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La Quadrature du Net's response to the European Commission's consultation on copyright reform

Version française
The English version is the definitive one

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La Quadrature du Net is a non-commercial association ***that defends the rights and freedoms of citizens on the Internet****. More specifically, it advocates for the adaptation of French and European legislation to the values underlying the founding principles of the Internet, most notably the freedom of expression and the sharing of knowledge.*

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TYPE OF RESPONDENT (Please underline the appropriate):

✓ **End user/consumer** (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student) **OR Representative of end users/consumers**

☐ for the purposes of this questionnaire normally referred to in questions as **"end users/consumers"**

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Introduction

The rejection of the ACTA treaty in July 2012 by the European Parliament should have prompted the European Commission to revise Directive 2001/29/CE on copyright in order to take into account the demands expressed by European citizens who had mobilised in large numbers against the threat to their fundamental rights posed by ACTA. This consultation therefore is rather late in coming.

The Commission instead launched the “Licences for Europe” process which contains the assumption that simple contractual solutions suffice to adapt the regulatory copyright framework to the challenges of the digital environment. Having been member of the working group “User Generated Content”, La Quadrature du Net was able to observe that this contractual approach was completely unfit to address the aspirations of citizens who hoped that their fundamental cultural rights would finally be recognised. Despite what the consultation claims, “Licences for Europe” was a complete failure. Unfortunately the lessons have not been learned yet.

La Quadrature du Net deplores the fact that the European Commission has, despite the rejection of ACTA, committed itself to the negotiations of new commercial treaties that include sections on “intellectual property” and that appear to attempt the introduction of measures similar to those in ACTA. A copy of the CETA treaty[i] between Canada and the European Union, leaked a few days only after the rejection of ACTA, proved that CETA contained ACTA's most dangerous sections relating to criminal sanctions and repressive measures on copyright. The current TTIP/TAFTA negotiations between the United States of America and the European Union raise the same concerns[ii]. Although the treaty's content is being kept secret, the Commission's negotiating mandate includes questions on intellectual property and could therefore herald the return of a Super-ACTA[iii]. Not only do these commercial negotiations disrespect the democratic decision-making process generally, they also throw significant discredit on this very consultation specifically as decisions on the matters addressed here might already have been taken behind closed doors during the CETA and TAFTA negotiations.

Of course civil society groups did not wait around for the European Commission to develop good ideas on copyright reform in Europe. They tabled proposals that seek to balance the recognition of the cultural right of individuals with the respect due to authors, and that suggest new ways to support cultural creation financially.

La Quadrature contributed to this process with its July 2012 publication “Elements for the reform of copyright and related cultural policies”[iv].

La Quadrature du Net's Programme for the Positive Reform of Copyright

The digital era holds immense cultural potential for everyone and a new world in which creative and expressive activities lie at the heart of our society. Despite a frequently hostile environment, this promise is being realised daily. In numerous areas, digital culture is the experimental laboratory in which innovation thrives. New dynamic social processes are invented that encourage the sharing of creative products, foster the growth of digital and real-life communities and support their creative works. The objective of an effective reform of copyright is to create a supportive environment for these developments, or at the very least, not to hamper them.

Several schemes have tried to create artificial scarcity of copies in the digital environment and to control and limit their use. This obsession fails to deal with the real challenges posed by digital culture. The most important arising from a positive development: an increasing number of persons are involved in innovation and creation. From the amateur to the professional, their products are getting better and more interesting. New skills are developed and individuals make time for these activities and for the social interactions that allow them to develop professionally and socially. However, our current social and regulatory system limits or even blocks the access to these opportunities of a large number of individuals.

La Quadrature du Net believes that the objective of copyright reform must be to support the creativity of European citizens and not only to defend the interests of established cultural industries. In order to be effective, the reform has to involve social, economic and political measures that go beyond the immediate goal of copyright reform. The legal framework is however essential to end the constant legal challenges to innovation in the digital sphere.

In order to support such a reform, La Quadrature du Net developed a 14-point programme, organised into four sections, that considers the non-commercial practices of individuals, non-commercial collective uses, the cultural economy and the technical, legal and financial infrastructures.

non-market activities of individuals

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11 effective enforcement of network neutrality right of usage against drm

12 compulsory registration and/or copyright 2.0

13 public funding and tax reform

14 a positive statute for the commons

public domain, mediation memory, education, research

legal, technical and fiscal common infrastructures

La Quadrature du Net deplores the overall orientation of the consultation. In contrast to the aspirations of European citizens, the principal objective of the Commission in this consultation is *"whether further measures [...] need to be taken at EU level [...] to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders"*. The Commission thus completely discards many important questions and passes over the most crucial ones on the recognition of the cultural rights of individuals. The principle underpinning DRM (Digital Rights Management, a technical system of copyright protection) remains unquestioned for instance, even though these "digital

handcuffs” have, since their introduction as prevention against circumvention in the 2001 directive, significantly weakened the rights of individuals. Even more crucially, the consultation utterly fails to address the most important question that any effective debate on the adaptation of copyright to the digital age must address: the legalisation of non-commercial sharing of digital works between individuals.

For the reasons stated above our response does not always conform to the order of questions in the questionnaire. We have moreover addressed more generally questions whose formulations were too closed to allow an adequate and complete reply.

I. The Recognition of non-commercial sharing between individuals through the exhaustion of rights

80. Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.

La Quadrature du Net greatly deplores the fact that the questionnaire fails to address the question of online sharing between individuals even though this has, for more than 30 years, represented the main challenge to existing copyright legislation and remains unsolved. La Quadrature du Net believes that the legalisation of non-commercial online sharing between individuals must be the first adjustment of European copyright rules. All other propositions submitted by La Quadrature du Net are linked directly or indirectly to this measure.

For the last 15 years, the war against non-commercial online sharing between individuals was waged obsessively. By all means technological, legal, police and political, attempts were made to stop what is not only inevitable but also legitimate and useful[v]. While peer-for-peer file-sharing was stigmatised and penalised, it created amongst its supporters large online communities. Although responsible for only a very small part of the difficulties encountered by the established cultural industries in their effort to adapt to the digital age, it was, without evidence, labelled “theft”[vi]. During the last ten years, researchers, civil society and creative communities have sought to obtain a legal recognition for non-commercial sharing. Many approaches were proposed (exceptions to copyright, mandatory collective management, extended collective licences, etc.). But as is true of most innovative political thought, these proposals found themselves confronted with many difficulties, especially when established interests erected obstacles in their way. In order to succeed, the recognition of non-commercial sharing of digital work between individuals must base itself on a clear and simple solution. What better way therefore than to adapt the familiar mechanisms of non-commercial sharing of tangible works to the digital world?

