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IPRED Versus The Sharing of Culture: Moving Away From Enforcement

Response to the European Commission's consultation on the "Intellectual Property Rights" Enforcement Directive (IPRED).

Executive summary: EU's Internet policy at crossroads

More than 10 years after adopting a framework for the development of information society services and the promotion of freedom of expression online, the European Union faces a crucial choice: It can either pursue the promotion of democratic goals and innovation in the digital environment, or remain blind to social and technical realities by enforcing a copyright regime that is at its very core unadapted to the Internet. Sadly, the European Commission's documents regarding the revision of the "Intellectual Property Rights" Enforcement Directive (IPRED) suggests that forces of the status quo could prevail.

In the age of the Internet, where any citizen can have access to a global communications infrastructure to access and disseminate culture and knowledge, our legal system must give up on the idea that each instance of transmission of artistic works must be submitted to prior authorization, especially in cases of non-profit transmission. **The debate needs to move away from enforcement and focus on financing schemes and business-models that can accommodate widespread social practices**, such as non-commercial file-sharing of cultural works, while providing appropriate resources for creative activities.

However, the Internal Market Directorate General of the EU Commission, which is supervising the revision of IPRED, appears **too much in line with the copyright industry to break away from outdated policies**. Even though it has undertaken laudable efforts to create a more integrated single digital market, its determination to repress non-commercial sharing of cultural goods over the Internet is endangering the technical and legal architecture on which are based the democratic and economic potential of the Internet.

In Part One of our response to the consultation, we point out that the **arguments in favor of increased enforcement of copyright, patent or trademark law in the digital environment are not based on any sound evidence**. Because they similarly apply to for-profit and not-for-profit infringements, they give way to the repression of widespread and positive social practices, such as the sharing of cultural works over the Internet. We assert that the impact of sharing on the creative economy as a whole is proven to be neutral or positive.

In Part Two, our analysis of the Internal Market DG documents on the revision of IPRED unveils the Commission's strategy to **transform Internet companies into a copyright police, monitoring their user's activities** to prevent any potential infringement, in the sake of preserving the copyright industries' control over the distribution channels of cultural works. The Commission seems keen on violating the letter and spirit of the e-Commerce directive's provisions that aim at creating a balanced legal regime for intermediary liability. These were adopted to promote the development of the digital economy while fostering freedom of expression online, and must remain a cornerstone of future Internet policy.

In Part Three, we conclude by stressing that the Commission's proposals disrespect the fundamental rights enshrined in EU law, in particular freedom of expression and privacy. We make **constructive propositions to better protects these rights in the online environment and engage a meaningful reform of copyright**; one that could help the EU pave the way for an innovative and diverse creative economy.

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1. THE COMMISSION FAILS TO ADOPT AN EVIDENCE-BASED APPROACH

1.1 The Problem With One-Size-Fits-All Approach to Enforcement

The Commission's communication on the revision of IPRED constantly mentions "counterfeiting and piracy", two terms referring to different phenomena. Indeed, both terms cover a wide variety of phenomena, and evidence-based policy making should not encompass all of them in broad language. Important distinctions must be recognized, and adequate conclusions be drawn at the policy level.

Different titles and different kinds of infringements

While **counterfeiting** applies to the manufacturing and subsequent distribution of physical goods that fake original items, **piracy** – a non-legal term – refers to different and more subtle forms of infringements. "Piracy" is often used among policy-makers to refer to the non-commercial sharing of copyrighted works on the Internet.

Given this diversity, it is wrong to prescribe similar enforcement policies for these different phenomena, like IPRED does. Counterfeited goods, such as fake medicines, deceive consumers by giving the impression of quality and reliable products when they are usually not. When it puts people's security and health at risk, there is no doubt that **counterfeiting is bad for society as a whole, not just rightholders**. This is an area where tough enforcement and criminal sanctions are legitimate, though one could argue that criminal law already provides adequate tools and that no special measures are required.

However, when it comes to non-commercial infringements, such as file-sharing between individuals which is clearly targeted by the Commission, consequences are very different. Digital technologies have separated informational goods, such as music or films, from their physical media. As a consequence, they can be reproduced an infinite number of time at negligible cost without loss of value (i.e digital goods are non-rival goods). The direct consequence is that the **non-commercial 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. The empowerment of being able to transmit works to other individuals is essential to the creation of a shared culture. Hence, **file-sharing provides consumers and society with many advantages compared to traditional distribution channels**, and the low cost is far from being the only or most important one. Furthermore, as we explain below, the economic impact for the cultural industries is far from being necessarily negative.

The Commercial Scale criteria is way too broad to draw necessary policy distinctions

As this example suggests, the confusion between counterfeiting and piracy is aggravated by the fact that the EU overlooks the crucial distinction between commercial

infringements and non-commercial infringements. **By suggesting a very broad definition of the commercial scale criteria in 2004[1], the EU has opened the door to stringent enforcement measures to be applied even in cases of not-for-profit infringements**. As a consequence, private individuals sharing cultural works online may fall under enforcement measures that may be adequate in dealing with profit-making illegal organizations but which are totally disproportionate when applied to not-for profit activities.

