



European Digital Rights

Shadow IPR Strategy Report

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1 INTRODUCTION

This document presents EDRI's position on the future of EU decision-making regarding intellectual property rights (IPRs).

This is an era of unprecedented expansion in society's ability to discover, share and develop the world's treasure of knowledge and ideas. Storage and distribution costs have plummeted. The obstacles to finding, creating and disseminating ideas and knowledge have radically decreased. The digital age has facilitated a fundamental shift from planning for information scarcity to managing its rich abundance.

This has created phenomenal opportunities for education, research, creativity, expression and innovation. An IPR framework whose priority is enabling access to knowledge should aim to maximise the benefits of this new environment of cultural and information abundance. When reproduction of information goods is both simple and inexpensive, this leads to one core question: how do we maximise the social value of information through its widest possible use, whilst at the same time creating economically sustainable IP industries and ensuring that creators are properly rewarded and recognised for their work?

IPRs play an important role as a governance tool, helping regulate the use of information with a view to achieving society's priorities. In doing so, they affect many aspects of today's information society, whether it is from an economic, technological, scientific, cultural or political perspective. A sound IPR system balances society's need for access to information with any economic or cultural imperatives that require limits to the free flow of information.

IPRs and the public good

The economic exploitation of information goods plays an important role in incentivising creativity through the promise of commercial rewards. It may cost nothing or almost nothing to distribute and share content, but creation is not always without costs. IPRs can therefore help to provide guarantees that work will bring economic reward. They can also turn information into an asset.

For example, digital infrastructure has opened up new markets for digital audiovisual goods. Huge opportunities have been created nationally and across the Single Market through technology making it easier to make content available to consumers in innovative, affordable ways.

However, economic returns are not the sole incentive or reward for creativity or innovation. IPRs can establish economic rights, but also the limits to those economic rights. Those limits should be set in the context of the public good that accrues from the use of information. The public good and economic rights are not necessarily synonymous, particularly not in this context.

The exploitation of the economic rights associated with an information good does not capture a work's full value. Furthermore, limiting the reuse of an 'information good' to only its economic exploitation through royalty-based business models can actively reduce its overall economic value to society, as well as its cultural and social value.

For example, the analysis of data sets for scientific or social research is a use that can be curtailed by the complicated or an overly strict application of economic rights. Creating depositories of

cultural heritage, from literature to genealogical databases, requires use of innovative business models to facilitate digitisation alongside rights of public access. Furthermore, works covered by copyright may be used in parody, commentary or critique that represent important democratic and social interventions, as recently highlighted in a UK government report on copyright legislation.¹

In short, obtaining maximum benefit from a society's use of information goods cannot be achieved by economic rights alone. Moreover, the social value of information goods transcends the strict economic value even further: the free exchange of thoughts, ideas and information is a fundamental part of a democratic society.

The positive role IPRs play through incentivising and rewarding creativity and innovation can be outweighed by their adverse effects on the creation and dissemination of culture, knowledge, technological innovation and fundamental rights such as the freedom of expression and the right to privacy.

This can happen either when the right to restrict the use of information goods is allowed to prevent socially or economic useful activity from taking place, or through heavy handed enforcement of IPRs that involves, for example, intrusive data collection. Current IPR policy in the EU suffers from precisely such an imbalance.

Due largely to a failure to accumulate sound, objective evidence that has led to a focus on IP maximalism, the EU has failed to design an IP policy framework fit for the digital age. The consequences are stunted and fragmented markets that favour incumbents over new entrants, unnecessary enforcement policies that will harm people's privacy and lead to repressive content blocking schemes.

Policy makers have been making policy 'blind', building strategy on faith not fact. In doing so, European IP policies are strangling the digital economy, hurting consumers and putting Europeans' fundamental rights at risk.

2 IPRs IN THE SINGLE MARKET AND IN THE GLOBAL ECONOMY

The development of an enabling IPR framework is partly an empirical matter based on an analysis of the best way to encourage and reward creativity, innovation and research. It is also partly a question of competing principles in the context of which the economic, moral and democratic rights are negotiated.

A sensible IPR strategy would be evidence-based and acknowledge the different forms of IPR as well as their role in the promotion of investment and growth for Europe. A sound IPR system would recognise the diversity of modes of production and creation of information goods. It would avoid locking European economies in a single business model. It would embrace the possibilities that digital technologies offer, not attempt to limit them. And it would involve proportionate enforcement.