Exhaustion of rights, known as the “first-sale doctrine” in the USA, is the legal doctrine by which certain exclusive rights are not transferred when a tangible copyrighted work is purchased. It means that you are able to lend, give, and even sell or rent out the work in some cases. Exhaustion of rights is neither an exception nor a limitation to copyright even if it has been codified[vii] and interpreted as an exception

or limitation in the past. In fact, exhaustion of rights applies in situations in which certain exclusive rights no longer exist. The question whether to impose an exception or limitation therefore makes no sense. What happens when, as is the case in the digital realm, the original work and its copy are indistinguishable from each other? Two approaches are possible but conflict with each other. Those who have a doctrinal approach to exclusive rights have tried to prohibit all applications of exhaustion of rights to intangible goods. The European regulatory framework did this by restricting the applicability of exhaustion of rights in the digital domain in article 3.3 of directive 2001/29/CE which specifies that: *"The rights referred to in paragraphs 1 and 2 [exclusive rights of authors, performers and producers of phonographs, videograms and cinematographic or radiophonic works] shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article."* One should note that this was in no way a requirement of the 1996 WIPO treaties that the directive sought to implement. To cancel the application of exhaustion of rights destroyed elementary cultural rights of individuals to goods and works they acquired. In contrast, the European Court of Justice decided in 2012[viii] that exhaustion of rights applied to downloaded software, although it restricted this right to the specific file that could be transmitted under a number of constraints but not copied.

The alternative approach extends exhaustion of rights as applied to tangible copies of copyrighted works for lending, exchanging, circulating, sharing, to the case of digital copies. The potential for these activities depends entirely on the possession of a digital copy and ability to copy it to make it available to others. The interpretation of exhaustion of rights as applied to digital copies would therefore be both broader and more restrictive. Broader because it would include the right to reproduction; more restrictive because it only applies to non-commercial activities of individuals. This would enable a better synergy with the wider cultural economy.

La Quadrature du Net proposes the following concerning non-commercial sharing between individuals[ix]:

- Define "between individuals" to cover all transmissions of a file (by exchanging storage devices, uploading files onto a blog or peer-to-peer network, sending it via email...) between a storage space "owned by an individual" to a storage space "owned by another individual". "Owned by an individual" is self-evident in the case of a personal computer, a personal hard drive or cell phone. But this definition should also include storage space on a server when the control of this space is solely in the hands of the user (user space rented from an Internet Access Provider, cloud hosting service in the case where the access provider has no control over the content).
- Sharing is non-commercial when no profit results, directly or indirectly (for example via advertising revenue) for either of the two individuals who are party to the sharing. The notion of profit must be understood in its strict monetary sense or as a swap against another good. Being able to access a file that represents a work that is elsewhere a commercial work should not be understood as a form of revenue or profit.

Finally, if non-commercial sharing between individuals was legalised, services that facilitate it, for example the operation of a DC++ Hub, eMule server or BitTorrent tracker, would have to be legal, under the condition that there is no

centralisation of digital content, nor advertisement associated to downloading or viewing/listening/reading. We propose moreover that service providers should be blocked from interfering with the conditions of exchange itself, in order to prevent them from making a profit by providing preferential treatment to one individual or copyrighted work[x] which would break the requirement that the transaction be non-commercial and "between individuals". This limitation aims moreover to maximise the benefit in terms of equality, cultural diversity and to ensure the best collaboration between non-commercial online sharing and the commercial cultural economy.

By this application of exhaustion of rights to the digital environment the following important results are achieved:

- Recognition that non-commercial sharing between individuals of digital works do not constitute copyright infringements.
- Facilitation of the establishment and recognition of new means of funding for authors (see p. 23).

Some reformers who share our objectives suggest nevertheless a different approach. They propose a copyright exception or the establishment of a mandatory collective management of copyright for non-commercial sharing. There are several obstacles to these. Although they are not prohibited by the Three-Step Test prescribed by the Berne convention and TRIPS accords[xi], they require a more significant revision of the *acquis communautaire* than our proposal does. The main drawback however would be the continuation of noxious aspects of current copyright regulation to new regulation (heirs and other persons who are not the authors receiving the majority of copyright rent, unfair division of benefits).

La Quadrature du Net is open to all solutions that allow the real legalisation of non-commercial sharing of digital works between individuals and the recognition of this as a cultural right. But it holds that an approach based on the exhaustion of rights has important advantages over a new exception to copyright, which would trigger the need for compensation payments, and over a mechanism for mandatory collective management. Most importantly, sharing would continue to be considered, not a cultural right, but instead a wrong done against copyright holders, even though such harm to copyright holders by online sharing has never been demonstrated.

II. Rights and the functioning of the Single Market

A. Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?

The notion of "*making available*"

The notion of "making available" represents one of the most harmful aspects of the 2001 directive. It extends the previous scope of copyright (reproduction/ communication/ performance of works) in a legally ambiguous manner.

While the stated aim of this notion was to provide a clear definition of actions such as file-sharing on a network (upload in peer-to-peer or "seeding"), the vagueness of its meaning and the fact that it was not defined by the directive, allowed rightholders to claim that copyright rules applied in situations that were previously excluded.

Any revision of the 2001/29/EC directive must remove the notion of "making available" in order to return to the previous meaning of reproduction and public communication. Our main partner and competitor, the US, has avoided implementing the "making available" right in practice. This clearly gives it a significant competitive advantage in terms of innovation. As La Quadrature du Net advocates for the legalisations of non-commercial sharing between individuals on the basis of exhaustion of rights, it also demands that certain actions of "making available" not be included in any exclusive rights of the rightholder.

Linking and browsing

11. Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

La Quadrature du Net advocates strongly for the full recognition of the legitimacy of referencing. One of the Internet's distinguishing features is that any published online content can quickly be accessed via a hyperlink or URL. Hyperlink referencing is nothing less than the contemporary incarnation of the established tradition of referencing of existing publications. Clearly, the freedom to reference any content is a precondition for the freedom of expression and communication. Numerous legal decisions have confirmed the link between the publication of content and the freedom for others to reference it directly via hypertext.

In the name of copyright, this essential freedom and fundamental aspect of the Internet is now being attacked. This happened in a recent case opposing Google to the German press. A new neighbouring right had been introduced that threw doubts on the legality of linking to online news websites[xii]. In several other countries (Ireland, France, Belgium and Italy) the temptation to regulate hyperlinks pointing to news sources was also strong. In the United Kingdom, the Meltwater affair, which involved clipping services, might result in a situation in which hyperlinks to news articles become paying[xiii]. Recently, the Court of Justice of the European Union[xiv] confirmed that when content is made accessible to users without access restriction, one is not required to obtain permission to link to this content.

