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Amending the Gallo report: Towards a balanced approach to IPR enforcement

In the coming days, the JURI committee of the European Parliament will vote on a **report on the enforcement of intellectual property rights (IPR) in the internal market**.

This report is bound to reflect the views of the Parliament on the recent debates and regulatory developments regarding copyright enforcement in the digital age, both in Member States and at the international level. As such, **it will pave the way for the future European IPR enforcement policies**.

As we draw closer to the date of the vote, the Members of the European Parliament (MEPs) are trying to reach a compromise regarding the substance of the report. **Constructive amendments have been tabled by MEPS from across the political spectrum**[1] to correct the dogmatic approach promoted by Marielle Gallo (EPP, France), rapporteur of the report, in her original draft[2].

These amendments should not be diluted during the negotiations leading up to the committee vote. After fifteen years of extension and toughening of IPR enforcement at the expense of creativity, innovation as well as rights and freedoms, **policy-makers must now resist the pressure coming from certain industry groups** by:

1 http://www.laquadrature.net/wiki/Rapport_Gallo_Amendments
2 The Draft report is available at:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-438.164+01+DOC+PDF+V0//EN&language=EN

1. Basing EU policies on sound evidence and empirical data.

Mid-March, a "study" by TERA consultants was sent to MEPs in order to "demonstrate" that file-sharing will 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.

In open and democratic political fora, such biased studies are increasingly criticized as well. Just when a few countries, including the European Union, the United States, Japan and Canada, were negotiating the Internet chapter[5] of ACTA, from November 4th to November 6th, 2009 [6], **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[7]. For instance, in a study commissioned by the committee and discussed during the meeting, economist Carsten Fink[8] criticized 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 demand any legitimate software at all. Accordingly,* ***estimated revenue losses by software producers are bound to be overestimated****"*[9].

Likewise, even in rich countries, the notion that songs downloaded off a peer-to-peer network mechanically equate to a net loss for the music industry is ludicrous[10]. On 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[11]. According to the GAO, ***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".***

But the influence of **industry-backed biased studies such as that of TERA consultants** on EU policies is real. And they are now providing justification for Marielle Gallo's tough stance against online file-sharing.

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**[12]. But these have been ignored by the Commission in its communication, just as they are ignored by Mrs. Gallo and many policy-making arenas that choose to pursue repressive policies against this new and positive form of cultural production and circulation.

Given this general bias regarding the damages supposedly caused by file-sharing, one can

3 http://www.euractiv.com/en/innovation/study-internet-piracy-taking-big-toll-jobs-news-354286
4 http://www.laquadrature.net/files/Piracy and Jobs in Europe - An SSRC Note on Methods.pdf
5 The content of which is available at http://www.laquadrature.net/wiki/ACTA_Draft_Internet_Chapter
6 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
7 http://keionline.org/node/681
8 Background on Mr. Carsten Kinks is available at: http://www.wipo.int/academy/en/meetings/iped_sym_05/cv/fink.html
9 Study available at: http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_6.doc
10 See, for instance, this study commissioned by the Dutch government: http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorised_translation.pdf
11 http://arstechnica.com/tech-policy/news/2010/04/us-government-finally-admits-most-piracy-estimates-are-bogus.ars
12 See an index of these studies: http://www.laquadrature.net/wiki/Documents

fear that the Observatory on Counterfeiting and Piracy will put IPR industries representatives in position to further influence statistics and other empirical information regarding file-sharing. Instead, **the JURI committee must ensure that EU public policies are based on credible evidence, transparent assumptions as well as objective and independent peer reviewed analysis**.

2. Recognizing the dangers of a one-size-fits-all approach to IPR enforcement.

The draft report presented by Mrs. Gallo in late-January was filled with references to **"counterfeiting and piracy"**. Both terms cover a wide variety of phenomena, and evidenced-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**.

While **counterfeiting** applies to the manufacturing and subsequent distribution of physical goods that fake original items protected by trademarks, copyrights or patents, **piracy** – a non-legal term – refers to different and more subtle forms of infringements (for instance creating a new and original medicine that include molecules already patented). It should also be noted that the word "piracy" is often used among policy-makers to refer to the non-commercial exchange of copyrighted works on the Internet.