In the past, the European Parliament has understood this important distinction between non-commercial file-sharing and the commercial malpractices of profit making infringers[2]. But such pragmatic stance was not withheld in the Gallo report adopted in September 2010, which might explain why the Commission has decided to pursue a one-size-fits-all approach through the revision of IPRED. As a result, the Commission calls for measures which will be **indiscriminately applied to all kinds of infringements, irrespective of their motivation or socio-economic impact.**

Recommendation 1: Rather than increasing repression against non-commercial infringements, IPRED should make it clear that the enforcement tools provided in the directive only apply to "for-profit infringements", or acts carried on with "commercial intent".

1.2 Special Focus On the Internet Based On No Empirical Data

The Commissions gives in to special interests

The Commission is rushing into the revision of IPRED, in spite of its own admission that "*the information available on the impact of the Directive is too limited to allow for a full assessment of its effectiveness at this stage*". But even in the absence of a detailed assessment report, which was required by article 18 of the directive. the Commission's report on IPRED goes on to stress that "*greater attention needs to be given to the infringements of intellectual property rights on the Internet and that the Directive does not sufficiently address this constantly growing, serious problem*".

However, **the Commission fails to provide sound evidence** showing that the measures provided in the directive are inadequate in dealing with serious online infringements. Also, while file-sharing is described as a growing phenomenon, the report gives no documented data supporting this claim.

Rather than the result of an evidence-based approach to policy making, the

1. Recital 14 provides that "*Acts carried out on a commercial scale are those carried out for **direct or indirect economic or commercial advantage** (...)*".
2. In the Susta report on the impact of counterfeiting on international trade 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** (...)*".
See an excerpt of the resolution: http://www.laquadrature.net/wiki/EP_Resolution_on_ACTA

Commission's suggestion that greater attention needs to be be given to online copyright infringements seems to rely on the claims of the copyright industry, which for more than a decade has been fighting against the new modes of production and distribution that have developed in the digital environment.

The copyright industry's figures are bogus

To back up their calls for increased repression, the copyright lobbies have issued repeated claims that file-sharing had disastrous economic consequences. In March 2010, during the debate at the EU Parliament on the so-called Gallo report, a "study" by TERA consultants was sent to Members of the European Parliament (MEPs) in order to "demonstrate" that file-sharing would result in impressive job losses in the European Union[3]. 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 an document debunking the study's findings[4]. According to the SSRC, even if one admits that some sectors in the industry suffer losses directly because of file-sharing, 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. The TERA study is a blatant example of work commissioned by private interests for their own benefits.

In April 2010, the **U.S Congress 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[5]. 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"***. The report goes on to acknowledge that "*few studies have been conducted on positive effects, and little is known about their impact on the economy (...). Since there is an absence of data concerning these potential effects, the net effect cannot be determined with any certainty*."

Independent studies show that file-sharing benefits society

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. 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**[6].

- This was shown in a 2009 report commissioned by the Dutch government, which considered the wider cultural sector and not only the sales of physical and digital supports[7].
- Quite ironically, another study commissioned by the infamous HADOPI – the agency in charge

3. *Euractiv*, 18thMarch2010, "Study: Internet piracy taking big toll on jobs". Address: http://www.euractiv.com/en/innovation/study-Internet-piracy-taking-big-toll-jobs-news-354286
4. Social Science Research Council, 2010, "Piracy and Jobs in Europe – A Note on the BASCAP/TERA Study" Address: http://piracy.ssrc.org/wp-content/uploads/2010/12/Piracy-and-Jobs-in-Europe-a-note-on-the-BASCAP-TERA-study.pdf
5. Nate Anderson, April 2010, "US government finally admits most piracy estimates are bogus", *Ars Techinca*. http://arstechnica.com/tech-policy/news/2010/04/us-government-finally-admits-most-piracy-estimates-are-bogus.ars
6. See an index of these studies: http://www.laquadrature.net/wiki/Documents
7. See, for instance, this study commissioned by the Dutch government: http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorised_translation.pdf

of implementing the three-strike scheme in France – showed that people who share cultural works online spend more on cultural goods than consumers that do not[8].

– Harvard Professor Felix Oberholzer-Gee and National Bureau of Economic Research researcher Coleman Strumpf published in the 2010 NBER Series a detailed study[9] under the title "File-sharing and copyright". It demonstrates that the overall economy of the music sector never stopped growing in the period marked by the growth of file sharing, and that only between 0 and 20% of the decrease of sales of recordings can result from file sharing.

But these studies have been ignored by the Commission and the MEPs who voted in favour of the Gallo report, who instead choose to listen to the copyright lobbies[10]. Such dogmatism leads them to pursue repressive policies against this new and positive form of cultural production and circulation. It leads to **dangerous solutions to a false problem**.

Recommendation 2: No further enforcement measures should be adopted before the Commission has made available a full assessment of IPRED, as required by the directive, looking into its effects on *inter alia* fundamental rights, access to culture and knowledge as well as innovation.

In parallel, the Commission should undertake a comprehensive assessment on the wider impact of non-commercial distribution of cultural works on the Internet, looking into its effects on i*nter alia* consumer welfare, cultural diversity, artist promotion, business-models.

Assessments of both enforcement measures and non-commercial distribution of cultural works shall be based on creditable evidence, transparent and realistic assumptions and objective peer reviewed analysis.

8. See p. 45 of the document: http://www.hadopi.fr/download/hadopiTo.pdf
9. Oberholzer-Gee, F. & Strumpf, K., File-Sharing and Copyright, in Lerner, J. & Stern, S. *(Eds.), NBER Series,* 2010, 19-55.
10. In the application report of the directive, the Commission openly states the lack of neutrality of the information presented. Under the title "Annex 2: Analysis and Methodology", the use of biased sources (from on-line service providers and "legal experts from the private sector"!) is justified by an alleged lack of information from Member States.