¹ <http://www.guardian.co.uk/media/2011/may/17/copyright-law-overhaul-for-uk>

2.1. IPRs as a driver for creativity, innovation, economic growth and welfare in Europe

According to the IFPI Digital Music Report 2010, there were fewer than 50 digital music services in 2003, a full eight years after the Internet started to grow as a mass phenomenon and after two years of rapid broadband take-up following the introduction of the EU's Regulation on Local Loop Unbundling. This means that, at the exact moment when the market should have been serviced, a huge long-term vacuum was created, which led not only to a rise in unauthorised access to audiovisual products, but a deep-seated culture where unauthorised access was wholly acceptable and an ongoing situation where IPR law is not seen as legitimate. Such an environment cannot effectively be addressed by repression. Today, we are given unreferenced statistics of thousands of authorised services, but this alleged abundance of legal offers bears little relationship with consumer experience, particularly in smaller national markets. Consumers need the right products at the right time, in the right format, with the right permissions at the right price. This is illustrated by the recent news that Netflix, a US-based video streaming service, is more popular in the USA as a source of film entertainment than the use of P2P-protocols for online filesharing such as BitTorrent.

Effective stewardship of the digital economy is about far more than simply imposing rights, it is also about facilitating, encouraging and even demanding that markets are easily accessible, efficient and transparent.

The more content that is easily available, the more innovative services can be developed. This will require a renewed and serious political commitment to developing more efficient, pan-European licensing arrangements. These have been discussed for nearly a decade as the primary means of developing an efficient and easily accessible creative content market. It is high time, despite the many difficulties of establishing such a system, to move from talking to doing. This should be a matter of priority over and above enforcement.

2.2 The evidence deficit

For IPRs to effectively drive the creation and protection of high quality jobs in Europe, policy must be developed that is based on facts – rather than manipulation or invention of “statistics” to fit a pre-existing narrative. It is important to ensure that the description of the value of intellectual property in Europe, and the benefits of particular IPR strategies, rely on statistics that are credible and accurate. For the moment, this is far from being the case.

It is remarkable, for example, that, on 17 May, 2011, a search of the ec.europa.eu web domain finds 39 different references to the widely discredited 2008 OECD BASCAP study on “the Economic Impact of Counterfeiting and Piracy” and no references at all to either the 2011 Social Science Research Council study on “Media Piracy in Emerging Economies”² or the 2009 Dutch government funded IVIR study on the Economic and cultural side effects of file-sharing on music, film and games.”³

Similarly, Europol chose to advise the EU that EU-wide awareness raising programmes are required, inter alia to inform “illegal downloaders unaware of the links to organised crime,” without providing any reference or analysis as to how/if/why this might be the case. On the other hand,

2 <http://piracy.ssrc.org/>

3 http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorized_translation.pdf

when the SSCR investigated this issue, they found that, in reality, no “systematic connections to drug trafficking, prostitution or other major features of organized crime.”⁴

On its website, the EU Commission states: "OECD estimates that infringements of intellectual property traded internationally (excluding domestic production and consumption) account for more than €150 billion per year (higher than the GDP of more than 150 countries). According to the OECD counterfeiting and piracy undermine innovation, which is key to economic growth."⁵ On July 13, 2010, Karel De Gucht, EU Commissioner for Trade, used the same number during a public briefing in the European Parliament LIBE Committee (Committee on Civil Liberties, Justice and Home Affairs).⁶ The Dutch Ministry of Economic Affairs uses the same number, but calls it a calculation.⁷

This estimate seems massively overstated. The OECD 2008 report says that, "to date, no rigorous quantitative analysis has been carried out to measure the overall magnitude of counterfeiting and piracy. (...) Analysis carried out in this report indicates that international trade in counterfeit and pirated products *could have been up to USD 200 billion in 2005*" (emphasis added). The OECD only provides the highest estimate.

Journalist Felix Salmon used the OECD's own data to try to come up with a realistic estimate: "If 8% of counterfeit imports are worth \$385 million, then the total value of counterfeit trade is \$4.8 billion. A far cry from \$200 billion, to be sure." Then he analyses how the OECD arrived at its \$200 billion number. He concludes: "You guess what the maximum amount of counterfeiting is in the countries where it's most prevalent, being careful to use no empirical data in the process. You then double that number, double it again, and apply it to the amount of world trade: presto, you've got \$200 billion."⁸

In 2009, the OECD published an update. Using a complicated calculation, the estimate is raised. The complicated calculation hides the fact it still is an estimate.⁹

A 2010 US Government Accountability Office report is critical about the OECD estimate: "While experts and literature we reviewed provided different examples of effects on the US economy, most observed that despite significant efforts, it is difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole. For example, as previously discussed, OECD attempted to develop an estimate of the economic impact of counterfeiting and concluded that an acceptable overall estimate of counterfeit goods could not be developed. OECD further stated that information that can be obtained, such as data on enforcement and information developed through surveys, 'has significant limitations, however, and falls far short of what is needed to develop a robust overall estimate.'