This decision did not specify whether the person who provides the link would have to check that the primary source had permission to make the content available to the public. Requiring this would entail high legal uncertainty for providers of links and damage a key principle of the Internet.

Whatever answer is given to this question in a context of unauthorised sharing, if the non-commercial sharing between individuals is legalised, the act of linking to a work, even if copyrighted, will be a right and not a crime.

12. ***Should the viewing of a web-page where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user's computer, either in general or under specific circumstances, be subject to the authorisation of the rightholder?***

The Internet works by storing copies of a visited website temporarily in the cache memory of a user's computer. These local copies are currently exempt by the 2001 directive from copyright. This exception is the only one that EU member states are obliged to transpose into their national legal systems.

To question this exception would undermine the very functioning of the Internet and represent a completely disproportional and unworkable application of copyright and furthermore, call into question "the right to read". Nevertheless, certain rightholders now argue that the simple visit to a website should be subjected to exclusive copyright and that it could, if need be, be paying. This question was posed in the U.K. by the *Newspaper Licensing Agency* in the context of a legal process in the High Court and which is now in front of the High Court of the European Union[xv].

Any revision of the 2001 directive must clarify the exception for temporary copies in order to ensure that it covers visits to websites.

Download to own digital content

The questions in this section only refer to the second-hand sale of digital goods. But this is a narrow framing of the question of "ownership". The ownership

that consumers expect when buying a file of a work cannot be restricted to that of the one specific copy obtained without leading to highly absurd and harmful results. Instead, the Commission should examine the extent to which exhaustion of rights applies to the digital environment and admit that acquiring a copy bestows rights well beyond that of reselling the product in the second-hand market.

Several businesses have started proposing ways in which the owner of a digital file could resell it by "guaranteeing" that their copy is deleted from their computer during the transaction (ReDIGI for music in the USA, Valve for video games, etc.). The reselling of a tangible good is legally possible on the basis of first sale doctrine in the USA and exhaustion of rights in Europe. The mechanisms that regulate copyright in the tangible realm are essential for cultural practices as they allow the donation and exchange of goods, such as books, CDs or DVDs. But to attempt to carbon copy this to the digital world by demanding the suppression of files, demonstrates a profound misunderstanding of the non-rival character of digital works

Rightholders have reacted to the existence of these new services of resale of intangible goods by taking them to court, which have, for now, ruled in their favour[xvi], except in the case of software licences for which the Court of Justice of the European Union ruled that exhaustion of rights applies[xvii]. But in truth, framing the resale of digital files as a problem is misguided. A person who owns a file should always be able to copy and share it online as long as they do not benefit financially. If non-commercial sharing between individuals were recognised as a right, rightholders would have nothing to worry about from the services of resale as sharing would take care of this form of distribution.

If instead the second-hand resale of files were allowed, it would lead to several harmful developments. Any system of resale would use DRM systems which ignore the basic rights of individuals to the cultural content they own. Moreover, music industry giants, such as Amazon or Apple, are already positioning themselves for this market opportunity in such a way that would reinforce, using patents and other means, their vertical integration and lock users into their systems.

This would clearly threaten citizens' fundamental cultural rights. The only solution that can really get rid of this sham is the legalisation of non-commercial sharing between individuals. Second-hand resale or digital lending are simply ways to deny the existence of the logic of non-commercial exchange of cultural goods on the Internet.

In order to acknowledge the legitimacy of sharing practices and draw out the best aspects the digital revolution has to offer, La Quadrature du Net draws the logical consequence of the abundance of perfect copies in the digital world: extend the mechanism of exhaustion of rights to non-commercial transactions between individuals. The alternative is an unacceptable level of repression. Moreover, the legalisation of online sharing, as we propose it, ensures a synergy between commercial and non-commercial digital activities.

B. Registration of works and other subject matter – is it a good idea?

Legal experts in all countries have searched for ways of how to avoid the following perverse and significant phenomena:

- Copyright rent going to rightholders who have no incentive to stimulate innovation, for example heirs or stock owners of copyright portfolios;
- The increasing number of orphan and out-of-commerce works;
- The weakness of the public domain.

This search has resulted in a proposal that makes the economic benefit of copyright (but not the moral rights such as attribution or disclosure) dependent on the voluntary registration of works by their authors. This registration would be for a limited duration (a few years) with the possibility of extension. This proposal is faced with certain difficulties. It might not be compatible with the Berne convention and would have an impact on those authors that are less predisposed to embrace bureaucracy. The threat however, of economic exploitation and possible re-appropriations of their works by commercial actors, would represent a strong motivator.

Marco Ricolfi has proposed copyright 2.0 according to which works would be placed by default under a regime similar to that of the Creative Commons licence, excluding the case in which the author decides to opt for the older copyright model. In order to prevent the undesired commercial exploitation with possible re-appropriation, the default licence could be of the type By-NC or by-NC-SA, which would allow modifications but require authorisation for commercial uses. As suggested by Marco Ricolfi himself, these two approaches, the registration for limited duration and copyright 2.0, can be combined. However, the adoption of copyright 2.0 would not dispense with the need to legalise non-commercial sharing between individuals, as it would not be dependent on the good-will of any person but would result from the simple act of having published a digital work. However, copyright 2.0 would also deal with the question of the right to remix (the right to quote, make a parody of, etc. which would, when appropriate, base itself on the classic interpretation of copyright) (see infra p.18).

C. Term of protection – is it appropriate?

20 Are the current terms of copyright protection still appropriate in the digital environment?

Members of La Quadrature du Net not only signed but also actively participated in the Communia network's drafting of the Public Domain Manifesto[xviii].

This manifesto states that "*The term of copyright protection should be reduced. The excessive length of copyright protection combined with an absence of formalities is highly detrimental to the accessibility of our shared knowledge and culture. Moreover, it increases the occurrence of orphan works, works that are neither under the control of their authors nor part of the Public Domain, and in either case cannot be used. Thus, for new works the duration of copyright protection should be reduced to a more reasonable term*".

It also affirms that "*Copyright protection should last only as long as necessary to achieve a reasonable compromise between protecting and rewarding the author for his intellectual labour and safeguarding the public interest in the dissemination of culture and knowledge. From neither the perspective of the author nor the general public do any valid arguments exist (whether historical, economic, social or otherwise) in support of an exceedingly long term of copyright protection. While the author should be able to reap the fruits of his intellectual labour, the general public should not be deprived for an overly long period of time of the benefits of freely using those works*".