2. THE COMMISSION'S STRATEGY: TRANSFORMING INTERNET INTERMEDIARIES IN A PRIVATE COPYRIGHT POLICE

The fact that the calls of the Commission for increased repression are blind to the different types of infringements and are not based on any sound evidence would not be so problematic if it were not for the dangerous measures that could be introduced in a revised IPRED. The trend at work is explained by DeBeer and Clemmer:

> *"Previously, the worldwide standard approach to issues of Internet service provider liability was to require carriers and hosts to behave passively until becoming aware of copyright-infringing activities on their networks (...).* ***Very recent events in several jurisdictions demonstrate a new trend away from a passive-reactive approach toward an active-preventative approach instead.***
>
> *Government policies, voluntary practices, legislative enactments, and judicial rulings are all contributing to this shift in the rules applicable to online intermediaries. One reason for the shift is increased pressure from rightholders on legislators and policymakers to make intermediaries play a greater role in online copyright enforcement. Another less obvious reason is that intermediaries' and rights-holders' interests are aligning. While rightholders are concerned about copyright enforcement and intermediaries are concerned about network management, the result is a mutual interest in content filtering or traffic shaping."*[11]

The core of the debate is : **what balance should be struck between the fundamental rights of Internet users, such as freedom of expression and privacy, and exclusive rights such as copyright**, which are not necessarily held by persons?

Back to the basics of Internet law: e-Commerce and the economics of online free speech

In order to protect the fundamental rights and promote the development of innovative online services, the e-Commerce directive adopted in 2000 created liability exemptions for technical intermediaries (articles 12 to 14). This means that Internet Access Providers (IAPs) as well as on-line service providers (such as hosting services, search engines and other websites) are not responsible for the actions carried on by the users of their services, as long as they are not aware of them.

To ensure that intermediaries could not be forced to police the activities of their users, the e-Commerce directive also includes a **ban on imposing a general obligation to monitor the information that intermediaries transmit or store**, or a general obligation to actively seek the facts or circumstances indicating illegal activity (article 15). This dual regime (liability exemptions, ban on general monitoring obligation) was reaffirmed by the Council of Europe's declaration of 28 May 2003 on freedom of communication on the

11. DeBeer, Jeremy F., and Christopher D. Clemmer. "Global Trends in Online Copyright Enforcement: A Non Neutral Role for Network Intermediaries?" *Jurimetrics* 49, no. 4 (2009). Emphasis added.
Address: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1529722

Internet[12].

In spite of this innovative legal framework, the e-Commerce directive does not prohibit injunctions against intermediaries, in order to terminate or prevent a specific infringement[13]. Such a possibility was reasserted in the 2001 directive of the harmonisation of certain aspects of copyright and related rights in the information society (EUCD)[14] and in IPRED in 2004[15]. However, as Montero and Van Enis underline:

> *"The possibility granted to the national authorities of imposing a specific monitoring obligation on intermediaries cannot be regarded as an exception to the principle of a ban on general monitoring obligations. Such an analysis would amount to acknowledging that a general monitoring obligation may be imposed in some circumstances. That is not what is meant here[16]."*

Considering that this legal framework prohibits public authorities from imposing a general monitoring of Internet user's communication on intermediaries, the Commission has tried to induce *a priori* filtering and other enforcement measures through so-called self-regulation. As we point out, after the partial failure of this strategy, the Commission is now trying to force intermediaries to participate in the war against sharing by expanding a dangerous case-law that has resulted in filtering injunctions.

2.1 The Commission's Problem: A Difficult Attempt at Promoting So-Called "Cooperation" in the War on Sharing

Since 2009, EU policy-makers have favored "cooperation" and "non-legislative measures"

After the attempts at targeting file-sharers with civil and criminal sanctions, in the past five years the supporters of a crackdown on the unauthorized online sharing of copyrighted works between individuals have tried to compel technical intermediaries to police their networks and services. In its communication on "IPR enforcement" dated September 2009, the Commission had called for non-legislative measures to that effect, stressing that:

> *"rightholders 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***

12. See principle 6:
"Member states should not impose on service providers a general obligation to monitor content on the Internet to which they give access, that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity.
Member states should ensure that service providers are not held liable for content on the Internet when their function is limited, as defined by national law, to transmitting information or providing access to the Internet. (...)"
Address: https://wcd.coe.int/wcd/ViewDoc.jsp?id=37031
13. Article 18: *"Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved."*
14. Aritcle 8.3 of EUCD: *"Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right".*
15. Article 9.1.a of IPRED: "*Member States shall ensure that the judicial authorities may, at the request of the applicant, issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid".*
16. Montero, Etienne and Quentin Van Enis. "Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle?" *Computer Law & Security Review* 27, no. 1 (February 2011): 21-35. http://linkinghub.elsevier.com/retrieve/pii/S0267364910001792.

advantage of possible alternatives to court proceedings for settling disputes"[17].

Keen on promoting a similar approach, a majority of the European Parliament stated in the Gallo report that:

> *"[The European Parliament] agrees with the Commission that additional* ***non-legislative measures are useful to improve the application of IPR****, particularly measures arising from in-depth dialogue among stakeholders*[18]*"*

It should also be noted that at the international level, the Anti-Counterfeiting Trade Agreement (ACTA) includes a call for "cooperation"[19], a second-best option for those among the negotiators who had favored an even harder line against online file-sharing[20].