One expert characterized the attempt to quantify the overall economic impact of counterfeiting as 'fruitless,' while another stated that any estimate is highly suspect since this is covert trade and the numbers are all 'guesstimates.'"

Professor Michael Geist refers to a 1997 US Government Accountability Office report: "Second, the data contained in the GAO report suggests that the claims associated with counterfeiting are massively overstated. The Industry Committee previously heard from witnesses who noted that there have claims that 5 to 7 percent of world trade involves counterfeit products (some even argue that is growing). The GAO study points to the US Compliance Measure Program, a statistical

4 http://regnet.anu.edu.au/program/conference/papers/_PDFs/Day%202_Session%204.1_JoeKaraganis.pdf

5 <http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/>

6 <http://www.keionline.org/node/886>

7 <http://www.rijksoverheid.nl/ministeries/ez/nieuws/2010/08/26/zestig-reacties-op-internetconsultatie-acta.html>

8 <http://www.portfolio.com/views/blogs/market-movers/2007/10/26/counterfeiting-much-less-prevalent-than-you-think/>

9 http://www.oecd.org/document/4/0,3343,en_2649_34173_40876868_1_1_1_1,00.html

sampling program, that randomly selects shipments to check for their compliance with the law, including IP laws. Of 287,000 inspected shipments from 2000 - 2005, IP violations were only found in 0.06 percent of shipments - less than one tenth of one percent. This large random sample suggests that counterfeit products are actually only found in a tiny percentage of shipments. Moreover, the GAO notes that despite increases in IP seizures, the value of those seizures in 2005 represented only 0.02 percent of the total value of imports of goods in product categories that are likely to involve IP protection. In other words, the evidence from an independent, U.S. government sponsored agency points to a far different reality from that presented to the two parliamentary committees investigating counterfeiting."¹⁰

The Dutch Accountability Office is very critical about the counterfeiting numbers as well ("major shortcomings"). The Office also writes that the shortcomings are known, but still the numbers are used in public documents and for new policy.¹¹

Specifically in the context of digital copyright, there is a breadth to the academic opinion on the issue of file-sharing's impact that is not reflected in policy making. Huge economic and behavioural assumptions are used to justify the figures often cited in policy making about the beneficial effects of stricter copyright enforcement.

In 2010 SABIP (now subsumed into the Intellectual Property Office of the UK) produced a report which argued that this has not received enough attention partly because the data available tends to relate exclusively to industry revenue.¹² The report suggests that '...in order to inform copyright policy, it is not sufficient to establish that so-called 'piracy' harms existent rights holders'¹³

Loren Yager, Director, International Affairs and Trade, Government Accountability Office (GAO), in his report to the World Intellectual Property Organisation Advisory Council on Enforcement in December 2010, highlights the lack of data as the 'primary challenge for quantifying economic impacts of counterfeiting and piracy', alongside a subsequent reliance on assumptions.¹⁴

Without a detailed understanding or estimation of the impact of different sorts of sharing and copying and distribution online - establishing with some level of granularity what behaviours have what kind of consequences - we are left with figures that cannot adequately form the basis of regulation.

In summary, we would wholeheartedly agree with the UK government's Hargreaves Review which stated that:

We urge Government to ensure that in future, policy on Intellectual Property issues is constructed on the basis of evidence, rather than weight of lobbying, and to ensure that the institutions upon which we depend to deliver intellectual property policy have clear mandates and adaptive capability. Without that, the pile of IP reviews on the Government's doorstep – four in the last six years – will continue to accumulate.

10 <http://www.michaelgeist.ca/content/view/1922/125/>

11 <http://www.vrijschrift.org/serendipity/index.php?/archives/111-Algemene-Rekenkamer-cijfers-namaak-onbetrouwbaar-en-onbruikbaar.html>

12 The economics of copyright and digitisation: A report on the literature and the need for further research, Christian Handke, SABIP, 2010, p. 12. Available at <http://www.ipo.gov.uk/ipresearch-economics-201005.pdf>

13 The economics of copyright and digitisation: A report on the literature and the need for further research, Christian Handke, SABIP, 2010, p 65. Available at <http://www.ipo.gov.uk/ipresearch-economics-201005.pdf>

14 Observations on efforts to quantify the economic effects of counterfeit and pirated goods, Loren Yager, World Intellectual Property Organisations, Advisory Council on Enforcement, Sixth Session, December 2010, available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=143312

The message from the evidence is clear: policy makers do not know what they think they know about what effect digitisation is having on the creative economy.