The term of copyright protection in the EU is excessively long. The extension to 70 years after the death of the author means that the use of a great number of works is impaired without economic justification. Moreover, the extension will profit only a minority of authors. A reduction in the term of protection fixed by the Berne Convention[xix] must be obtained with WIPO. It is very regrettable that the European Union should have extended neighbouring rights of actors and musical recordings from 50 to 70 years whilst the Communia network had expressed its disagreement with this extension. Here again, only a very small proportion of artists will actually profit, while the disadvantages for society as a whole will be very strong (notably in terms of the multiplication of orphan works). It would therefore be ill-advised to reproduce this mistake with neighbouring rights of audiovisual works.

We recommend a reduction of term of copyright protection to a maximum of 30 years after first publication. This reduction could be introduced progressively (the reduction of one year for each year gone by) in such a way as to avoid the expropriation of exclusive rights. Let us remember that the 14 years protection contained in the Queen Anne Act of 1709 was justified by the fact that this length was deemed sufficient to ensure that a book will have reached its public during that time. What is one meant to think of a duration for the digital age that is often eight times as long[1]?

[1] 70 years after the death of the last author often means more than 112 years after publication.

Beyond the question of excessively long terms, La Quadrature du Net holds the opinion that the public domain must be given an explicit legal status in the European Union through the introduction of a positive status in the European copyright directive. Confronted with the continued expansion of intellectual property rights over the last 30 years, researchers and legal experts have launched a project that aims to recognise the positive status of the public domain, voluntary commons and the fundamental rights of users (including those of authors) with regard to works[xx].

At present, the public domain is, at best, considered a residue or a market failure, and the commons a space in which there has, as yet, been a failure to privatise, and the rights of users tolerated only because no means have been found to eradicate them. As soon as these communal entities have been attributed a positive status, the impact of any new legal or political measure on their well-being, enrichment, upkeep and accessibility will have to be studied and taken into account.

Communia's Public Domain Manifesto contains numerous principles that represent a strong basis for the positive recognition of the public domain. A first step in the right direction already exists in Chilean law[xxi]. Moreover, the Lescure report, which was submitted to the French president and the culture minister in May 2013, proposed the introduction of such a positive definition in French law in order to “reinforce the protection in the digital environment”, “indicate that faithful reproductions of works in the public domain belong also to the public domain, and affirm the supremacy of the public domain on these interrelated rights”[xxii].

Similarly, it is very harmful that EU member states were left with the ability to invent new exclusive neighbouring rights (neighbouring rights on content indexation of press created in 2013 in Germany, new neighbouring rights profiting the life-performance producers that is currently under consideration in France, etc.). Not only does this harm the harmonisation of rights across the EU, it also threatens the public domain.

III. Limitations and exceptions in the Single Market

21. Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?

The biggest limitation to the harmonisation of copyright legislation in the EU has been the failure to make obligatory the transposition into national law of exceptions listed in Directive 2001/29/UE. One consequence has been that European citizens were not able to fully and efficiently exploit available culture and knowledge. In order to solve this problem, it is essential to make obligatory the transpositions of those exceptions that are essential for fundamental freedom and the healthy development of cultural practices: Exceptions for educational and research purposes, for libraries, archives and organisations of a similar calling (including organisations offering public access to orphan works and their reuse), exceptions for collective non-commercial use, exceptions for citations in all media, for the use of parody, etc. However, the harmonisation of exceptions should not prevent member states from

trying out new exceptions. This right was recognised in the Berne Convention and TRIPS agreement, subject only to the Three-Step Test. Experimenting with policies that favour the common interest must be a driving force in the development of new rights in the changing environment of the digital world.

25. What would be the best approach to provide for flexibility? (e.g. interpretation by national courts and the ECJ, periodic revisions of the directives, interpretations by the Commission, built-in flexibility, e.g. in the form of a fair-use or fair dealing provision / open norm, etc.)? Please explain indicating what would be the relative advantages and disadvantages of such an approach as well as its possible effects on the functioning of the Internal Market.

Although La Quadrature du Net does not advocate for the introduction of *fair use* in Europe, we believe that the status of exceptions to copyright in the EU must be strengthened and that it is currently weakened by the abusive interpretation of the Three-Step Test.

The maximalist interpretation used by some courts of justice has eroded the strength of exceptions. This was the case for the exception for private copying in France in 2006 in the Mullholland Drive decision by the Cour de Cassation[xxiii]. In order to remedy this problem, La Quadrature du Net proposes the introduction of a more reasonable interpretation of the Three-Step Test, as many European legal scholars already advocate[xxiv]. Furthermore, any revision of the directive must clearly state that the Three-Step Test describes general measures to be used by European legislators and does not outline principles that can be called on by courts, tribunals or rightholders.

A. Access to content in libraries and archives

La Quadrature du Net believes that libraries and archives play a crucial role in the circulation and diffusion of knowledge and that they should profit from, rather than be restricted by, the digital environment. As stated above, this exception must be transposed into all member states' national laws to create a secure environment across Europe in which these cultural institutions can provide access to copyrighted works. To this end, La Quadrature du Net proposes two modifications to European copyright rules:

- Make orphan works freely available for a wide range of uses in libraries, archives and other public institutions.
- Establish the freedom of collective non-commercial use.

La Quadrature du Net thoroughly regrets that the EU declared itself in January 2014[xxv] against the adoption of a treaty within the WIPO framework dedicated to exceptions for libraries and archives, and preferred instead simple licences which is not an adequate solution.

1) Make orphan works freely available for a wide range of uses in libraries, archives and other public institutions.

For a good many years a workable solution to the problem of the great number of orphan works (those works whose authors or rightholders are not known or cannot be contacted) has been known: Libraries and archives, but also any actor who chooses this as their mission, must be allowed to make orphan works freely available to the public. This would facilitate the access to and use of these works, at least for non-commercial purposes, but also open up the possibility for commercial exploitation through republications. This system would not involve any payment by users but could be linked to a deposit (guaranteed by the state or para-fiscal schemes) that would protect users from the risk that a rightholder comes forward at a later date (in general the publishers or heirs of the original rightholder). Users can in no way be held responsible for damages for any use prior to the time that a rightholder came forward. The Scandinavian countries have set up a system which resembles this idea and which is compatible with current European law[xxvi].