"Cooperation", or the privatized and extra-judicial enforcement of copyright

Since 2009, the EU Commission has been convening regular meetings at the Internal Market Directorate General in order to consider the specifics of so-called "voluntary agreements". This quasi-secret working group supervised by Margot Froehlinger[21] involved on-line service providers, IAPs and the copyright industries. Last September, website PCINpact leaked internal documents[22] showing that network-based filtering methods had been considered as a way to prevent people from sharing cultural goods on peer-to-peer networks. They also revealed that other items of discussion have included the unauthorized collection and processing of file-sharers' personal data as a way to identify and, eventually, punish them. **Such "cooperation" could have resulted in access restrictions or other sanctions being imposed on alleged infringers as "HADOPI-style", extra-judicial sanctions**.

Fortunately, in March 2011, after being questioned by two MEPs on these secret meetings who criticized the lack of respect for fundamental rights and the absence of transparency[23], and given the unwillingness of on-line service providers and IAPs to cooperate, the Commission decided to put an end to this endeavor[24]. In the application

17. See p. 10 of the communication.
18. Paragraph 24 of the report. http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0340
19. See article 27.3: *Each Party shall endeavour to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement while preserving legitimate competition and, consistent with that Party's law, preserving fundamental principles such as freedom of expression, fair process, and privacy*.
20. See page 28 of the version dated January 18th, 2010 of the draft ACTA : http://www.laquadrature.net/wiki/ACTA_20100118_version_consolidated_text#Page_28
"New Zealand can, however, support the inclusion of a provision aimed at preventing a party to ACTA conditioning safe harbours on an online service provider "monitoring its services or affirmatively seeking facts indicating that infringing activity is occurring".
21. Mrs. Froehlinger is director of the Knowledge-based economy directorate of the internal market DG.
22. Marc Rees, September, 2nd 2010, "Comment les ayants droit défendent le filtrage en Europe", *PC INpact*. Address: http://www.pcinpact.com/actu/news/59102-hadopi-bruxelles-filtrage-blocage-europe.htm
23. Stavros Lambrinidis, Françoise Castex. Priority Written Question to the European Commission regarding secret talks on anti-filesharing industry agreement (January 26th, 2011). Address: http://www.laquadrature.net/files/Question%20%C3%A9crite%20Castex%20Lambrinidis.JPG
24. Marc Rees, 10 mars 2011, "Bruxelles met fin aux tractations secrètes entre FAI et ayants droit", *PCINpact*. Address: http://www.pcinpact.com/actu/news/62393-ayantsdroit-commission-europeenne-tractations-secretes.htm

report, it underlines the shortcoming of the "cooperation" approach[25].

2.2 The Commission's New Plan: Revising IPRED to Put Pressure on Technical Intermediaries

Given the difficulties faced by the "cooperation strategy", the goal is now to put legal pressure on technical companies to turn them into a privatized copyright police. In its two recent documents on IPRED, the Commission itself makes clear who the targets are:

> *" Search engines often enable fraudsters to attract Internet users to their unlawful offers available for sale or download."*
>
> *"Many online sites are either hosting or facilitating the online distribution of protected works without the consent of the right holders. In this context, the limitations of the existing legal framework may need to be clearly assessed."*
>
> *"Internet platforms such as online market places or search engines can also play an important role in reducing the number of the infringements, in particular through preventive measures and 'notice and take-down' policies."*

In the name of the protection of a copyright regime profoundly at odd with digital technologies, the Commission is pushing for the deployment of what could become a true censorship infrastructure.

The Commission is building on dangerous case law to impose filtering

As explained above, the 2000 e-Commerce directive created a special legal framework distinct from the one regulating traditional media and interpersonal means of communications, and enabled strong innovation and growth in the online sector. It also protected freedom of expression by prohibiting any general obligation for on-line service providers to monitor their users' activities.

In the past years, however, legislative, administrative as well as judicial decisions have led to **diverging interpretations regarding the scope of the liability exemptions granted by the directive**. In our opinion, the main reason for these diverging interpretations does not lie in the ambiguity of the provisions in the original directive (though some may need to be adapted to take in account new technologies and uses). Rather, this trend results from a concerted offensive of interests that do not accept the philosophy of the e-Commerce directive.

In particular, there is already quite extensive although **much criticized case law regarding injunctions imposed on intermediaries, which have led to broad**

25. In the application report, the Commission goes on to say that:*"In several Member States associations have made use of such a collaborative approach and have put in place national codes of conducts (voluntary arrangements) to combat counterfeiting and piracy. In some cases, such voluntary agreements became the basis for legislation. However, in other Member States such arrangements would seem not to be possible, mainly due to the restrictions imposed by privacy laws and protection of personal data, which prevent intermediaries (e.g. on-line service providers) to forward warning notices to the alleged infringers or to share information about the alleged infringer's identity outside the scope of judicial proceedings."*

Internet filtering practices – akin to censorship – thereby harming the protection of fundamental rights in the EU. Generally, such injunctions impose a hosting platform – such as Google's YouTube or Dailymotion – to deploy a filtering architecture to screen all the content uploaded by their users, in order to block potential infringements.

Examples of case-law leading to the general monitoring of Internet users' activities

– In 2007, Dailymotion A French court ruled that video host provider Dailymotion was liable for the content uploaded by one of its users[26]. The court held that Dalymotion had deliberately enabled mass-scale piracy, and the Court took the view that exemption from a general duty to monitor their network "*did not apply when the unlawful activities were generated or induced by the service provider itself*". Shortly thereafter, Dailymotion implemented a filtering system screening users' uploaded content to detect copyrighted material.