Finally, in the drive for IPR enforcement, it is important not to “throw the baby out with the bathwater. Some research has shown that the jobs created in the luxury goods sector are supported by fake goods. In the preparation of a Harvard University study entitled "The real value of fakes: Dynamic symbolic boundaries in socially embedded consumption,” researchers interviewed hundreds of consumers who knowingly bought fake luxury apparel, many at 'purse parties' where such goods are sold. Gosline found that within two years, 46 percent of these buyers subsequently purchased the authentic version of the same product — even though other people could not necessarily tell the difference.”¹⁵ “The more information that emerges on the scale of counterfeiting, the more it seems as though it’s small and helpful, rather than large and extremely damaging.”¹⁶

An EU-funded study came to the conclusion “that buying designer goods can benefit consumers and the companies whose brands are being ripped off.”¹⁷

2.3. Legal uncertainty

An ambitious single market should provide European creators, citizens and businesses with a coherent, clear, harmonised and above all austere legal framework for IPR. A sound and coherent pruning of all forms of IP is fundamental to Europe's endeavour to fulfil the ambitions of the Europe 2020 Strategy¹⁸, the Digital Agenda for Europe¹⁹, the Single Market Act²⁰ and the Innovation Union²¹.

For intellectual property rights to act as an effective driver for high quality products and services, the legal framework must enable a maximum of availability of protected works, in the most coherent and predictable legal framework possible.

Many of the most successful recent online services are based on reasonable exceptions and limitations from copyright. However, in an environment with 15 optional exceptions/limitations implemented according to 27 different interpretations of the WIPO 3-step test, the safest approach for an European innovator is to move to the USA, take advantage of the real single market there, which employs a simpler and more coherent approach and come back to the EU once the service has developed to a stage that it can afford the court costs and unpredictable results of European court cases.

As just one case study, in the USA, network level “video recording”²² was subjected to considerable legal analysis and ultimately considered²³ to be a “fair use”, in line with the US obligations under WIPO. This immediately meant that companies innovating and developing such services which are

15 <http://gradworks.umi.com/33/71/3371273.html>

16 <http://blogs.reuters.com/felix-salmon/2009/12/06/those-weirdly-persistent-counterfeiting-statistics/>

17 <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/7969335/Fake-goods-are-fine-says-EU-study.html>

18 Europe 2020: A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 3.3.2010

19 A Digital Agenda for Europe, COM (2010) 245, 19.05.2011

20 Towards a Single Market Act, COM (2010) 608 final, 27.10.2010

21 Europe 2020 Flagship Initiative, Innovation Union, COM(2010) 546 final, 6.10.2010

22 http://en.wikipedia.org/wiki/Network_DVR

23 <http://www.reuters.com/article/2009/06/29/us-cablevision-court-dvr-idUSTRE55S38520090629>

of no independent economic significance to the rightholder had a huge single market within which to operate.

In Europe, German courts ruled that this form of copying, which is functionally identical to traditional analogue recording, is a “separate type of use”²⁴ due to the underlying technology and how it is financed. In France, the Tribunal de Grand Instance²⁵ ruled that the facts that the service was functionally identical to home video recording, that the recording was encrypted and could only be viewed by the end-user who programmed the recording were not enough for this to be considered legal under the private copying exception.

Instead, the French court ruled that the service breached copyright as the copying was done by the service provider. Meanwhile, services like TVkaista in Finland and the simialr service launched by KPN in the Netherlands wait in legal limbo, unaware of whether their de facto private copying services will be prohibited or not by their own national courts.

Why, with a Directive in place to harmonise “copyright in the information society” is this absurd situation possible? Why are there so many barriers to innovating to provide a service which the US courts have ruled does not conflict with the normal exploitation of the work and which does not unreasonably prejudice the legitimate interests of the rightholder?

2.4 The right enforcement regime

Digital technologies are helping shape a revolution in our ability to express ourselves and organise socially and politically. These benefits accrue where new technology affords relative openness and an element of anonymity, meaning people are allowed to communicate with each other without the fear that their legitimate right to do so will be interfered or punished.

An IPR regime can affect these rights in two ways – serving to simultaneously undermine freedom of speech and freedom to innovate. First, by setting overly restrictive rules on the legitimate use of content that reduce people's ability to quote, comment or critique. Second, through IP enforcement measures that actively disrupt the new infrastructure of communication in detrimental ways.

