakers need to move away from brutal enforcement of outdated and restrictive "intellectual property" regimes and demonstrate pragmatism. In particular, one fundamental fact needs to be acknowledged by policy-makers and cultural businesses alike: digital technologies allow for the perfect replication of cultural goods at virtually no cost. Regulations that run counter to this reality – for example by trying to alter the architecture of the Internet in order to deter copyright infringements, or by imposing technical measures that artificially recreate the scarcity that existed in the "old" cultural economy – defy common sense and hold back socio-economic progress while being often unrealistic from a technical point of view.

Accordingly, the European Digital agenda should reject such endeavors and seek to **reorganize the Internet-based creative economy around the emancipatory practices enabled by new technologies**, such as the sharing and re-use of creative works. These practices promise a participatory culture where people can not only access, share and comment the works of others, but also use new tools to express their own. If the European Union adapts copyright law in accordance with new technologies, a vibrant and innovative commercial cultural economy can develop along with other financing schemes to support this new creative ecosystem and provide appropriate monetary rewards for creators. Some cultural industries will undoubtedly complain about this evolution, in which they will loose the control they exerted on distribution channels and see their rents eroded. However, society as a whole will benefit from a new-found balance between the rights of the public and the interests of authors and producers. Otherwise, copyright will face a disastrous legitimacy crisis.

(i) The fist part of this document discusses some fundamental elements of EU copyright policy that are not addressed by the Commission's consultation paper. We take the view that to achieve the goal of a "*modern, pro-competitive, and consumer-friendly*"[2] digital single market for creative content, **the coercive and repressive components of European copyright policy need to be revised**.

(ii) In the second part, we turn to some of the possible actions outlined in the Commission's document. We make the case for a **unified EU legal framework** for the Internet-based creative economy that would **foster the rights of the public in the digital environment**, while pointing out to **regulations and funding mechanisms that would sustain the renewed creative economy**.

2 Page 3 of the Commission's document.

I) The Need to Reconsider Coercive and Repressive Copyright Policies

At the beginning of the reflection document, **former Commissioner Charlie McCreevy makes an unfortunate pledge in favor of a strong protection of intellectual property rights** (IPR), presenting them as a condition for a "*knowledge-based economy*" and "*innovation and investment in real life*". While a proper dose of IPR might be important for innovation, numerous scientific studies[3] show that the strengthening of proprietary rights over information – which has been the landmark of cultural and technological policy for more than thirty years – actually stifles innovation and investment in new informational productions. For copyright too, the extension of exclusive rights impose an unnecessary and therefore illegitimate burden on society. As William Patry, Copyright Counsel to the U.S Congress, has put it, "*we are well past the healthy dose stage and into the serious illness stage*"[4]. Not only is abusive copyright regime economic non-sense, but its ruthless enforcement also severely threatens civil liberties.

Liberty-killer "three strikes" schemes and Internet filtering

Now that even non-commercial reproductions of works between individuals without the author's authorization are subject to criminal sanctions in numerous European countries, the vast number of individual who practice file-sharing are **outlaws**. As such, they see their rights and freedoms – such as the right to a fair trial, protection of privacy or freedom of expression - under constant attack. After the tough legislative debate on the "three strikes" law (also known as HADOPI) in France and the failed attempt to introduce similar provisions in EU law through the Telecoms Package, we are seeing a **strong push from rights holders in order to put an end to the limited liability enjoyed by technical intermediaries**, i.e Internet Service Providers (ISPs) and hosting services[5]. Such a move would profoundly alter the way the Internet functions but is nonetheless defended by the Commission's Internal Market Directorate General in a communication released in September 2009[6]. The communication calls for "voluntary agreements" between rights holders and ISPs to tackle file-sharing. In line with the current negotiations on the Internet chapter of the Anti-Counterfeiting Trade Agreement (ACTA), such agreements could lead to the implementation of the following measures:

- **blocking and filtering practices** by ISPs that wish to benefit from a favorable liability regime. Blocking and filtering would aim at disabling the exchange of copyrighted works through the network.
- **"three strikes" policies** – or graduated response – possibly through contract law. Upon request of rights holders, the Internet access of suspected infringers would be cut off or restricted after warnings.

Saying that such measures harm civil liberties is not an overstatement: they undeniably represent restrictions to citizens' free access to the Internet, and therefore **harm the enhanced freedom of expression and communication granted by this new communications tool.** In June 2009, in its decision against the HADOPI law implementing "three strikes" policy against file-sharing[7], 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*

3 See, for example, Josh Lerner, *Patent Protection and Innovation Over 150 Years.* Working paper n° 8977, National Bureau of Economic Research, Cambridge, USA, 2002. Josh Lerner studied changes in intellectual property law in sixty countries over a period of 150 years. He found that when patent law was strengthened, investment in innovation for local firms slightly decreased.