– In 2007 the French film company Zadig Productions sued Google Video regarding the repeated posting of some of its copyrighted material[27]. The court said it was liable for not having prevented the repetition of the infringement, and held that even "*if the [multiple postings] are attributable to different users, their content (...) is identical*"[28]. Google was required, through a careful wording, to use "*targeted and temporary surveillance*" to "*avoid damage or abate damage caused by [specific content]*". A similar ruling was rendered in 2008 regarding the repeated posting of a documentary on George W. Bush[29]. In this case, judges held that "*if the hosting provider is not bound to a general monitoring obligation, it is bound to a somewhat specific one*". Four other similar decisions were rendered on January 14th, 2011 by the Paris Court Appeal.[30]

– In 2010, YouTube was compelled by a judge to put in place a filtering mechanism to block the upload of the French National Archive Institute's catalogue by YouTube's users, after it was established that similar works had been posted multiple times in spite of previous takedown requests.[31]

– A Hamburg court found in September 2010 that video host provider YouTube was liable for the copyright infringing content uploaded by its users, especially because the platform can be used anonymously.[32] The court said that YouTube had to pay damages for not having prevented and blocked the upload by its users.

– In the United States, whose law also includes liability exemptions for technical

26. Tribunal de Grande Instance, Nord-Ouest Prod. v. S.A. Dailymotion, July 13th, 2007.
Address: http://www.juriscom.net/documents/tgiparis20070713.pdf
27. Tribunal de grande instance, Zadig Prod. v. Google, October 19th, 2007.
Address: http://www.juriscom.net/documents/tgiparis20071019.pdf.
28. DeBeer Jeremy F. and Clemmer Christopher D., *op. cit.*, p. 400.
29. Tribunal de commerce de Paris, Flach Film et autres / Google, February 20th, 2008.
Address: http://legalis.net/spip.php?page=jurisprudence-decision&id_article=2223
30. Cour d'appel de Paris, Google Inc et France c/ Bac Films et autres, January 14th, 2011.
Address: http://legalis.net/spip.php?page=jurisprudence-decision&id_article=3052
31. Tribunal de Grande Instance de Créteil, INA / Youtube, December 14th, 2010.
Address: http://legalis.net/spip.php?page=jurisprudence-decision&id_article=3052
32. Associated Press, September 3rd, 2010, « German court rules against YouTube over copyright », Address : http://news.yahoo.com/s/ap/20100903/ap_on_hi_te/eu_germany_youtube

intermediaries[33], after many legal battles for alleged infringements, Google decided to give in to the copyright lobbies by censoring queries related to BitTorrent (a file-sharing technology) in its Google Instant and Google Suggest services. Here, "cooperation" comes back by the back-door.[34]

– In 2011, in a similar ruling, Google was condemned for having indexed on its search engines a copyrighted picture of a famous singer which the company had already been required to take down in 2007. After a first injunction to takedown the picture to which Google complied, another Internet user uploaded the picture on a third-party website. Google's search engine automatically indexed the said picture. In spite of the automatic nature of the indexing, judges condemned Google saying that it should have implemented "*all the necessary means to avoid any other reproduction (…).*"[35]

– But the most compelling example of IPRED could lead to is to be found in a case currently pending before the European Court of Justice. In first instance, the Belgian judge ordered that the IAP "*make the infringements of copyright cease by making it impossible, in any form, via peer-to-peer software, for its clients to send or receive electronic files containing musical works from the [collecting society] SABAM repertory".* After this first instance ruling, the Brussels Court of Appeal cautiously asked the European Court of Justice to clarify whether *a priori* filtering practices are legal under EU law[36]. The preliminary ruling should be rendered in the coming weeks.

IPRED's revision could facilitate filtering injunctions by building on unsettled case-law?

Bypassing the liability exemptions: When judges rigorously apply the principles of the e-Commerce directive and seek to protect free speech, they find intermediaries to be non-liable and therefore refuse to impose injunctions leading to filtering measure. On the contrary, in the above-mentioned case law, judges sought to tweak the principles of the e-Commerce directive so as to declare the intermediary liable and impose an injunction. With the upcoming revision of IPRED, the Commission's Internal Market directorate general seems to be keen on fostering such liberty-killer case law by weakening the liability exemptions currently enjoyed by Internet intermediaries, by de-linking liability and injunctions:

> *"It could be useful to clarify that injunctions should not depend on the liability of the intermediary (…). Intermediaries with no direct contractual relationship or connection with the infringer are subject to these measures provided for in the Directive."*

33. See section 230 of the Digital Millennium Copyright Act.
Address: http://en.wikibooks.org/wiki/US_Internet_Law/Section_230
34. http://torrentfreak.com/google-starts-censoring-bittorrent-rapidshare-and-more-110126/
35. Cour d'appel de Paris, André Rau c/ Google & AuFeminin.com, February 4th, 2011.
http://www.laquadrature.net/wiki/Jurisprudence_sur_la_communication_en_ligne#Cour_d.27appel_de_Paris.2C_4_f.C3.A9vrier_2011.2C_Andr.C3.A9_Rau_c.2F_Google_.26_AuFeminin.com
36. See question from the Brussels Court of Appeal, dated February 5th, 2010, Ref C-70/10. International Law Office, October 4th, 2010, « Courts look to ECJ as fight against illegal downloading continues », *internationallawoffice.com*.
Address : http://www.internationallawoffice.com/newsletters/detail.aspx?g=c4173f67-7f9a-4063-8f62-a884b1149157#3

