



## Why the Gallo and ALDE resolutions on IPR enforcement fail to promote a balanced approach

On Wednesday September 22<sup>nd</sup>, the European Parliament will vote on resolutions regarding the enforcement of intellectual property rights (IPR) in the internal market. The resolution will pave the way for **the future European IPR enforcement policies**.

The main resolution, of which Mrs. Marielle Gallo is rapporteur, proposes a very repressive approach regarding the enforcement of IPR in the digital environment. In the recent days, the ALDE group, led by Mr. Toine Manders, has tabled an alternative resolution which unfortunately falls into some of the same pitfalls as the Gallo report.

Both **the Gallo report and ALDE resolution should be rejected as dangerous and disproportionate attempts** to repress online file-sharing, calling for policies that will inevitably undermine the fundamental freedoms of millions of Internet users.

### 1. Support for non-legislative and extra-judicial measures to repress online file-sharing of copyrighted works.

A first important flaw of both the Gallo and ALDE resolutions is their common call for “*additional non-legislative measures are useful to improve the enforcement of IPR, particularly measures arising from in-depth dialogue among all those active in the sector*”<sup>1</sup>. Often mentioned in the field of online copyright infringement as a way to bypass the legal shield enjoyed by Internet technical intermediaries, these non-legislative measures could fundamentally alter the online ecosystem and undermine fundamental freedoms.

Beyond this vague language of “non-legislative measures”, the reality is that Internet Service Providers (ISPs) are increasingly pressured by rights holders to take a **more active role in preventing copyright infringement**. Public authorities are being responsive to rights holders' concerns and are forcing ISPs to collaborate under the threat of legislation<sup>2</sup> (a threat reiterated by both the Gallo and ALDE resolutions)<sup>3</sup>. Over the past year, the Commission has convened a set of meetings between industry representatives in order to consider the specifics of **so-called “voluntary agreements”**<sup>4</sup>. In the spring of 2010, two other “stakeholders dialogues” took place, during which **the blocking of websites through “self-regulation”** was discussed, as rights holders explained that if ISPs can block child abuse websites, they could also block websites for the purpose of copyright enforcement<sup>5</sup>.

Evidently, the “non-legislative measures” defended by the Gallo and ALDE resolutions should be interpreted with regard to these developments. These could consist 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 targeted **Internet access restrictions** by ISPs such as three strikes policies – or graduated response – through contract law. The Internet access of suspected infringers would be cut off or restricted after warnings.

<sup>1</sup> See p. 10 of the Commission's initial communication: “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**”

<sup>2</sup> The communication refers to legislation by warning that “the Commission will carefully monitor the development and functioning of voluntary arrangements and remains ready to consider alternative approaches, if needed in the future” (p. 10).

<sup>3</sup> For instance, the Gallo resolution includes the following paragraph: “all parties concerned, including Internet service providers, must join in the dialogue with stakeholders in order to find appropriate solutions; calls on the Commission, failing this, to submit a legislative proposal or to amend existing legislation, particularly Directive 2004/48/EC, so as to upgrade the Community legal framework in this field on the basis of national experiences”. Paragraph 32.

<sup>4</sup> See <http://www.europeanvoice.com/article/imported/commission-looks-to-pull-the-plug-on-illegal-downloading/65531.aspx>

<sup>5</sup> In July, the last meeting will focus on “technical measures”.

Such measures to deter file-sharing would be provided by ad hoc clauses in Internet subscribers' contracts.

However, **such non-judicial copyright enforcement measures run counter to the rule of Law**. As the June 2010 decision of the French Constitutional Council outlines<sup>6</sup>, 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**<sup>7</sup>. 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 and the given situation is indeed illegal, or that the sentence will be proportionate to the original offense. Hence, contrarily to the assertions made in the communication<sup>8</sup>, there is **no way for contractual three-strikes policies and content filtering practices to be 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 - also recognized the importance of the Internet for the freedom of communication and the exclusive role of the judiciary to impose restrictions to Internet access.<sup>9</sup>

Wednesday's vote is an opportunity for the European Parliament to renew its commitment to protect citizens' fundamental freedoms as our societies embrace digital technologies. Accordingly, **MEPs must reject "non-legislative measures" as a way to repress copyright infringements**. It is copyright law that has to be made more flexible, not civil rights.

## 2. A biased view of the socio-economic impact of file-sharing.

Both the Gallo and ALDE resolutions assert that the "*growth of unauthorised file sharing of copyrighted works and recorded performances is an increasing problem for the European economy in terms of job opportunities and revenues for the industry as well as for government*". This one claim serves to justify the repressive policies called for against online non-commercial copyright infringements in both resolutions.