Currently, many developed markets, such as the EU and US, are seeking to place obligations on internet intermediaries to establish borders and barriers in cyberspace. This is done via blocking and filtering, removal of domain names and other technical measures. Such approaches fundamentally undermine the openness that gives the Internet its value for both fundamental rights and for the economy. Most importantly, the model being proposed puts control in the hands of private companies – meaning that protectionist and anti-competitive activities resulting from either the commercial motivations of the intermediaries themselves or their governments would be much more difficult to fight through normal international trade law.

Furthermore, it is important for the European economy to develop a harmonised and effective approach to exceptions and fair use. The vast majority of such uses have no meaningful consequence for the revenues or economic interests of the rights holders, in line with the “WIPO three-step test”. However, as shown by services such as Google News, they have tremendous potential, both economically and in the provision new services to consumers. As demonstrated by the recent case in the Belgian courts involving Google News²⁶, where newspaper publishers successfully sued for infringement – having themselves failed to employ a simple industry standard

24 <http://merlin.obs.coe.int/iris/2011/2/article19.en.html>

25 <http://www.webmediastategies.com/catch-up-pvr-ou-npvr.htm>

26 <http://recent-ecl.blogspot.com/2011/05/quoting-online-equals-plagiarism-google.html>

technology to prevent their content from being indexed and despite the fact that, in almost all cases, the activity by Google was of not conflict with the normal exploitation of the work and did not prejudice the legitimate interests of the rights holders.

The second challenge is to establish the limits of IPR enforcement. Until the digital revolution, it was a relatively simple matter to manage the infringement of IPRs without damaging the infrastructure of communication itself. To prevent newspapers or creatives violating IPRs, one did not need to tamper with printing presses or recording studios. Thus the benefits of widened access to the means of communication were not risked by rules governing IPRs.

However, in the digital age there is a risk that enforcement of IPRs affects the infrastructure of communication itself. Interferences with the IP addressing system, domain name system, routing system and Internet intermediary infrastructure creates enormous risks for the open nature of the Internet itself, to the detriment of the economy and freedom of speech. This is especially problematic where the EU campaigns to export such measures where those techniques are used in the service of violent repression. There is a danger that the EU will place itself on the wrong side of history in missing that their policies on regulating the Internet will materially affect the openness that might help drive unprecedented movements of democratisation.

3 KEY POLICY INITIATIVES TO MEET THE CHALLENGES AHEAD

3.1 Optimising the EU's legal framework for IPR

In the digital environment, the most important issue currently facing the EU's legal framework is a fundamental problem with the credibility of intellectual property in the eyes of consumers. This is borne out by the Commission's assessment in its report on the application of intellectual property rights (SEC(2010)1589 final), where it described “ubiquitous” copyright infringements. It is crucial to understand that, when disrespect for a law reaches the level of “ubiquitous”, repressive measures will be more likely to further undermine the credibility of the law.

The task therefore is to develop an IPR strategy which promotes innovation and erodes the illegitimacy from which the legal framework currently suffers. Expanding innovation increases the range and usability of legal offers, legitimising the legal framework and removing the excuses that citizens currently have when breaking the law.

3.2 Reform of the patent system in Europe and accompanying measures

3.2.1 A unitary patent protection

Economists have become increasingly sceptical of the economic benefits of patent systems, suggesting that their propensity to increase incentives for innovation is more limited than was thought in the late nineteenth century when the groundwork for the current patent system was laid²⁷.

Furthermore, no patent office in the world has been able to solve the bad patents problem. It is too

²⁷ See for example Bessen, J. And Meurer, M.J. (2008), Patent Failure, How Judges, Bureaucrats and Lawyers Put Innovators at Risk, Princeton University Press, 315 pp.

expensive as Patent offices are, almost by nature, “rationally ignorant”, because strengthening the examination process is not cost effective. This leads to the granting of bad patents. The software field suffers particularly in this regard.²⁸

"We are the constant target of patent lawsuits, many of which are frivolous and more than half are filed by non-practicing entities," according to Mike Holston²⁹, general counsel of Hewlett-Packard.

"We find ourselves in a situation with more patent infringement suits than ever before and each one costs as much as \$4 million," John Thompson, chief executive of software developer Symantec.

Patents create a legal minefield in the software development field. The issues are not limited to software, but the software field provides excellent examples of patent absurdities. Software is full of ideas, and consequently and unfortunately, full of patents. One third of all patents are computer-related nowadays. All software developers ignore software patents to some extent, simply because every single useful program that is written will infringe on several patents. Software patents hamper competition and, consequently, innovation and interoperability. They cause legal uncertainty and high transaction costs.