4 http://williampatry.blogspot.com/2008/08/end-of-blog.html

5 This limited liability is guaranteed in EU law by the Electronic Commerce Directive (directive 2000/31/EC). See articles 12-15.

6 See excerpts of La Quadrature du Net's memorandum on this communication in Annex. The full version is available at: http://www.laquadrature.net/files/LaQuadratureduNet-20091118-EC_on_IPR_enforcement.pdf

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

> *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 freedom of expression and communication. It follows that, 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**[8]. 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 the evidence is valid, or that the sentence will be proportionate to the original offense. Allowing private actors or administrative authorities to adopt measures restrictive of fundamental freedoms is in total contradiction with the core principles of the European Union[9].

Recommendation 1:
The European digital agenda must:
- recognize that the **fight against file-sharing necessarily harm the rights and freedoms** of Internet users;
- **renounce** to this stupid **"war on sharing"** and recognize it as an integral component of the Internet-based creative economy (see below).

Technical Protection Measures

Although unaddressed in the Commission's reflection document, there is an **older but similarly dangerous copyright policy that should be repelled** as the EU moves forward with its Digital Agenda: Technical Protection Measures, or TPMs. The role of TPMs is to make practically impossible for users to copy a "protected" digital file and are thus totally anachronistic. Alas, they are still very much on the global IPR agenda, given that the draft ACTA also includes new civil and criminal sanctions against technologies aimed at circumventing TPMs. Similar though somewhat softer provisions already exist in the 1996 WIPO treaty, transposed in EU law with in the 2001 European Copyright Directive (EUCD)[10].

The EUCD directive has been widely criticized[11]. Technical control over digital materials, for instance under the form of digital rights management, have proven to **deter consumers** from turning to the pay-per-download offerings that include them, and have to some extent hampered competition and innovation in the device market by preventing **interoperability** of media files[12]. Having realized their detrimental impact on cultural consumption and related markets, the music industry is now progressively abandoning these technologies.

8 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*, available at http://www.laquadrature.net/en/improving-amendment-138-while-preserving-its-core-principles

9 As underlined by Article 2 of the Treaty of the European Union: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (…).*"

10 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

11 L. Guibault, G. Westkamp, T. Rieber-Mohn, and P.B. Hugenholtz. Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society. Report to the European Commission, DG Internal Market. February 2007. See in particular p. 95-115. http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf

12 For a recent example of the burdens associated with TPMs, see this recent analysis of the Kindle, Amazon's e-book reader: http://www.unicom.com/blog/entry/622

The lesson, for both policy-makers and the rest of creative businesses, is that preventing copying in the age of digital technologies is at best vain, as it discourages potential consumers who will more often than not refuse to give up their legitimate expectations when using cultural works. More fundamentally, TPMs are completely at odds with new technologies, which allow for a more progressive creative ecosystem with the emergence of **new modes of cultural production and circulation that rely on people's ability to mechanically copy existing cultural works** (for instance by engaging in quotations, remixes, mash-ups, etc). TPMs represent a regrettable attempt to transform digital creative content in "finished goods", designed for passive consumers.

Recommendation 2:
European policy-makers must seriously **evaluate the impact of TPMs on the rights of the public and competition in the digital creative economy**. Eventually, the provisions aimed enforcing TPMs should be repelled.

"Shrink-wrap" licenses

In the recent evolution of copyright law, the development of shrink-wrap licenses is an important element **undermining the rights that the public enjoyed in the physical creative economy**, and one that should be closely monitored by the European Commission. Shrink-wrap licenses refer to the terms of use and conditions that must be accepted by consumers upon acquisition of a given product. This form of non-negotiated agreements started developing in the 1980's in the software industry and has been encountered by anyone who has ever downloaded a program off the Internet (and subsequently clicked "I agree" before installing it onto their computers).

Shrink-wrap licenses have sparked much controversy regarding their legality when attached to copyrighted works, considering that copyright statutes already establishes the rights and obligations of both parties, i.e the creator and the user of a given work. In the United States, legal debates went on for years to determine wether these **"contractual enclosures"**, as Yochai Benkler has described them, were enforceable by courts[13]. With the advent of TPMs, we are now seeing a growing number of cultural businesses who use these licenses to impose abusive conditions on users of copyrighted digital material. These conditions are abusive in that they represent a **drawback compared to the rights and allowances that the public enjoyed with physical creative goods**. As Canadian journalist and science fiction author Cory Doctorow puts it:

> *"When I buy an audiobook on CD, it's mine.* ***The license agreement, such as it is, is "don't violate copyright law,"*** *and I can rip that CD to mp3, I can load it to my iPod or any number of devises—it's mine; I can give it away, I can sell it; it's mine"*[14]. (Emphasis added)