The European directive Orphan Works 2012/28/UE which allows certain uses of orphan works[xxvii] is an imperfect system but it attempts to make it possible for libraries and archives to provide access to orphan works. There are several problems with the text. Firstly, it imposes on any user a “diligent search” for rightholders and thus introduces an important legal uncertainty and risk to institutions such as libraries (who are by nature risk-averse), who will therefore abstain from making use of this right. It also introduces a system of copyright compensation for the time when previously unknown rightholders come forward that could lead to a situation in which rightholders choose to wait for their work to be digitised, published and gain a significant audience before coming forward and demanding compensation. It moreover contains a list of approved uses, and thus excludes uses that are not covered by copyright, such as indexation and cataloguing. The final point is that the the types of institutions that can make use of orphan works, or give access to them, is restricted.

Despite these faults, the text is definitely preferable to the 2012 French law on out-of-commerce 20th century books[xxviii], which for the sake of commercial exploitation disenfranchises authors, leaving them only with the choice of opting out, and deprives the public of access to these works. The situation of orphan works is not comparable to that of out-of-commerce works and must not be treated with the same instruments. Any solution to the problem of out-of-commerce books must return all rights to the author. Digital and paper editions should be treated separately. There should be a separate contract for digital publishing. And it should ensure that rights are returned to the author when the tangible or intangible edition of the work is no longer available.

La Quadrature du Net warns the Commission against extending any system that resembles the above-mentioned French law to the whole of the EU although the French government appears to be advocating for this. Alternatives more respectful of authors and the public can be found in Norway for instance, which offers the free access to the totality of its literature published before 2001[xxix]. Finally, it is very regrettable that the directive affirms that it is “without prejudice” with regard to measures in members states on out-of-commerce works as this gives the impression that it sanctions actions that treat orphan works like out-of-commerce works, such as

the French law[xxx] which undermines the rights of authors and the public for the benefit of certain publishers.

2) Establish the freedom of collective non-commercial use

Aside non-commercial use by individuals, collective non-commercial use plays an essential part in the access to knowledge and culture, most notably in the context of activities organised by libraries, museums and archives. These activities can involve the display of copyrighted works in spaces freely accessible to the public, the online use of copyrighted materials by not-for-profit organisations, the ability to offer users, on a non-commercial basis, the means of reproduction of these works, and access to digital resources in libraries and archives.

Right now these collective uses occur in a very limited and ill-adapted legal setting. The unfounded presumption that collective use of digital content hurts sales causes the significant risk that rightholders might attempt to prevent libraries from offering digital content to their users. In a context in which non-commercial exchanges were legalised, collective uses will also have to be protected and extended.

The following measures should be put in place:

- Transform the exception for personal use, which includes use within the family sphere, into an exception for non-commercial display of copyrighted works in public spaces.
- Non-profit organisations should have the same opportunities available as individuals in terms of online non-commercial use of copyrighted works.
- The means of reproduction, including digital reproduction, offered by institutions to the public should be included in the exclusion for private copying, including occurrences via remote access and transfer.

Finally the specific role that libraries should play in making copyrighted works, including in digital form, available to the public is an important question. A whole spectrum of solutions can be imagined: From a situation in which libraries are the source of a publically-accessible digital reference-copy, to a situation where libraries would be authorised to communicate DRM-free files through a collective licensing or a per copy exception.

B. Teaching, research and disabilities

Educational practices and research have been transformed by the digital world. Considering teaching practices for example, three main changes have taken place: education easily reaches outside teaching establishments, the notion of "educational resources" is outdated as every work and information has become a potential educational resource, and finally, the pupil or student in not only user but also author and content creator. The present exceptions that apply to education are so outmoded that the European Commission has already stated in its Green Paper Copyright in the Knowledge Economy[xxxi], that exception for education must be enlarged[xxxii].

All societies worthy of that name have extended rights for education and research according to the following principles:

- Exceptions must cover all educational and research practices and it must be independent from the framework in which these practices occur. The exception for education should for instance not be limited to schools or depend on the fact that the persons involved have the status of pupils or students. Education in all its forms, formal or informal, institutionalised, or communal, should be included, as should workshops of a cultural and artistic nature and educational programmes in museums and libraries. Educational practices should be distinguished from other forms of use by the nature of the activities and in the nature of the role played by teachers, facilitators and tutors on one hand and participants on the other. Research practices should continue to be defined by the nature of the activities and their goal, as is the case for R&D tax credits in many countries.
- Exceptions must apply to all copyrighted works. Nobody can decide beforehand whether a particular work or content has an educational value. The exclusion of published tutorials or manuals in France is an example that must not be followed.
- No payment by users must be involved. As every author knows, there's no better way to get recognition of your work and secure long-term income than that their work becomes an educational resource.
- Pupils, students or participants in an educational setting should be treated as normal authors. The notion of "user-generated content" is an invention by intermediaries who want to profit from the freedom of being able to use, without paying or consideration for the rights of authors.

Other kinds of exceptions, such as the one concerning the blind and visually-impaired, at present prescribed by the Marrakesh Treaty signed in June 2013[xxxiii] in the context of WIPO, must also be included. These exceptions should moreover not only be obligatory, but also defined in a sufficiently effective and broad manner that guarantee access for intended uses (reading and writing in this case). In light of the importance of educational and research activities and of access to culture for disabled persons, it matters that the adjustments lead to a system that is free-of-charge. Concerning education and research, Canada voted in October 2011 a broad exception to copyright which is, for the most part, free-of-charge, and which could be an inspiration for developments in Europe[xxxiv].

C. Text and data mining

55. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?

Text and data mining represent major opportunities for research in the natural but also in the human sciences, in particular human digital sciences, a field that is growing rapidly. A special working group was set up in the framework of "Licences for Europe" but which reached no consensus. Representatives of libraries and researchers found that contractual solutions would be ineffective as research practice can only develop autonomously in a secure legal setting.

Text and data mining is the automated version of the older research practice of indexation, referencing, counting the number of occurrences, etc. There is no cause to argue that what was free-of-charge in the analogue environment should fall under copyright legislation in the digital realm, other than to drastically restrict innovation and the development of research in Europe.

La Quadrature du Net subscribes completely to the view formulated by The International Federation of Library Associations and Institutions (IFLA) for whom text and data mining should be covered by "the right to read", at least for purposes of research, and that "the right to mine" should be implied without the need for supplementary contractual clauses. For this purpose one could envisage 1. to consider that these activities result from exhaustion of rights and that they are completely free-of-charge, 2. to introduce a new exception in European regulation that applies to data mining for research purposes, including when it is necessary, for these ends, to make temporary copies of the analysed body of work. This exception should cover both copyright and database law.