Bypassing the general obligation to monitor by increasing the scope of injunctions: Injunctions resulting in filtering systems have so far been imposed to block specific copyrighted works, be it a song, a picture or a film, after they have their uploading has been declared illegal by a judge. But are these so-called specific monitoring obligation really different from general monitoring? The difference is unclear given that **even to detect a specific infringement, all of the users' doings will have to be screened by the intermediaries**. Therefore, if the spirit and letter of the e-Commerce directive are to be respected, the possibility to impose specific monitoring provided in EU law must be read narrowly, and the injunctions pronounced by circumscribed to very targeted monitoring practices[37].

Unfortunately, rather than protecting fundamental rights of Internet users, the Commission seems to want to increase the scope of injunctions, thereby rendering completely ineffective the ban on imposition of general monitoring obligation provided by article 15 of e-Commerce. If the Commission has its way, injunctions against intermediary would quickly scale up to encompass all of the catalogues of rightholders. Such a call for catalogue-wide filtering is made clear by the Commission's statement in its application report:

> *"Injunctions often tend to be 'title specific'. Rightsholders therefore have to provide a full list of titles when asking for an injunction and the injunction will normally relate only to the indicated titles, while infringements with a view to titles not contained in the list can continue."*

Thus, **the Commission is proposing to generalize the wide censorship scheme ordered by the first instance judge in the SABAM case** by eroding the liability exemptions enjoyed by technical intermediary.

2.3 More Pressure: Increasing Damages and Undermining Privacy

The legal pressure exerted on technical intermediaries is accentuated by two other proposal put forward by the Commission.

Copyright should not take precedence over the right to privacy

In both the communication and the application report, the Commission makes numerous references to the alleged need to undermine privacy in order to guarantee rights-holders' right of information provided by IPRED.[38] In particular, the Commission seems critical of the European Court of Justice' Promusicae ruling, rendered in 2008, in which the Court held that **EU law does not require on-line service providers to disclose**

37. According to Montero and Van Enis, "*It only seems possible to envisage a form of injunction that involves specific acts of removal, blocking or filtering relating to an infringement, or risk of infringement, which is identified, clearly circumscribed and duly established. Such will be the case, for example, in situations where a site contains counterfeited works, particularly if it is hosted anonymously :where the owner of the disputed site cannot be identified, the intermediary may be instructed to remove the counterfeit content. A host provider could also be ordered to cease storing an illegal site or access providers to implement all appropriate measures to prevent access to the disputed site from national territory*". 2011, *op. cit.* p. 33.

38. For instance: *"(...) It appears that some rightholders find it difficult to establish that the infringer has acted on a commercial scale without having obtained information from the on-line service providers In some Member States (e.g. Spain, Austria) it seems that the disclosure of the relevant information is practically impossible in both criminal and civil proceedings."* Commission application report on IPRED (December 2010).

subscriber information and underlined the need to respect the principle of proportionality[39]. Quite worryingly, as it was not enough to call for censorship of Internet communications, the Commission seems to think that copyright should take precedence over privacy rights.

> **Recommendation 3** : Consistent with the European Court of Justice "Promusicae" ruling, EU law should not force on-line service providers to give away the data of their subscribers or users, especially in cases of alleged not-for-profit infringements (such as file-sharing), for which such disclosures are disproportionate.

Increased damages could deter the development of innovative services

In its communication on IPRED, the Commission states that:

> *"It could be considered whether the courts should have the power to grant damages commensurate with the infringer's unjust enrichment, even if they exceed the actual damage incurred by the rightholder. Equally, there could be a case for making greater use of the possibility to award damages for other economic consequences and moral damages."*

This appears in total contradiction with the Commission's own recognition that "*the main aim of awarding damages is to place the rightholders in the same situation as they would have been in, in the absence of the infringemen*t". As in ACTA, the revision of IPRED could include new provisions regarding damages, which would have a disastrous effect on innovation and creativity.

Beefing up damages would allow rightholders to sue all the re-users of copyrighted works or patented inventions, or go after technical intermediaries whose services are deemed to "facilitate" infringements. Bigger damages means higher litigation costs, and therefore have a chilling effect on innovation and free culture.

> **Recommendation 4** : Damages should only by awarded in cases of for-profit infringements and be based on empirical data regarding the material prejudice suffered by the rights-holder.

39. Daniel Ray, *European Court of Justice holds that EU law does not require on-line service providers to disclose subscriber information*, website of the *Harvard Journal of Law & Technology*. January 31th, 2008. Address: http://jolt.law.harvard.edu/digest/copyright/promusicae-v-telefonica

3. ALTERNATIVES TO REPRESSION: FUNDAMENTAL RIGHTS AS THE BASIS OF THE DIGITAL CREATIVE ECONOMY

3.1 Fundamental Rights on the Internet Must be Protected, Not Weakened

Recognizing the importance of technical intermediaries for online free speech

The protective regime provided by the e-Commerce directive is based on the EU legislator's recognition that technical intermediaries plays a crucial role in enabling freedom of expression in the online environment. They are the ones who **give citizens the tools to communicate over the Internet, thereby fostering prominent democratic goals**.