Now, TPMs and shrink-wrap licenses attached to digital media render these activities impossible. For instance, audiobooks publishers like Audible.com (whose market share in the downloadable audiobook market is estimated at 90%[15]) sells products that are protected by TPMs and submitted to a license [16] forbidding users to "*copy, reproduce, distribute*" them. However, in many instances, this contradicts copyright law given that 21 Member States in the EU have adopted private copying levy systems that authorize users to reproduce a copyrighted work for a strictly private use. This evolution clearly runs counter to the objectives of copyright, which was originally instituted by law to strike the right balance between the rights of the creators and those of the public.

13 Yochai Benkler, The Wealth of Networks, Yale University Press, 2006, p. 445.
14 Cory Doctorow, *How to Destroy the Book*, speech on copyright at the National Reading Summit in Toronto, Canada, November 13th, 2009. http://thevarsity.ca/articles/23855
15 http://www.guardian.co.uk/technology/2009/aug/12/victor-keegan-internet-innovation
16 http://www.audible.fr/adfr/site/generalPages/conditionsGenerals.jsp

Recommendation 3:
The development of shrink-wrap licenses, which are non-negotiated private law contracts, **unjustifiably increases the market power of vendors at the expense of consumers' rights**, and should be combatted by public authorities, especially those in charge of consumer affairs.

Copyright terms extensions

Lastly, a current legislative initiative should be held off: that of copyright term extensions. International law, and more specifically the Berne convention supervised by WIPO, provides protection 50 years after the death of the author (for the rights of the author) and 50 years after the first publication (for neighboring rights). After having harmonized the term for the rights of the author across Member States at 70 years after the death of the author in 2001, **the Commission has introduced a directive[17] that would extend the term of neighboring rights** (that of performers and producers) on musical works **from 50 to 95 years** after the first publication. For the first time in history, a wide collection of significant cultural works – many music recordings released between 1950 and 1970 – was about to enter the **public domain**, **allowing anybody to freely access and build upon these works** without the authorization of rights holders. If the proposal is adopted, free uses of these works will have to wait for another 45 years.

According to the Commission,

> "***the proposal aims to improve the social situation of performers**, and in particular sessions musicians, taking into account that performers are increasingly outliving the existing 50 year period of protection for their performances"*. (Emphasis added).

However, this argument is clearly erroneous and only serves to **mislead the general public**. According to a study by the Open Rights Group, for the vast majority of performers, the projected extra revenues resulting from the proposed term extension will be largely insignificant: from 50¢ to €26.79 each year in the first ten years. In contrast, the top 20% recording artists - those who already had successful and monetarily rewarding careers - will receive most of the gains associated with term extensions (89.5%)[18].

What is more, **economics and intellectual property scholars are unanimous to consider that copyright terms extensions fail to provide any incentive for the creation of new works**, which is in basic terms the reason why copyright exist in the first place. In the United States, when the Supreme Court accepted to hear a case[19] regarding the constitutionality of the 1998 Copyright Term Extension Act (CTEA)[20], seventeen economists, including several Nobel prize laureates[21], filed a amici curiae[22] in which they concluded that:

> *"Comparing the main economic benefits and costs of the CTEA, it is difficult to understand term extension for both existing and new works as an efficiency-enhancing measure. **Term extension in existing works provides no additional incentive to create new works and imposes several kinds of additional costs**. Term extension for new works induces new costs and benefits that are too small in present-value terms to have much economic effect. As a policy to promote consumer*

17 Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights. COD(2008)0157. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0464:EN:NOT

18 http://www.openrightsgroup.org/blog/2008/performers-likely-to-get-as-little-as-50-a-year-from-increased-term-of-copyright

19 *Eldred v. Ashcroft*, 537 U.S 86 (2003)

20 The U.S CTEA extended the rights of the author from 50 to 70 years after the death of the author.

21 Such as Kenneth J. Arrow and Milton Friedman.

22 The brief is available at: http://cyber.law.harvard.educyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdft/amici/economists.pdft/amici/economists.pdft/amici/economists.pdft/amici/economists.pdft/amici/economists.pdft/amici/economists.pdf

welfare, the CTEA fares even worse, given the large transfer of resources from consumers to copyright holders." (Emphasis added).