Failing that, the European Union will fall behind the USA where recent decisions have given a solid legal basis for text and data mining based on *fair use* (consider notably the decision with regard to Google Books by Judge Chin who considered that text and data mining constitutes a transformative usage of work conform to the criteria for *fair use*[xxxv]).

D. User-generated content

62. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?

La Quadrature du Net was a member of the working group (WG2) of the "Licences for Europe" process dedicated to the question of user-generated content[xxxvi]. With the agreement of other representatives of user groups and civil society, La Quadrature de Net denounced the disguised presence of lobbyists in the working group, their covert presence shedding more discredit on the "Licences for Europe" process. However, even without this, the working groups' orientation was not useful because it postulated that contractual solutions were sufficient to deal with questions that arise due to transformative practices such as remix and mashup[xxxvii].

La Quadrature du Net considers that these creative practices represent one of the most interesting and important aspects of digital culture and copyright law should adapt to provide a secure legal setting for their creative development. Contractual measures cannot offer satisfactory solutions and currently represent a real threat to freedom of expression and creation online. Google's ContentID system on YouTube for example frequently takes down mashup or remix videos even though, as parodies, they would be frequently excluded from copyright in several legal systems in Europe. For example, La Quadrature du Net's video "Robocopyright ACTA" on Youtube was taken down for copyright infringement although it was undeniably a parody. Contractual systems tend to turn into a kind of "private copyright police" which act in a domain in which only judges are qualified to rule, i.e. on the censuring of an online content for copyright reasons[xxxviii].

La Quadrature du Net deplores therefore that the Commission continues to privilege contractual solutions. We regret also that it uses the erroneous term "user-generated content" to speak of remix, mashup and other such practices. These transformative works constitute original work even as they borrow material from previous works. To speak of user-generated content introduces a false hierarchy and a value judgement that separates the amateur "user" from the "professional" author, whereas this distinction does not exist in copyright law and is meaningless in the digital environment.

For these reasons, La Quadrature du Net believes that a change in European regulation with regard to transformative uses is necessary. This is the approach taken by Canada which is the first country in the world to have introduced, in 2011, the exception for non-commercial remix[xxxix]. Following the recommendations of the 2013 Lescure report such an exception is also being considered in France. Studying its feasibility was entrusted to a task group led by the legal scholar Valérie-Laure Benabou[xl]. An exception is also being studied in Ireland following the publication of the "Modernising Copyright" report[xli].

Any revision of the 2001 directive must study several possible solutions in order to build a stronger legal basis for transformative work. The planned exception for citations is broad enough to cover a large part of remix and mashup (the exception

applies to all kinds of media and does not apply to "short" citations but "proportional to the aim") but only under the condition that member states transpose it into national law without restrictions (France for instance transposed the 2001/29 exception for citations in an extremely restrictive manner, in contrast to Germany). The exception that applies to parodies should be extended to cover also transformations for other purposes than parody. An exception, such as the one in Canada, could also be introduced. Such an exception should not involve payment by the user, as transformative practices are strongly linked to freedom of expression and the right to cultural participation.

La Quadrature du Net believes that the most coherent solution must consist of the combination of these two measures:

- In a non-commercial context, the transformative practices of mashup or remix are a direct result of the legalisation on the basis of exhaustion of rights of non-commercial sharing between individuals. Within such a delineation, transformations should be freely available and free-of-charge, although under the requirement to attribute appropriately.
- Transformations that satisfy the requirement for originality should receive copyright protection and should be authorised even for commercial purposes.

E. Private copying and reprography

64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[2] in the digital environment?

To a large extent, the private copying and reprography exceptions have not fulfilled their regulatory role in the digital environment. Courts in several member states, when confronted with the first cases relating to the downloading of copyrighted material, considered these acts as covered by the private copying exception. This happened in France during the first decade of the century[xlii] and in Spain, where downloading copyrighted work through peer-to-peer networks was ruled to be covered by the exception for private copying[xliii]. In 2012, Dutch parliamentarians refused to criminalise the downloading of copyrighted work, believing that it could be considered as within the private copying exception under the condition that it was matched by a "private copying tax"[xliv] . In France, lawmakers had considered in 2005, during the transposition of the 2001 directive into national law, to legalise online sharing on the basis of the exception of private copying, linked with a mechanism for financial compensation in the form of a monthly charge to Internet subscriptions (global licence system[xlv]).

One can therefore work towards the legalisation of downloading of copyrighted work through the exception of private copying. However, such a solution would be unsatisfactory because, although it would legalise downloading, it would not legalise the uploading of peer-to-peer sharing. For this reason La Quadrature du Net

[2] Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

recommends instead that the online non-commercial sharing between individuals be legalised (download, upload and other means of making it available).

Another failing of using the private copying exception is the fact that sharing is still considered to harm cultural industries although no study has demonstrated this[xlvi]. A question, related to this unfounded assumption, recently reached the Court of Justice of the European Union[xlvii] and seeks to know if a private copy had to be made from a “lawful source”. The addition of this criteria has become the rule in France since the modification of the regime of private copying in December 2011 was introduced under the pressure of interest groups. These had advocated for it in order to prevent the legalisation of downloading on the basis of private copying. La Quadrature du Net opposed this development in so far as it caused a significant legal ambiguity for users as they would be required to check on whether the source copy is lawful (for instance was originally bought or licensed) although this would be very difficult to do over the Internet[xlviii].

Any revision of the 2001 directive should clarify private copying in order to prevent the “licensed source” criteria, even as the legalisation of online sharing would be on a more effective legal basis using exhaustion of rights.

66. How would changes in levies with respect to the application to online services (e.g. services based on cloud computing allowing, for instance, users to have copies on different devices) impact the development and functioning of new business models on the one hand and rightholders’ revenue on the other?

As mentioned above, La Quadrature du Net advocates for the legalisation of non-commercial sharing on the basis of exhaustion of rights. As stated previously, the sharing between individuals should be defined as any transfer of a file from one storage space “owned by an individual” to another storage space “owned by another individual”. “Owned by an individual” is self-evident in the case of a personal computer, a personal hard drive or cell phone but also includes storage space on a server when the control of this space is exclusive to the user. Therefore, it would be incoherent to introduce levies for online services such as storage space.

Revenue collected through licence-fees has decreased significantly due to the decline in the number of privately-owned tangible copies of work, especially when this number is compared to the number of intangible copies in circulation. Because of this, some propose to introduce new taxes on, for instance, connected devices or “screens” (such as smartphones and tablets). This was proposed by the Lescure report in France[xlix]. La Quadrature du Net believes that this type of tax on the user is illegitimate because it is not matched by new rights for the user. Also, they cannot be justified by lost revenue as it was never demonstrated that online sharing harmed rightholders. La Quadrature du Net recommends the system of contributory resource pooling to ensure financial sustainability that is clearly distanced from this unsubstantiated argument that sharing causes harm to rightholders (See next section).