Given this diversity, it is wrong to prescribe similar enforcement policies for these different phenomena, like the draft Gallo report does. Counterfeited goods, such as fake medicines, deceive consumers by giving the impression of quality and reliable products when they are usually not. They put people's security and health at risk. There is no doubt that, generally speaking, **counterfeiting is bad for society as a whole, not just rights holders**. This is an area where tough enforcement and criminal sanctions of the kind suggested in the draft report can be legitimate.

However, when it comes to online infringements, such as file-sharing between individuals, 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. 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 suggested above, the economic impact for the cultural industries is far from being necessarily negative.

In the past, the European Parliament has understood this important distinction between file-sharing and the commercial malpractices of profit making infringers[13]. The final Gallo report should reflect the same understanding: **enforcement policies must address different phenomena, and each should be dealt with justified and proportionate means and solutions.**

13 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

3. Properly assessing the current EU framework regarding IPR enforcement before pushing for further legislative action, especially in the field of criminal law.

The draft report bemoans that lacunae still exist regarding the harmonization of criminal sanctions to tackle IPR. After the Directive on the civil enforcement of intellectual property rights[14] was passed in 2004, another proposal (IPRED 2) was introduced in 2005 with the aim of harmonizing criminal sanctions among Member States. **IPRED 2 was eventually dropped** after much criticisms from Members of the European Parliament, civil society groups and even Member States who pointed out the EU's lack of legal competence in the field of criminal law[15].

The substance of the draft directive was denounced on the ground that:

- The scope was extremely broad compared to the enforcement standards found in the WTO TRIPS agreement, and even the very vaguely defined fact of "*aiding, abetting or inciting*" would have been liable of criminal sanctions[16].

- **Criminal sanctions are a costly and most often irrelevant way to deal with IPR infringements**. Many law practitioners and scholars argue that criminal law is badly suited for IP law, since the illegality of a given situation is often open for interpretation, such as in the case of patent litigation[17]. In view of such uncertainty, criminal law places too much risk on both producers and users of informational goods, thus **chilling innovation and undermining fundamental rights** such as freedom of expression.

Calling for the reintroduction of this directive, as the draft Gallo report does[18], amounts to dismissing these criticisms. It is all the more dangerous given that **the EU approach to IPR enforcement – as resulting of the 2004 IPRED directive – is already strongly criticized**. In particular, the notion that non-commercial infringements such as online exchange of copyrighted works should be repressed in the same manner as 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 people's privacy and, again, the proportionality of such measures** in the case of non-commercial infringements[19].

Considering these debates around the IPRED directive, it is very unfortunate that the European Commission has 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**. In any case, it would be totally unacceptable to launch an initiative regarding the harmonization of criminal IPR enforcement at the EU level before conducting an in-depth analysis of IPRED. Should such an initiative be eventually carried on, **criminal penalties would have to be limited to intentional commercial infringements**, that is to say carried on with motivation of direct financial gains.

14 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R%2801%29:EN:HTML

15 These issues of legal comptence have been resolved with the entry into force of the Lisbon treaty.

16 In 2010, EU Member States have proposed to introduce a similar provision in ACTA. See: http://keionline.org/node/806

17 See, for instance, the comments by the Law Society of England and Waleson IPRED 2: http://www.lawsociety.org.uk/secure/file/157008/e:/teamsite-deployed/documents//templatedata/Internet%20Documents/Non-government%20proposals/Documents/ipcriminalsanctions310806.pdf

18 "*Does not share the Commission view that the principal body of laws with respect to IPR enforcement is already in place; points out in this respect that negotiations on the directive on criminal sanctions have not been successfully concluded and calls on the Commission to put forward a new proposal on criminal sanctions under the Treaty of Lisbon*" (Paragraph 6).

19 See, for instance, the case of Sweden: http://www.thelocal.se/19556/20090520/

4. Opposing non-legislative measures to repress online file-sharing of copyrighted works.

In its original communication, the Commission's Internal Market Directorate-General wrote that:

> *"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****"*[20].