On July 21st, 2008, Europe's most prominent intellectual property experts wrote an open letter addressed to then-Commissioner Charlie McCreevy to bemoan the **lack of principled basis for the proposed term extension** from 50 to 95 years. They denounce in unequivocal terms the influence of special interests (entertainment companies) on copyright policy-making and the fact that the Commission has refused to consider the numerous independent studies opposing the term extension. According to them:

> *"The simple truth is that copyright extension benefits most those who already hold rights. **It benefits incumbent holders of major back-catalogues, be they record companies, ageing rock stars or, increasingly, artists' estates**. **It does nothing for innovation and creativity**. The proposed Term Extension Directive undermines the credibility of the copyright system. It will further alienate a younger generation that, justifiably, fails to see a principled basis*
>
> *Many of us sympathise with the financial difficulties that aspiring performers face. However, measures to benefit performers would look rather different. They would target unreasonably exploitative contracts during the existing term, and evaluate remuneration during the performer's lifetime, not 95 years"*[23]. (Emphasis added).

In spite of these hard criticisms, the European Parliament adopted the directive in first reading in Spring 2009, and the proposal is now under discussion at the EU Council.

Recommendation 4:
It is still time for the new European Commission to **intervene in the legislative process so as to put an end to the endless extension of copyright terms**. Going further, the Commission should consider whether having longer copyright terms than what international copyright law requires is not sub-optimal from a socio-economic perspective, and consider **shortening copyright terms**.

23 *Copyright extension is the enemy of innovation,* The Times, July 21st, 2008. http://www.timesonline.co.uk/tol/comment/letters/article4374115.ece

II) The Way Forward: Towards an Open Creative Ecosystem

The European Union must now start **organizing the creative economy in accordance with the rights of the public, not against it**. After 15 years uselessly spent trying to enforce a copyright regime fundamentally unadapted to new technologies, we cannot afford to loose more time. Copyright policy-making should not be subject to the undue influence of special interests whose main purpose is to maintain rent-seeking behaviors relying on the scarcity of cultural works and the control of their uses. As the Commission points out in the reflection document, the public must be taken into consideration. This goal is achieved not only by raising consumers' confidence in online services and granting them access to a wider variety of creative content, but also by **giving the public more rights when it comes to circulating, promoting and building upon culture and knowledge**. In return, these new rights could justify the development of **innovative mutualized funding schemes**. A serious debate on these issues must take place at the European level. The Commission's document also provides interesting elements with regard to how the European Digital Agenda could develop a legal framework favoring the development of **dynamic business-models** suited to the possibilities that digital technologies and the Internet offer.

Adopting an open approach regarding EU-wide exceptions and limitations to copyright

As outlined in the first part of this document, for years, major changes in copyright law have been introduced at the expense of the public's rights. This evolution, by systematically discouraging the circulation and re-utilization of creative content, has hindered the advent of the knowledge economy, which is one of Europe's most important public-policy goal since the adoption of the Lisbon Strategy in 2000. It has also failed to **take into consideration the need of more fragile parts of the population in relation with cultural works**, most notably persons with disabilities and individuals whose economic situation severely constrains their access to cultural goods.

We welcome the recognition by the Commission that EU copyright law has been suffering from an obvious lack of symmetry between exclusive rights on the one hand, and limitations and exceptions on the other hand. The **real harmonization of copyright regimes across the EU requires that mandatory exceptions be imposed to Member States**. Contrary to the claims of rights holders, it is clear that contractual licensing would seriously compromise the swift and successful introduction of exceptions on which there is a broad consensus. This is notably the case of exceptions for disabled persons and education and research. For these two specific needs, mandatory exceptions should be urgently introduced at the EU level as we argued last year in our response to the Green Paper on Copyright in the Knowledge Economy[24]. Naturally, any measure - such as technical protection measures (TPMs) - infringing on these exceptions should be deemed illegal.

Creating a mandatory exception for education and research

Regarding exceptions for education and research, we support a mandatory exception for research and education, where the **definition of beneficiaries is focused on the type of activities** that can benefit from the exception rather than on the nature of institutions, taking into account the fact that education and research are often inseparable activities. EU law could nonetheless usefully clarify the fact that, for instance, educational organizations are by nature among the beneficiaries of the exception for all their educational activities, regardless of the targeted public. In particular, open universities or courses open to the general public should benefit from such an exception.

In defining the scope of the exception, no mandatory rules should apply regarding the length of

24 La Quadrature du Net, *Comments on the Green Paper on Copyright in the Knowledge* Economy, November 2008. Available at http://www.laquadrature.net/files/LQdNcommentsonCopyrightGreenPaper.pdf

excerpts of works that can be reproduced or made available for teaching and research purposes. Whether a given use qualifies for the exception depends on the needs of the teaching activity. **It is for judiciary authorities and case law to determine whether a given use respects the defined scope of the exception**.

> **Recommendation 5:**
> EU lawmakers should **create an exception for education and research**, providing a **clear and inclusive definition** of the scope of the exception and making sure that this exception is **practically workable**.