On several occasions, **the European Court of Human Rights (ECHR) itself stressed the importance of technical mediums of expression**, granting them the benefit of article 10 of the European Convention on Human Rights, which protects free speech[40]. For instance, in a case regarding measures adopted by Swiss authorities obstructing parabolic antenna reception of broadcasts transmitted by satellite, the Court ruled that **article 10 protects both the content of the information as well as the means of transmitting and receiving it**, "*since any restrictions imposed of the means necessarily interferes with the right to receive and impart information*"[41].

Though these rulings relates to traditional technical intermediaries, the reasoning of the Court fully applies to the technical intermediaries digital environment, especially considering the Council of Europe's repeated declarations on freedom of communication on the Internet[42]. The CoE Committee of Ministers has made clear that:

> *"Freedom of expression, information and communication should be respected in a digital as well as in a non-digital environment, and should not be subject to restrictions other than those provided for in Article 10 of the ECHR, simply because communication is carried in digital form".*[43]

40. Article 10 : Freedom of expression.
1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Address: http://en.wikisource.org/wiki/European_Convention_for_the_Protection_of_Human_Rights_and_Fundamental_Freedoms#Article_10_.E2.80.93_Freedom_of_expression.C2.B9

41. ECtHR, 22 may 1990, Autronic vs. Switzerland, paragraph 47. http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Autronic&sessionid=68442286&skin=hudoc-en

42. See Montero and Van Enis, 2011, op. cit, p. 24.

43. Declaration of 13 May 2005 of the Committee of Ministers on human rights and the rule of law in the Information Society.
Address: https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM%282005%2956&Language=lanEnglish&Ver=final&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864

As a consequence, the EU must make sure that the framework for protecting freedom of communication on the Internet is not undermined by the protection of copyright.

Internet filtering cannot meet the proportionality criteria

If the EU is to respect the European Convention on Human Rights as it is required under the Lisbon Treaty, then any restriction infringing on the right to freedom of expression – even if it relies on a measure bearing on technical intermediaries – must i) be prescribed by law, ii) aim at one of the legitimate objective restrictively listed in article 10 paragraph 2, and iii) meet the proportionality requirement.

Given the Commission's focus on fighting file-sharing and other non-commercial exchanges of copyrighted works, and considering the inherent flaws of filtering measures, **the proportionality criteria would be violated by any attempt at circumventing the prohibition on general obligations to monitor online services**[44].

The most important reason for this is the fact that the restrictions on free speech induced by filtering are disproportionate since they **outweigh the legitimate interests attached to the protection of copyright** (the same can be true of restrictions on privacy, as the Promusicae ruling suggests). Whether they are network or content-based, filtering schemes suffer from their inability to correctly assess the legal situations they are supposed to apprehend.

The inaccuracy of filtering is all the more important in copyright law: the transmission of a copyrighted works over networks does not in and of itself amount to an infringement. In many cases, such transmission will be totally lawful under the various exceptions and limitations to copyright provided by law (for purposes of quotation, information or private copying, for instance). Prevention of publication through automatic systems is **bound to impede legitimate acts such as parody, presentation for the sake of information and criticism or the right of quotation**. Such filtering systems, such as those of YouTube[45] or Vimeo are unable to correctly assess whether a given use of copyrighted10 material constitutes an infringement. For more legal certainty, the filter will tend to consider bits of copyrighted works as unlawful, and remove them to avoid any risk of litigation. If filtering systems are given any legal status or even a simple encouragement by public authorities, online free speech would be durably harmed.

Recommendation 5: EU law should affirm the principle that there should be a presumption of legality on all uploaded content.

In particular, in order to strengthen the principle enshrined in article 15 (prohibition on general monitoring obligation), the e-Commerce directive should ban all types of mandatory preventive mechanisms aimed at preventing the publication of certain types of online content, whether these are imposed by administrative or judicial authorities. Article

44. For a comprehensive analysis of why filtering fails to meet the proportionality criteria, see: Callanan, Cormac, Marco Gercke, Estelle De Marco, and Hein Dries-Ziekenheiner. *Internet Blocking: Balancing Cybercrime Responses in Democratic Societies*, 2009. http://www.aconite.com/blocking/study
45. See a brief presentation of YouTube's filtering system: http://www.youtube.com/t/contentid

12's “mere conduit” principle needs to be strongly reaffirmed.

The role of judicial authorities to protect online free speech should be reasserted throughout EU Internet law.

3.2 Rethinking Copyright For the Benefits of Creation and Democracy

Moving away from repression, the EU must establish new policy to promote the creation and circulation of culture and knowledge in the digital environment. The pragmatic realization of the urgent need to reform copyright has led prominent policy-makers to recognize that copyright law in particular needs to be reformed. EU Commissioner for the Digital Agenda, Neelie Kroes, said in the Fall of 2010 that:

> *“All revolutions reveal, in a new and less favourable light, the privileges of the gatekeepers of the "Ancien Régime". It is no different in the case of the Internet revolution, which is unveiling the unsustainable position of certain content gatekeepers and intermediaries. No historically entrenched position guarantees the survival of any cultural intermediary. Like it or not, content gatekeepers risk being sidelined if they do not adapt to the needs of both creators and consumers of cultural goods”.*[46]

Even more recently, the director of the World Intellectual Property Organization, Francis Gurry, gave a keynote speech on the future of copyright:

> *“I believe that we need more simplicity in copyright. Copyright is complicated and complex, reflecting the successive waves of technological development in the media of creative expression from printing through to digital technology, and the business responses to those different media. We risk losing our audience and public support if we cannot make understanding of the system more accessible.”*[47]

While we welcome the current efforts of the Commission to facilitate the development of innovative commercial offers of creative content online, with the upcoming reform of the collective management of copyright, the promotion of paneuropean licenses or the adoption of a legislative instrument on orphan works, **these initiatives will only go halfway in really giving the public the rights it should enjoy in the digital environment**. 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**.