Keen on promoting a similar approach, the draft Gallo reports states 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*[21]*"*

This vague language 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 Internet Service Providers (ISPs) - liable for the activities enabled by their services. Such liability would amount to **dismantling the fundamental principle of mere conduit**[22] **guaranteed by the eCommerce directive**, which ensures that an ISP's role is limited to the transport of data. Under this legal shield, they cannot be held responsible for, say, copyright infringements carried on by their customers on the Internet. By excluding the policing of the network by ISPs, mere conduit is an essential feature of the Internet as we know it, and a pillar of the principle of network neutrality, which rules out any discrimination against the source, destination or actual content of the data transmitted over the network.

In spite of this crucial principle, **ISPs are increasingly pressured to take a more active role in preventing copyright infringements, as rights holders want to see them bearing 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's 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 at the Commission between industry representatives** in order to consider the specifics of so-called "voluntary agreements"[23]. ISPs were compelled to join in under the threat of legislation[24]. In April 2010, the second-last of these "stakeholders dialogues" took place. **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. The different blocking techniques – such as DNS blocking - were also debated[25].

Evidently, the "non-legislative measures" defended by rapporteur Gallo echo these meetings and rights holders' calls to deter file-sharing through ad hoc provisions in Internet subscribers' contracts. These could consist in:

- the implementation of **blocking and filtering practices by ISPs**, in order to disable

20 See p. 10 of the communication.

21 Paragraph 16 of the draft report.

22 Electronic Commerce (EC Directive) Regulations 2002, Regulation 17

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

24 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 future*" (p. 10).

25 In July, the last meeting will focus on "technical measures".

the exchange of copyrighted works through the network.

- the implementation of **targeted Internet access restrictions 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.

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[26], 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**[27]. 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[28], **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***". 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. Yet, its important loopholes have prompted La Quadrature to point out that:

> *"The text only relates to measures taken by Member States and thereby fails to bar telecoms operators and entertainment industries from knocking down the founding principle of Net neutrality"*[29].

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 a major loophole of the provision that now replaces "amendment 138".

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

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26 *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

27 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

28 *"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).*

29 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

5. Initiating a debate on the future of the Internet-based creative economy and alternatives to repression.

Communication technologies bring about **new affordances**[30] **for consumers**, among which that of freely sharing cultural works in a non-commercial purpose. The change of paradigm brought about by these new technologies should result in **the development of new business-models for cultural goods, ones based on managing a new abundance as opposed to organising scarcity**.

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

What is for certain is that today's copyright regime is by far too rigid, and fails to achieve this goal. Accordingly, **copyright reform should be a priority for European lawmakers**. In particular, new exceptions to copyright must be created in order to serve general interest while preserving civil liberties. It requires Member States adopt an open approach regarding instruments of limitations and exceptions.

For instance, the EU could stress the potential of extended collective licenses or other collective licensing mechanisms (similar to existing schemes for radio broadcasting or private copy) for non-commercial peer-to-peer exchange between individuals of digital works on the Internet. Indeed, it represents a strategy for ensuring effective remuneration and funding of creation in a way that is compatible with the rights and freedoms of all. In *Sharing and the Creative Economy, Culture in the Internet Age*, Philippe Aigrain[31] proposes a system called the "creative contribution". It would **give 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 protected by media chronology regulations and 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 Access Providers).

More generally, **the EU should promote a reasonable interpretation of the international instrument for limitations and exceptions, the so-called the three-step test** (in line with the declaration of European copyright scholars, A Balanced Interpretation of the Three-Step Test in Copyright Law[32]) as a basis for future reforms of the European copyright framework. Europeans should also defend this sensible approach in the relevant international arenas, especially the WIPO and the WTO. Finally, the EU must oppose the inclusion in the trade agreements under negotiation - such as ACTA - of any provision that could directly or indirectly further limit the existing or possible exceptions, or otherwise restrict directly or indirectly the legitimate rights of users of information, knowledge and culture.

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

31 Philippe Aigrain, *Sharing and the Creative Economy, Culture in the Internet Age*, 2010.
http://paigrain.debatpublic.net/?page_id=171
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32 See the declaration on the three-step test: http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf

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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