The situation is abused by patent trolls. They acquire patents at low cost, for instance by buying bankrupted companies. Their patents tend to have broad claims on trivial methods so that infringement is unavoidable. Then they extort entrepreneurs. It is not possible to retaliate against them. As they do not produce anything, they do not infringe themselves. In the US, even major companies, owning huge patent portfolios, want patent reform. They wish to limit the number of patent infringement cases and damages³⁰. Pharmaceutical companies oppose this.

3.2.2. A uniform patent litigation system

The problems described in the previous section are manifest in the U.S. There is no EU wide litigation in Europe. Once the EU adopts EU wide litigation (the Union patent), patent litigation may become more popular in Europe. We may see, in the ICT sector, the same patent litigation battlefield in Europe as in the United States. This will be harmful for European SMEs.

Hewlett-Packard holds about 30,000 patents and is granted an average of four every day. With lower damages, trolls and small sized companies cannot hurt HP, while HP can still strike against smaller competitors. A limited reform helps major companies, not small and medium sized companies, which are very innovative and provide for much employment.

The IPR Enforcement Directive's high damages, injunctions and ex parte measures result in the overcompensation of patent owners relative to their inventive contributions to society. Holders of huge patent portfolios may decide to eliminate competition from startups, small and medium sized enterprises and open source projects, on their own, or by using a proxy, a patent troll. Patent trolls acquire excessive power.

ACTA's heightened measures will only make this worse.³¹

3.2.3. The effects of IPR enforcement on access to medicine

Prior to the 1994 WTO TRIPS agreement, Europe and the United States could develop their own economies with low intellectual property (IP) rights protection. For instance, the Netherlands abolished patents in 1869, and did not reintroduce them until 1912.

28 <http://www.law.stanford.edu/publications/details/2701/Rational%20Ignorance%20at%20the%20Patent%20Office/>

29 <http://www.eetimes.com/showArticle.jhtml?articleID=215800319>

30 <http://www.patentfairness.org/>

31 https://action.ffii.org/acta/Analysis#Remove_patents_from_ACTA

The TRIPS agreement changed this. It forced developing countries to adopt US-style protection and enforcement of intellectual property rights. The world wide enforcement of IP rights created a money flow from poor to rich and limits access to medicine in developing countries.

In the 1990s, AIDS took millions of lives in Africa. Pharmaceutical companies only served the upper side of the market, for prices even higher than in the US³². In 1997 President Mandela of South Africa signed a law to ensure the supply of affordable medicines. The US and the EU started to pressure South Africa. The US prepared trade sanctions. 41 Pharmaceutical companies sued Mandela. But public outrage over what was happening forced companies and governments to withdraw.

Ultimately, this led to the Doha Declaration on the TRIPS Agreement and Public Health, WTO, 2001, a declaration that affirms the right of developing countries to protect the health of their populations. Since then, there is a pattern of “efforts to confuse the IP issues with those of substandard or spurious medicines”³³ taking place at a number of international fora, according to Indian Ambassador Ujal Bhatia.

In 2008 and 2009, claiming to follow EU rules, Dutch customs seized essential medicines. Generic AIDS medicine not patented in the country of origin (India) or the country of reception (Nigeria) was seized while in transit in the EU.³⁴ After these seizures became front page news, the then Dutch Minister for Development Cooperation Bert Koenders said that the EU rules have to change.³⁵

This statement was welcomed by many. But the EU is still exporting in-transit border measures in free trade agreements, like the EU – South Korea FTA. Similarly, there are access to medicine problems in ACTA and in other trade agreements, notably with the EU - India FTA.

Pharmaceutical companies try to minimize the effects of the Doha Declaration. They try to overextend the definition of counterfeiting. They try to label generic medicine as counterfeit. The EU customs regulation and the EU IP Enforcement Directive (IPRED) do not make a distinction between counterfeiting and other infringements. This led to the "Dutch seizures" of essential medicines, meant for developing countries. Likewise, music companies try to blur the definition of commercial scale, in order to criminalise non-commercial behaviour. We witnessed this in the European Parliament first reading plenary vote of the EU criminal measures IP directive proposal (IPRED 2) and again in ACTA.

Recent price cuts of patented medicines by various European governments, the lack of important innovation and the growing burden of medicines on national healthcare budgets make it clear that the current model for biomedical innovation is unsustainable and inefficient, both for developing countries and for EU Member States, increasing the calls within EU for new models of medical innovation.