46. Neelie Kroes European Commission Vice-President for the Digital Agenda A digital world of opportunities Forum d'Avignon - Les rencontres internationales de la culture, de l’économie et des médias Avignon, 5th November 2010 Address: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/619&format=HTML&aged=0&language=EN&guiLanguage=en

47. Gurry, Francis. “The Future of Copyright, by Director General, World Intellectual Property Organization”. Sidney, Australia, February 2011. Sidney, Australia.
Address: http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html

Designing a cultural policy adapted to digital technologies

Information and Communications Technologies (ICTs) bring about **new affordances**[48], 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 proprietary regimes relying on scarcity and restraining access to informational resources.

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

Since 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[49], 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[50]. 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,* by Philippe Aigrain[51], 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

48. An affordance is a quality of an object, or an environment, that allows an individual to perform an action (source: Wikipedia).

49. 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.

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

51. Philippe Aigrain, *Internet & Création*, Éditions 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).

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 on-line 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 of the contribution per subscriber, which serves as a basis for further discussions for all media and is estimated according to the French creative economy, is comprised **between 5€ and 7€ monthly**. 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 rightholders. 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 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 than the existing ones. 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 rightholders 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.

Internet *& 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.

Recommendation 6: The EU must start reflecting on funding schemes that can go hand in hand with the full recognition of non-market uses of cultural works on the Internet and engage in a debate with rights-holders discuss its implementation.

Embracing user-created content in the new creative ecosystem

In its 2009 document on online creative content, the Commission stated that "*serious consideration should be given to measures facilitating non-commercial re-use of copyrighted content for artistic purpose*"[52]. Such re-uses, or remixes, of existing content by

52. European Commission , *Creative Content in a European Digital Single Market: Challenges for the Future*

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**[53].

It is necessary to engage in a serious reflection 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[54]. 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.

Recommendation 7: Moving forward in the reflection over so-called "user generated content", 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 retribution for rightholders whose content is re-used for non-commercial purposes. The creative contribution could provide an appropriate framework for such a compensation.

Paving the way for the development of new business models

It is often argued by the defenders of today's outdated 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 revolution", copyright industries 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**[55] or on the **"Long Trail"**[56]. As the windfall profits

(October 2009). Footnote 46, page 15 of the document.
Address: http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf

53. Such a study of positive effects of the remix culture is found in Lawrence Lessig's books on free culture.
54. See article 6 bis of the Berne convention of the moral rights of authors.
55. 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).
56. 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.

of the infamous Pirate Bay website suggest[57], 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**.

Recent efforts on the part of civil society organizations, such as the Free Culture Forum, to reflect on business models suited for the online creative ecosystem show that **plenty of business-models exist to fund artistic creation while authorizing the free dissemination of works**[58].

The Commission is currently undertaking important efforts to facilitate the development of commercial offerings. 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, rightholders 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[59] (Deezer or Spotify, for instance) and exceedingly constrain the experimentation of successful business-models.

Recommendation 8: As a consequence, the Commission should move ahead with the possible actions outlined in the document, by:

- reforming collective management for online commercial distribution and continue its work on maximizing 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” would provide commercial users 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.

- finalizing the creation of freely accessible and comprehensive online databases containing information on rights and owners for all creative works (“ARROW” project).

57. Some estimates put The Pirate Bay's annual earnings at $9 million. See *TPB Raking in Millions*, Rixtstep, available at http://rixstep.com/1/20060708,00.shtml
58. See, for instance, the Free Culture Forum's *How-To For Sustainable Creativity*. Address: http://fcforum.net/sustainable-models-for-creativity/how-to-manual
59. New York Times, “Music Industry lures 'Casual' Pirates to Legal Sites”, July 19, 2009. http://www.nytimes.com/2009/07/20/technology/Internet/20stream.html

Conclusion: Preparing For the Future of the Networked Society

Calls for more repression against infringements committed via the Internet are not based on any **factual evidence**. Instead, they systematically relay the demands of the entertainment industries. It is time for the EU to rethink its approach tocopyright, patent and trademarks law.

If it sticks to the status quo, the next version of **IPRED could result in the deployment of disproportionate filtering technologies** aimed at preventing not-for-profit uses of cultural works. In the name of a copyright regime fundamentally at odds with digital technologies, Internet users would then see their fundamental rights – such as freedom of expression, privacy and the right to a fair trial – drastically undermined by the deployment of a private censorship architecture. This would run counter to the democratic and economic potential of the Internet.

The way forward lies in a **better protection of the fundamental rights of Internet users**, which can notably be achieved by strengthening of the principles embedded in the e-Commerce directive. It is also time for copyright, patent and trademark law to adapt to digital technologies. Such reform would be achieved by **allowing the non-commercial sharing of culture and knowledge on the Internet and by designing appropriate financing mechanisms**. If Europe is to harvest the benefits of the knowledge society, it must break away from the endless cycle of repression and adopt a open-minded perspective on what the future of the networked society should be.

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.

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