IV. Fair remuneration of authors and performers

72. What is the best mechanism (or combination of mechanisms) to ensure that you receive an adequate remuneration for the exploitation of your works and performances?

The explosive increase in the number of creators and products, of all levels of competence and quality, and the diversification of media forms has greatly diminished the amount of time a work receives public attention and hence leads to a unfamiliar but significant challenge for the economic sustainability of creative practices. Although population growth and increased amounts of leisure time mitigates these effects somewhat, overall, the average audience size and time accorded to a work will continue to diminish until a new balance is found between the production and reception of a work[l]. The current system of financial compensation is therefore not sustainable over the long-term and will have to adapt to the new environment. At the same time, creative and expressive activities are more and more valued in society and the proportion of active participants is growing. The willingness of a large segment of the population to contribute to their economic sustainability is certain[li]. However, to translate this desire into a functioning system requires revenues by distributors, financial investors or institutional players, who contribute nothing to the creation itself, to be limited.

On what mechanisms could we rely in order to ensure the economic sustainability of digital culture in this context? The table below summarises the benefits and weaknesses of different possible systems, including their ability to extend to a greater number of creators and works, and their ability to promote authors and works.

Source of revenues or financing	**Probable evolution of share of overall financing**	**Resulting diversity of works**
Public employment (salary & status)	↓ or =	Large diversity
Public subsidies	↓ or =	Diversity depends on policies implemented
Parafiscal resources with curated management	↓ or =	Public film funds (e.g. in France), tax break or credit, levy on home copying. Limited diversity
TV production levy or obligation to invest	↓	Limited diversity
Sales and rental to end-users	↓ or =	Diversity depends on market organisation
Intermediary services financed by advertising	↑ or =	Search engines, social networks Concentrated on works with large audiences

Cultural mediation	?	Limited resources but essential to quality detection in a world without upfront filters
Commercial licensing	=	Limited but extensible diversity
Human services	↑	Teaching art, concerts, theatre viewings, conferences, etc. Wide diversity for teaching, dependant on market organisation for theatre and concerts performances.
Voluntary resource pooling	↑	Cooperatives, participative financing, support subscriptions. Significant diversity but limited by capabilities of platforms to attract sponsors
Society-wide statutory resource pooling	= or ↑	Creative contribution, basic income, wide possible diversity if schemes can be brought to exist

Some public professions, such as teaching and research, support a diverse and dynamic cultural space, including a digital cultural space and we should be greatly concerned by the threat to their existence and freedom. Thinking beyond this however, three mechanisms have the potential to significantly contribute to the sustainability of a many-to-all cultural society. Each mechanism implements a form of resource pooling on a different scale. These three are: voluntary cooperative resource pooling, statutory contribution organised by law but managed by contributors, and basic income allowance. These mechanisms should not be conflated with parafiscal systems with curatorial management which have multiplied in number in recent years and whose governance is the target of serious criticism.

Voluntary cooperative resource pooling (artist and author cooperatives, production and publishing cooperatives, crowd-funding intermediaries such as Kickstarter, Ulule, KissKissBankBank or Goteo etc.) has been developing impressively. It already plays a crucial role pooling efforts and funds of creative communities for projects that would not be possible without them (for instance documentaries, investigative reports, useful software without a business models to make it financially viable to develop and distribute, etc.). Author and artist cooperatives and related editorial and publishing cooperatives are the natural development model of creative digital communities and it is essential to provide a more favourable tax and regulatory framework. An important question however is up to what amounts participative financing can provide funding. Only the largest platforms are in a position to attract a sufficient number of sponsors. Moreover, only very limited space is offered for the presentation of projects and, as the great majority of projects will not be promoted on the front page or by mailings, most will have to rely on their own support networks.

Statutory financial contribution resource-pooling imposed by law and managed by contributors is fundamentally different from public subsidies based on taxes or levies, such as the “TV licence” in the UK or the “avances sur recettes” in France[lii] as funds collected through this type of “crowd-sourcing on a societal level” are allocated by contributors. In the Creative Contribution scheme advocated by La Quadrature du Net and several cultural and society actors, funds are used to:

- support projects, for instance by financing their production and realisation, and supporting organisations such as cooperatives and culture and media education groups;
- remunerate contributors whose work has been shared on a non-commercial basis.

Sums are allocated according to contributors' preferences in the first case, and in the second case, on the basis of data collected from a large sample of voluntary participants, on their appreciation of works (peer-to-peer sharing, recommendations, blog post, etc.). The flat-rate contribution would be of the order of €5 per month per household in developed countries. This represents about 3-4% of the average cultural consumption of households, and does not of course aim to replace the other sources of income listed above. It should provide additional income specifically adapted to digital culture and its vast number of contributors.

The limitations of the other mechanisms described above lead some proponents to defend a scheme whose aspirations go well beyond cultural activities: unconditional basic income allowance which proposes that every citizen or resident be guaranteed a basic income or “citizen's income”. Every person could then choose how to use their time, for example to work to supplement their basic income, or to volunteer. It could therefore play a fundamental role in sustaining the other mechanisms.

The three schemes described above all aim to balance ease of implementation with the effectiveness of their impact but they differ in their generalisability. La Quadrature du Net believes that the Creative Contribution scheme is particularly relevant for the years ahead: it can support voluntary resource pooling and prepare the ground for more general schemes. There are many different opinions amongst societal actors, and policy makers have the duty and responsibility to explore how each option could be put in place and best supported.

73. *Is there a need to act at the EU level (for instance to prohibit certain clauses in contracts)?*

Authors and other creative contributors have to be protected against the worst aberrations of what copyright, invented many centuries before the digital age, has become. Copyright has to adapt to ensure that it is fair to authors, contributors and the public, not only in commercial publishing but also in commercial distribution. For this, the following conditions must be met:

- Obligation for a separate digital-rights contract, with limited copyright term and which takes advances in technology and digital uses into consideration.
- If an edition involves tangible and intangible products, copyright must automatically return to the author or contributors if one or both become unavailable (after a short delay subsequent to the author's request, six months for instance). It is unacceptable that the availability of the digital version should allow the publisher to leave the tangible version unavailable.