The problems with patents are manifold. Higher quality patents are not enough; the scope has to be limited appropriately. Competition has to be stimulated. ICT standards have to remain free of patents. In many cases, compulsory licences have to be available. Enforcement has to be proportionate.

Appropriate exceptions and limitations in cases regarding access to medicine are needed. Further tools include Medicines Patent Pools and Innovation Inducement Prizes that de-link the cost of R&D from the price of products, in order to increase access to medicines for patients living in Europe and developing countries.

32 Drahos, P., with Braithwaite, J., Information Feudalism, Who Owns the Knowledge Economy?, Earthscan Publications Ltd, 2002 <http://cgkd.anu.edu.au/menus/PDFs/Information%20Feudalism.pdf>, page 6,

33 <http://www.ip-watch.org/weblog/2010/05/12/counterfeit-medicines-in-wto-dispute-process-heating-up-at-who/>

34 <http://www.ip-watch.org/weblog/2009/06/05/drug-seizures-in-frankfurt-spark-fears-of-eu-wide-pattern/>

35 <http://www.idafoundation.org/we-inform/news/single-news/news/response-mr-koenders-at-recent-seizures.html>

3.3 Modernisation of the trade mark system in Europe

Only fraudulent imitations should be regarded as counterfeiting, like fake Gucci handbags (a trade mark infringement). Ambiguous cases of trademark confusion are not counterfeiting, they do not involve fraudulent imitation.

There may be a legitimate call for fraudulent imitations of other rights to be called counterfeiting too. Say a fraudulent imitation of a wine, protected by a Geographical Indication. But patent infringements are never so clear that they can be legitimately called counterfeiting. They do not involve fraudulent imitations.

The Max Planck Institute (MPI) stated for the proposed IPRED 2 (Criminal Sanctions) Directive to be proportionate, it would be essential to define the qualification characteristics of the elements of a crime as clearly and narrowly as possible. Proportionality is a *conditio sine qua non* for EU legislation (art. 5 TEC). At the bare minimum, "infringing item", "commercial scale" and "intentional infringement" have to be clearly defined. The "infringing item" has to be a look alike (identity, sameness).³⁶

Likewise, without such narrow definitions, harsh civil and administrative measures are disproportionate too, as they hurt legitimate business competitors as well.

Parallel importation

Parallel importation does not involve copying at all: genuine products are sold after being imported from a country where they are already being offered to the public. Parallel importation is not counterfeiting.

A vicious circle

Professor Annette Kur³⁷, Max Planck Institute, Munich, in the same presentation: "Lastly, some rather 'incorrect' thoughts... The modern plagues of counterfeiting and piracy did not come out of nowhere – to some extent, they are rooted in the development of IP protection itself. The wider the gap becomes between production costs and the gains achieved by protected items, the more illegal copying it will attract. If rightsholders are compensated for their losses by granting ever stronger rights, also the attraction will increase, and so on. It is doubtful whether imposing (ever more) drastic sanctions is able to break the vicious circle – experiences in other areas tell a different, sad story.

What to do? It is unlikely that the battle against infringement in general, and counterfeiting in particular, will be won by deploying more, and harsher sanctions. It is at least equally important that the IP system as such re-gains general acceptance and approval. Contrary to what is often held, this is not just a matter of 'education' – it might mean that the system has to change. Apart from that, serious crimes such as making and selling fake inefficient or hazardous medicaments should be targeted for what they are – not (primarily) as IP infringements, but as criminal acts jeopardizing public health and safety."

Fight dangerous products, not counterfeiting

Combatting risks for public health is not primarily an IP issue. Resources are limited, especially in developing countries. Developing countries are better off with a focus on fighting dangerous products, whether IP rights are involved or not. Up to 80% of the active ingredients in US drugs

36 http://www.ip.mpg.de/shared/data/pdf/directive_of_the_european_parliament_and_of_the_council_on_criminal_measures_aimed_at_ensuring_the_enforcement_of_intellectual_property_rights.pdf

37 http://www.se2009.eu/polopoly_fs/1.28342!menu/standard/file/Kur%2C%20Max%20Planck.pdf

are now made overseas, many in countries where regulatory oversight does not meet US standards. Developed countries too may be better off with a focus on fighting dangerous products, whether IP rights are involved or not.

Trade marks are private rights

Trade marks are private rights, no public resources should be spent enforcing them beyond the means the private law system already grants to rightsholders. Civil and border measures should be proportionate to the public interest in having an adequately working trade mark system.