Creating a mandatory exception for persons with disabilities

Likewise, EU law should ensure that persons with disabilities, such as blind and other visually impaired persons can access creative works, even when the market has failed to provide them with efficiently priced access. Even though all Member States have adopted such exceptions in their national legislation, **the Commission is right to consider that the current situation fails to guarantee a sufficient level of legal certainty** for disabled persons and the non-profit organizations that assist them, especially when it comes to the cross-border transfer of the small number of works accessible in appropriate formats. The situation is critical: as the Commission points out, only 5% of the books that are published in Europe each year are converted into accessible formats such as audio, Braille or large print[25]. An EU-wide exception must be urgently introduced to make sure that copyright law does not endangers the social inclusion of disabled persons. For them, the European Single Market is far from being a reality and the territorialization of copyright law should not be held as an excuse.

EU-wide mandatory **provisions on formats** benefiting from the exception are useful and even necessary in order to guarantee an effective access. However, these provisions, like any other provision regarding technology or formats, should not mandate specific formats, but rather **define the properties of the possible formats**. More specifically, the formats for disabled persons should rely on open standards in the sense of the European Interoperability Framework developed by IDABC[26]. As such, the EU should make sure that **simple open source software solutions are available for accessing, processing and even re-using these formats**.

However, in spite of the encouraging stance recently taken in written communications, **the Commission's position at the international level inspires skepticism** about its commitment to fostering the cultural rights of disabled persons. During a meeting in December 2009, the World Intellectual Property Organization's standing committee on copyright and related rights (SCCR) considered a proposal by Brazil, Ecuador and Paraguay for an international treaty regarding exceptions and limitations for print-disabled persons. At the global level, the challenges are even greater that the ones identified by the Commission for Europe: in developing countries, less than 0.5% of published books are available in accessible formats. But, as independent studies[27] have shown, current international law limits access to culture and knowledge by forcing very costly, unnecessary duplications of accessible formats. The proposed treaty would facilitate cross-border exports and imports of works published in such formats.

Although the SCCR eventually decided to initiate "*focused, open-ended consultations*"[28] regarding the proposed treaty after the United States finally adopted a pragmatic approach by agreeing to discuss it, the EU – represented by the Commission – opposed the creation of a working group on the matter. Even more disturbingly, the EU successfully introduced an amendment to the SCCR conclusions that deleted the reference to a possible future treaty. It is very difficult to understand this attitude. It seems that the EU, most likely under the influence of rights holders, has adopted a position of principle by

25 European Commission, *Communication on Copyright in the Knowledge Economy*, COM(2009) 532 final, October 2009. http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf
26 http://ec.europa.eu/idabc/servlets/Doc?id=19529
A similar definition is included in article 4 of the french Loi n°2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164
27 Some of these studies are available at: http://www.keionline.org/node/646
28 See WIPO's press release: http://wipo.int/pressroom/en/articles/2009/article_0061.html

opposing any precedent that would favor the public. Indeed, with the proposed treaty, **for the first time in history, international copyright law would impose a specific exception to all signatories in order to guarantee the rights of the public**.

Recommendation 6:
Congruent with the views expressed regarding the rights of the public in the Commission's recent documents on the matter, the EU should:
- **introduce a mandatory exception for persons with disabilities in the EUCD**, paying close attention to the definition of formats;
- adopt a more **progressive stance on limitations and exceptions in international norm-setting arenas**, and **support the proposed treaty for visually impaired persons at WIPO**.

Removing the exhaustive character of the list of limitations and exceptions in EUCD

The exhaustive character of the list[29] of exceptions appears to be an **absurd constraint imposed upon national legislators**, and is unjustified by the overall international legal framework. It risks hindering the development of innovative remuneration schemes based on collective licensing for the non-commercial exchange of creative works over the Internet, at least in situations where legal licensing would be necessary to overcome the opposition of some collective rights management organizations (CMOs), when they act like entrenched and inefficient oligopolies (see below).

Recommendation 7:
For that reason, the Commission should:
- **propose to remove the exhaustive character of the list** of exceptions in EUCD;
- ensure that new exceptions and limitations can be created by Member States as long as they **respect the applicable international legal framework**: the three-step test when applicable, and other instruments, such as the Berne Convention Appendix or the article 40 of TRIPS.

At the **global scale**, the EU should:
- promote a **reasonable interpretation of the three-step test** in the relevant international arenas (WIPO, WTO);
- oppose the inclusion in **trade agreements** (or other international agreements) such as ACTA of any provision that could directly or indirectly further limit the rights of users of creative content and knowledge in general.