However, such an assertion relies on a misleading study backed up by the copyright industry. Mid-March, a "study" by TERA consultants was sent to MEPs in order to "demonstrate" that file-sharing would result in impressive job losses in the European Union on the coming years<sup>10</sup>. As usual, the methodology was highly debatable, and the Social Science Research Council - which is undergoing a major study on piracy - was quick to publish a document **debunking TERA consultants methodology and findings**<sup>11</sup>. According to the SSRC, among other methodological biases, the TERA study overlooks the fact that the money not spent on, say, CDs and DVDs is simply transferred to other activities and sectors, which potentially **better contribute to EU economic and social wealth**.

<sup>6</sup> In its decision against the HADOPI law implementing "three strikes" policy against file-sharing, 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. "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, Freedom of expression and communication**" implies freedom to access such services." (Emphasis added).  
[www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009\\_580dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009_580dc.pdf)

<sup>7</sup> 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>

<sup>8</sup> "Any 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).

<sup>9</sup> 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**".

<sup>10</sup> <http://www.euractiv.com/en/innovation/study-internet-piracy-taking-big-toll-jobs-news-354286>

<sup>11</sup> <http://www.laquadrature.net/files/Piracy-and-Jobs-in-Europe-An-SSRC-Note-on-Methods.pdf>

Likewise, in April, the U.S Government Accountability Office published a groundbreaking report in which it stressed that the numbers that had previously been circulated regarding the economic impact of counterfeiting and piracy were erroneous<sup>12</sup>. According to the GAO, "*commonly cited estimates of U.S. industry losses (...) cannot be substantiated or traced back to an underlying data source or methodology*".

Moreover, a growing number of independent studies - including from the OECD, IPSOS, the Canadian Department of Industry and other academic as well as governmental sources - show a **neutral or positive economic impact of file-sharing on the creative sector as a whole**<sup>13</sup>

**It is now time for a fresh and evidence-based perspective** on these issues, particularly in the case of file-sharing - a widespread social practice. So far, independent studies have been ignored by the Commission, just as they are ignored by Mrs. Gallo, Mr. Manders and many other policy-makers who choose to take the industry's numbers for granted and pursue repressive policies against this new form of cultural dissemination. Instead, the honorable members of the European Parliament (MEPs) must ensure that EU policies are based on **credible evidence, transparent assumptions as well as objective and independent peer reviewed analysis**.

### **3. A call for a new IPR strategy in the absence of any assessment of past legislation.**

The Gallo and the ALDE resolutions both call on "*the Commission to urgently present, by the end of 2010, a comprehensive IPR strategy addressing all aspects of IPRs, including their enforcement as well as their promotion*", particularly regarding copyright infringements. The Gallo resolution goes even further by pushing for the harmonization of criminal sanctions to tackle IPR. Such a call seems particularly inappropriate given that the **2004 IPR enforcement directive (IPRED) has yet to be assessed**.

This all the more worrying considering that **the IPRED directive is already strongly criticized**. In particular, the fact that IPRED overlooks crucial distinctions between not for profit infringements – such as online sharing of copyrighted works – and commercial ones has been seen as lacking empirical justification as well as proportionality. Moreover, the directive created an obligation for Internet Service Providers to disclose personal information regarding their customers to recording industry executives during civil prosecution of persons suspected of sharing copyrighted works over the Internet. This has led to much **controversies in Member States regarding the respect of privacy and, again, the proportionality of such measures** in the case of not for profit infringements<sup>14</sup>.

Considering these important debates around the IPRED directive, it is extremely unfortunate that the European Commission failed to thoroughly assess its impact by May 2009, as article 18 requires. Given the alleged flaws of the European doctrine of IPR enforcement, **this assessment report – which should be based on objective and indisputable methodology – is urgently needed**. But in any event, it would be totally unacceptable to launch an initiative regarding the further harmonization of IPR enforcement at the EU level before conducting an in-depth analysis of IPRED.

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<sup>12</sup> <http://arstechnica.com/tech-policy/news/2010/04/us-government-finally-admits-most-piracy-estimates-are-bogus.ars>

<sup>13</sup> See an index of these studies: <http://www.laquadrature.net/wiki/Documents>

<sup>14</sup> See, for instance, the case of Sweden: <http://www.thelocal.se/19556/20090520/>