- Contractual conditions that prevent the non-commercial distribution by authors of works should be prohibited.
- Minimum levels of remuneration of authors and contributors for the commercial exploitation of their work should be introduced. These should consider the greatly reduced overhead and cost of reproduction of intangible products.

Several recent developments in France have not respected these principles and have disempowered authors and restricted the rights of the public to access cultural goods. The law on the digital exploitation of out-of-commerce 20th century books adopted by the French Parliament in March 2012[liii] sets up a collective system that applies automatically to all authors and publishers who do not opt-out within six months after the registration of works in the database managed by the French National Library (ReLIRE[liv]). This law is a categorical refusal of any form of non-commercial access, the focus being on commercial exploitation that is collectively managed and placed under the management of publishers. In this context, authors can only opt out, while the public loses the possibility to access works through non-commercial channels. Orphan works represent a significant part of out-of-commerce books of the 20th century and this new measure is likely to prevail over measures established by directive 2012/28/EU which had made it possible to make digital copies of orphan works available non-commercially through libraries, museums and archives. This directive has not yet been transposed into French law and France is instead pushing for the extension of these new measures to the whole of the EU, which would hurt both the rights of authors and that of the public.

As a result of an agreement between authors and publishers[lv], France is also getting ready to modify, via a legal ruling, its law relating to publishing contracts in order to cover digital editions. The planned changes are very limited in terms of the protection of authors and restrict the possibility for authors to allow the non-commercial use of their work. For these reasons, it is important that European legislation explicitly provides guarantees on the supranational level against these types of contractual clauses.

In the particular case of academic authors, it is important that publishing contracts with scientific publishers should not prevent researchers to submit their work to open-access archives, even in the case of a transfer of rights. The German 2013 law on Free Access could serve as an example for this type of regulation in Europe[lvi].

V. Respect for rights

75. Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?

Possible sanctions against “aiding and abetting” the “infringement on a commercial scale” represented one of the most dangerous provisions in ACTA. La Quadrature du Net had helped raise awareness of the dangers to innovation they represented. Widespread social practices, such as non-commercial online sharing between individuals, publication of content on public information portals or the distribution of innovative tools could have been interpreted as “infringement on a commercial scale”. Internet access and web hosting providers would have been faced with a significant legal ambiguity that would have made them vulnerable to attacks from the entertainment industries. They would have been forced to introduce censorship measures, which would have harmed freedom on the Internet. Moreover, “commercial scale” was defined in a very broad sense as “direct or indirect economic or commercial advantage” and failed to distinguish between commercial and non-commercial infringements of copyright.

La Quadrature de Net condemns commercial counterfeiting of cultural goods, but we also consider that the best way to fight it is to legalise online non-commercial sharing between individuals on a decentralised basis rather than repressive sanctions. The development of large-scale centralised online sharing platforms which offer services that are often fee-paying (such as DirectDownload and Streaming) is a direct consequence of the repression experienced by peer-to-peer networks, BitTorrrent and even by online link directories that facilitate sharing. A site such as MegaUpload was a monster created by this war on sharing[lvii].

The legalisation of online non-commercial sharing represents the best way to fight against commercial counterfeiting by returning to decentralised practices without having to take recourse to repressive means.

76. In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?

It is astonishing that the Commission appears to want to question the independence of technical intermediaries as their independence is key to protecting freedom on the Internet. The involvement of Internet access providers, advertising brokers, payment service providers and domain name registrars was also at the heart of ACTA, as well as SOPA in the USA, two proposed treaties rejected by democratically elected representatives after an unprecedented mobilisation of citizens in defence of online freedom.

The European legal framework relating to the responsibility of technical intermediaries, derives from directive 2000/31/CE on electronic commerce and is satisfactory in as much as it does not force technical intermediaries to pro-actively control or filter content on their networks. European jurisprudence is also very clear on the fact that one cannot oblige hosting services to investigate content[lviii]. To come back on these principles is to open the door to significant pressure by the entertainment industry. The threat is that technical intermediaries could be obliged to put in place automated censorship to filter or even delete online content. The creation of such forms of "private copyright policing" would unavoidably restrict freedom online.

La Quadrature du Net is worried to see a reference in the questionnaire to "cooperative efforts" with technical intermediaries, an expression lifted straight out of article 27.3 of ACTA. This notion recalls a proposal by France in the context of Hadopi[lix] and in the conclusions of the Lescure report[lx] that argued in favour of legislating responsibility of technical intermediaries on a European level. It would force technical intermediaries to "auto-regulate" through contractual agreements with cultural industries brokered by the state. Those who would refuse to "auto-regulate" would see themselves threatened by various sanctions that could go all the way to the seizure of their domain name or to censorship by an administrative authority. The Lescure report furthermore proposed that public institutions support the research into automatic detection and filtering technologies which already pose a grave danger to freedom of communication on the Internet. Measures of this type are already used, for instance Content-ID of YouTube which already blocks content that is perfectly legal, and which therefore compromises the effective application of copyright exceptions and limitations. The Hadopi law in France suggests that search engines should be made to dereference certain websites or censor and block access to them. These measures derive directly from the worst in ACTA and SOPA. They make technical intermediaries legally responsible for content, by-pass the judicial system and represent an evolution towards contractual forms of control of communications that will lead to a de facto private censorship of the Internet.

La Quadrature du Net rejects this new repressive approach that risks to be at the heart of the next law to be debated in France in 2014. We are also worried that France is pushing for the adoption of "auto-regulation by online platforms" on the European level (see notably the European Council of 24-25 October 2013[lxi]). European citizens will mobilise again to protest this contractual, back-door version of ACTA.

77. Does the current civil enforcement framework ensure that the right balance is achieved between the right to have one's copyright respected and other rights such as the protection of private life and protection of personal data?

The Court of Justice of the European Union, in its SABAM vs. Netlog decision of the 16 February 2012[lxii], considered that the current state of European law did not allow for the imposition on webhosters to establish a generalised surveillance of communications through their network. This decision based itself on the principle that copyright protection must not lead to a disproportionate breach of freedom of expression, nor against privacy. No changes in European legislation should undermine this balance by harming the protection of personal data and privacy.

Instead, this principle should be better protected in order to avoid what happened in France. In the context of the graduated response introduced by the Hadopi Law, a large-scale surveillance of online communications was set up, with the collection of IP addresses done by agents on the payroll of the entertainment industry, using techniques developed in secret by private companies. The principle of the protection of privacy should be reaffirmed with sufficient strength by the European Union to ensure that such measures cannot be introduced anywhere else.

Authors

This submission to the public consultation was written by Lionel Maurel and Philippe Aigrain, both members of the Board of La Quadrature du Net which also validated it.

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