Allowing non-commercial exchanges and re-uses of cultural works while funding artistic creation

Information and Communications Technologies (ICTs) bring about **new affordances**[30], enabling people to engage in a wide variety of practices that previously required significant amounts of capital investment in order to be carried on. This is arguably the biggest contribution of the Internet to freedom and democracy in modern societies, as this structural change profoundly reorganizes the media landscape. Creating information, whatever it may be; circulating this information and exchanging it with others; commenting on existing information and building upon such information or re-contextualizing it in order to make up new claims: all these activities represent a **radical shift in the political economy of communications**, one that is not restricted to the artistic field but permeates to other fields of the informational sphere, such as political and public expression or science. It is the clear public interest to create policies that can foster these evolutions, rather than ruthlessly maintain

29 Article 5.2 of the directive 2001/29/EC.
30 An affordance is a quality of an object, or an environment, that allows an individual to perform an action (source: Wikipedia).

proprietary regimes relying on scarcity and restraining access to informational resources.

In order to **recognize the public's status not only as a consumer but also as a participant in the cultural ecosystem**, new rights must be created. Non-commercial file-sharing between individuals, which has been at the center of the debate regarding online creative content and is especially popular among young people (the so-called digital natives[31]), must now be recognized and integrated in a reformed copyright regime. Likewise, the EU should encourage an appropriate framework for non-commercial re-uses ("remixes") of creative works.

Recognizing "non-market" exchanges of creative content between individuals

During the debate on the HADOPI law in France, La Quadrature du Net has been a strong supporter of the legal recognition of non-commercial file-sharing as a way to start rebuilding the Internet-based creative economy. Such proposals are being tabled elsewhere in Europe and in the world[32], and some have been considered by national lawmakers, notably in France and Italy.

Policy-makers must understand the **value of non commercial file-sharing for the cultural ecosystem** while providing authors with an appropriate monetary rewards. Contrary to the assertions of many entertainment industries executives, the introduction of such a mechanism would not have a negative impact on the creative economy. Even if detailed knowledge on file-sharing is still scarce, a growing number of studies actually suggests quite the opposite[33]. What is for certain however, is that the relentless fight against unauthorized file-sharing has enormous social, economic and cultural costs, and the only way forward is to recognize this practice.

The **creative contribution**, as detailed in *Internet et Création: comment reconnaître les échanges sur Internet en finançant la création*, written by Philippe Aigrain[34], co-founder of La Quadrature du Net, consists in **giving to all individuals the right to engage in non-market sharing of digitally published works with other individuals**. The definition of activities included in the scheme would ensure that the distribution channels providing the greatest part of remuneration to creators would not be harmed by peer-to-peer exchange. In full respect of the three-step test, this new right given to the public would come with an **efficient funding mechanism under the form of a flat-rate contribution paid by all internet broadband subscribers** (and levied by Internet Service Providers). A framework is proposed in the book to determine the amount of the total contribution and handle its evolution in time. The level of the contribution for each broadband subscriber should aim at guaranteeing that the creators will not be negatively impacted - directly or indirectly - by the recognition of peer-to-peer sharing. The proposed amount, which serves as a basis for further discussions for all media and is estimated according to the French creative economy, is situated **between 5€ and 7€**. The total product of the contribution would therefore be **between 1200 million € and 1700 million € per year in a country such as France**. Half of the product of the "creative contribution" would be used for the remuneration of the creators whose works are shared over the Internet, while the other half would help fund the production of works, as well as the support to added-value intermediaries in the creative environment.

The **measurement of usage of online creative content** would determine the **modalities for the redistribution** of the contribution among rights holders. In order to respect people's privacy, this measurement would be based on a large **panel of voluntary Internet users**. Statistical techniques would also ensure that the overall method is resistant to fraud and efficient for measuring the level of

31 John Palfrey and Urs Gasser, *Born digital : understanding the first generation of digital natives*, Basic Books, 2008.

32 For an overview of such proposals, see Volker Grassmuck, T*he World is Going Flat(-Rate), A Study Showing Copyright Exception for Legalising File-Sharing Feasible, as a Cease-Fire in the "War on Copying" Emerges*. Published on Intellctual Property Watch, 11 May 2009.

33 See an index of these studies: http://www.laquadrature.net/wiki/Documents
See, for instance, a recent study commissioned by the Dutch government:
http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorised_translation.pdf

34 Philippe Aigrain, *Internet & Création*, Editions In Libro Veritas, 2008. Philippe Aigrain is also founder and CEO of Sopinspace, Society for Public Information spaces, a company that develops free software and providing commercial services for the public debate and collaboration over the internet. He holds a PhD in Computer Science. Dr. Aigrain has researched the application of IT to media such as photography, video and music. From 1996 to 2003, he joined the European Commission R&D funding programmes where he was head of sector "Software Technology and Society".Dr. Aigrain is the author of *Cause commune, l'information entre bien commun et propriété*, Fayard, 2005. He stands on the Board of Directors of the Software Freedom Law Center (New-York, USA) and on the board of Trustees of the NEXA Centre on Internet and Society (Torino, Italy).

usage of less popular but nonetheless deserving works. The governance of the organization in charge the distribution of the remuneration and that of the organization responsible for the funding of creation would be significantly different. For the former, an **independent observatory** would be created in order to collate and analyze the data on usage, but also to determine the distribution keys for the different categories of rights holders and their respective (and existing) collective rights management organizations (CMOs). For the support to production and the creative environment, a mix of peer-based allocation of funds and assignment to intermediaries by internet subscribers (under the competitive intermediaries model) would be used. I*nternet & Création* also discusses international aspects in situations where the creative contribution would be put in place first in one or a limited number of countries.

In order to implement the creative contribution, two different models can be considered:

- The optimal model would probably be that of **extended collective licenses**, by which CMOs would contractually agree to allow private individuals to engage in non-commercial peer-to-peer exchange of copyrighted works, while ad hoc legislation would extend the agreement to rights holders that are not formally members of any CMO. Such a system, which is often used in Scandinavian countries, relies on voluntary choice on the part of rights holders and is arguably the most likely to take into account the needs of all interested parties.

- If the governance of CMOs, which is too often controlled by big entertainment companies rather than the legitimate representatives of actual creators, the creation of a **legal license** could represent a workable alternative. It could be achieved by introducing a new mandatory exception to the EUCD, or by re-opening the list of possible exceptions in a manner that allows Member States to experiment such schemes and harmonizing later on this basis (see above).

Recommendation 8:
In the reflection document, the Commission expresses interest in pushing for the adoption of **extended collective licenses for the digitization and online usage of orphan-works and possibly out-of-print works**. It is a very positive step.

We suggest that, possibly when conducting negotiations with European CMOs on orphan and out-of-print works, the Commission **discuss the implementation of the creative contribution**.

Embracing user-created content in the new creative ecosystem

In the reflection document, the Commission states that "*serious consideration should be given to measures facilitating non-commercial re-use of copyrighted content for artistic purpose*"[35]. Such re-uses, or remixes, of existing content by individuals is usually labelled as "user-created content" (UCC) (it should however be noted that all creative or knowledge works are "user-created content"). The generalization of content production by individuals re-using existing content, and the ability of these end-users to reach out to the general public is **one of the most promising developments of the knowledge society**.

It is necessary to engage in a serious reflexion over UCC and the way such practices can flourish **in accordance with the moral rights of authors**, notably the right to claim authorship and to object to modifications of the works that are prejudicial to the author's honor or reputation[36]. Of course, the legal recognition of UCC should not restrict in any way the general rights of the public, such as the right of quotation for the sake of criticism, review or public political expression. Likewise, the requirements on users' duties such as attribution should not induce technical or human complexity detrimental to the development of UCC.

35 Footnote 46, page 15 of the document.
36 See article 6 bis of the Berne convention of the moral rights of authors.

Recommendation 9:
Moving forward in the reflexion over UCC, the Commission should:
- **follow the good practice of free re-use licenses**, such as **Creative Commons licenses**.
- consider what can be achieved by way of **general exceptions** and other users' rights;
- address other questions, such as the possible creation of a **compensation** for rights holders whose content is re-used for non-commercial purposes. The creative contribution could provide an appropriate framework for such a compensation.

Giving room to the development of new business models

It is often argued by the defenders of today's copyright regime that the recognition of non-commercial file-sharing, even if it is compensated by a flat-rate contribution, would dry up the demand for commercial offerings of creative content. In our view, such an argument rely on outdated business notions and fails to **acknowledge the new economic phenomena that typify the networked society**.

From the beginning of the "digital evolution", creative businesses should have understood that the business-models of the physical creative economy – based on the control of the reproduction of creative works and the organization of scarcity – could not be transposed in the digital world. Straightaway, they should have embraced the **numerous business opportunities** offered by new technologies.

It is still time for them to finally implement business strategies based, for instance, on the principles of the **attention economy**[37] or on the **"Long Trail"**[38]. As the windfall profits of the infamous Pirate Bay website suggest[39], organizing the online creative economy around the free circulation of cultural works, i.e loosening the control of rights holder over distribution channels, creates a **huge potential for the creative content market**.

In the reflection document, **the Commission hints at some interesting possible actions**. If they are implemented in relation with the recognition of the the public's rights in the online creative ecosystem, they can kick-start online commercial revenues of creators. These proposals consist in harvesting the benefits brought by the Internet, whose important economic property is to significantly **decrease transaction costs**. Currently, the main problem for commercial users is that the EU copyright system is highly fragmented because of the territorialization of copyright law and the multiplicity of rights, rights holders and corresponding CMOs. This complexity induces far too much costs for innovative and often nascent companies who want to distribute creative content over the Internet. In addition, especially in the music industry, producers impose abusive conditions on distributors[40] (Deezer or Spotify, for instance) and exceedingly constrain the experimentation of successful business-models.

Recommendation 10:
As a consequence, the Commission should move ahead with the possible actions outlined in the document, by:
- enhancing licensing efficiency for commercial users by **aggregating the rights involved in the online dissemination of creative content** (rights of reproduction, performance right). A "**one-stop shop**" - such as the one the Commission mentions - would provide commercial users

37 Attention economics is an approach to the management of information that treats human attention as a scarce commodity, and applies economic theory to solve various information management problems (source: Wikipedia).
38 The "Long Trail" is a retailing concept describing the niche strategy of selling a large number of unique items in relatively small quantities – usually in addition to selling fewer popular items in large quantities (source: Wikipedia). Amazon, one of the most successful businesses in the Internet-based creative economy, has based its strategy on this concept.
39 Some estimate The Pirate Bay's annual earnings at $9 million. See *TPB Raking in Millions*, Rixtstep, available at http://rixstep.com/1/20060708,00.shtml
40 Music Industry lures 'Casual' Pirates to Legal Sites, New York Times, July 19, 2009. http://www.nytimes.com/2009/07/20/technology/internet/20stream.html?pagewanted=1&_r=1&partner=rss&emc=rss

with an easy way to clear all the rights attached to copyrighted content. The Commission should make sure that the licenses for online dissemination do not entail stringent financial conditions on commercial users, especially if they are small businesses.

- continue to **promote multi-territory licensing** and "single state-clearance" models, in line with the deal the Commission recently brokered with the music industry to establish online European repertoires[41];
- encourage the creation of **freely accessible and comprehensive online databases** containing information on rights and owners for all creative works.

Also, on the long run, the Commission should launch a **debate on the creation of a European copyright title** in order to simplify the EU copyright system. The main objectives should be to:

- guarantee meaningful rights for the public across Member States (see above);
- solve the persistent problem of market fragmentation and associated costs.

About La Quadrature du Net

La Quadrature du Net is a France-based **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.

You can contact us at: contact@laquadrature.net

41 See the press release fo the Commission on the matter: *Competition: Commission's Online Roundtable on Music opens way to improved online music opportunities for European consumers*, October 20, 2009. http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1548&format=HTML&aged=0&language=EN&guiLanguage=en

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

Response to the European Commission's communication[42] on "*Enhancing the enforcement of intellectual property rights in the internal market*" COM(2009) 467.
Published in November 2009.

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)[43] 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[44], 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[45] 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.).

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***[46]". (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**[47] guaranteed by the eCommerce directive, which ensures that

42 The Communication is available at: http://ec.europa.eu/internal_market/iprenforcement/docs/ip-09-1313/communication_en.pdf
43 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.
44 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
45 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
46 See p. 10 of the communication.
47 Electronic Commerce (EC Directive) Regulations 2002, Regulation 17.

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[48].

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.

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"[49]. ISPs were compelled to join in under the threat of legislation[50]. 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 – possibly 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

48 For a more thorough account of Net neutrality, see La Quadrature du Net's report: *Protecting Net neutrality in Europe* (November 2009).
49 See http://www.europeanvoice.com/article/imported/commission-looks-to-pull-the-plug-on-illegal-downloading/65531.aspx
50 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).

also patently contradicts the Commission's commitment to protecting a free an open Internet[51].

What is more, **these proposals violate 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**.

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[52], 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 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**[53]. 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[54], 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'*

51 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*".

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

53 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

54 "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).

fundamental rights"[55]. 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 entertainment industries from knocking down the founding principle of Net neutrality*"[56]. 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[57]. 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

55 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

56 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

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

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 infringers, often criminal organizations. In a resolution[58] 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**[59] **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[60]. 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[61] of ACTA, from November 4th to November 6th, 2009 [62], 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, economist Carsten Fink[63] 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*

58 See an excerpt of the resolution: http://www.laquadrature.net/wiki/EP_Resolution_on_ACTA
59 An affordance is a quality of an object, or an environment, that allows an individual to perform an action (source: Wikipedia).
60 See an index of these studies: http://www.laquadrature.net/wiki/Documents
61 The content of which is available at http://www.laquadrature.net/wiki/ACTA_Draft_Internet_Chapter
62 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
63 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***"[64].

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[65]. 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[66]. **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.

64 Study available at: http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_6.doc
65 See, for instance, this study commissioned by the Dutch government: http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorised_translation.pdf
66 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