3.4. Creation of a comprehensive framework for digital copyright

EDRi is of the opinion that the digital environment has changed the playing field profoundly. Both the production and dissemination of culture have fundamentally different cost structures than they used to have before the advent of digital technology. The profoundness of this change notwithstanding, the disconnect between information and its carrier was to a certain extent foreseen even in the nineteenth century through the notion of the *corpus mysticum* in copyright law literature.

As such, we resent the notion of a 'digital copyright'. There is just copyright and due to the opportunities digital technologies provide, there is a lot of room for improvement of copyright. If anything, the tendency has been so far to treat digital works as something special. For example through the exceptionally strange notion of 'intended use' in the Directive on the Legal Protection of Computer Programs (2009/24/EC) and that of circumvention of copy-protection measures in the Copyright Directive (2009/24/EC).

A comprehensive framework on copyright in the digital context would if anything not extend copyright with fundamentally alien notions to placate special interests, but would embrace the opportunities digital technology give that warrant a reduction of the scope of copyright. One of the fundamental notions of copyright is the perceived risk of underproduction of cultural works in the face of not having the legal means to recoup an investment made. Now that digital technology is reducing the investments needed for the creation of new works, this notion applies to a lesser extent in the digital environment.

Furthermore, given the convergence of media in the digital environment, a comprehensive framework should apply the same exceptions to all works - for example the right to transform a software program for private use or the right to quote a work that has technological measures to prevent its copying in place.

3.4.1. Fair use and the limits of IPRs

Digital goods in the creative economy have competing roles as both economic and cultural or knowledge 'goods', facilitating democratic conversations, economic innovation, and scientific collaboration.

There should be a renewed commitment to the copyright exceptions that permit the fair reuse of culture and information, and how those exceptions are exercised in practice.

These exceptions do not only bring softer benefits such as rights that create a greater environment for democratic expression. They bring economic benefits when follow-on innovators are encouraged, educational and research benefits where researchers' ability to analyse content in new ways is permitted, and social benefits where people with accessibility issues are allowed to transform works to make them, for example, more easy to read.

Copyright exceptions establish the rights of creators, commentators, satirists, amateurs, citizens and innovators. There is a need for a renewed commitment to copyright exceptions that permit fair

dealing of copyrighted works. In a media saturated world the images, sounds and text shared in digital form are the currency of our conversations about the world. Some of these exceptions can be seen as the right to freedom of expression and access to knowledge manifested as checks against the economic right to restrict that access.

Currently there are two main problems with exceptions in the EU. They are not universally adopted, and they have not kept pace with technological change.

At the moment EU copyright flexibilities are not mandatory. This creates unnecessary differences between member states and limits growth of startup companies. One of the consequences of this is, for example, to limit the growth of startup companies. EU copyright flexibilities should be made mandatory, moving away from the current situation where Member States have a the option of imposing none, all or some of the exhaustive list of exceptions drawn up at the end of the last century.

Furthermore, some of the United States' most successful new companies are based on 'fair use' of copyrighted material. The European system of fixed and optional exceptions is not flexible enough in a rapidly changing world. European startup companies should have the advantage of such flexibility too. The EU should ultimately aim to introduce an open norm such as a fair use system. Recently, the Dutch³⁸ and Irish³⁹ governments also expressed a willingness to implement such an approach.

Fair use would be an appropriate implementation of the EU proportionality principle. Furthermore, a strong fair use and a reverse Berne's Three-Step Test could provide a solution for many problems in the copyright field.⁴⁰ The EU must look at the options for expanding the scope of exceptions either through the development of a general 'fair use' rule or, following the findings of the UK's IP review, a further exception that facilitates similar kinds of technological innovation.

Orphan works, access to knowledge and the public domain

There has been a welcome focus on finding a solution to the problem of 'orphan works' – work whose IP owners are not traceable and so which sit locked away, unavailable to the public. A significant amount of material currently exists in this cultural black hole and solving this problem is a matter of priority.

Open access and the public domain should be explicitly recognised in any sound IPR strategy. Such a strategy would promote open access policies, both within the EU institutions as well as in the member states. Furthermore, the value of the public domain should be made an explicit cornerstone of any policy formulation within the Commission.

3.4.2 Proportionate enforcement

There is little chance of taking reasonable steps to legislate for the digital economy without a proper understanding of the nature and effects of digitisation on creativity and the creative industries. Without such an understanding unproven assumptions are made about what kind of enforcement is appropriate and what might 'work'.

Without this there is little basis for policy judgements that involve the weighting of various rights.

38 <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2011/04/11/speerpuntenbrief-auteursrecht-20-20/5692923-tk-def-2.pdf>

39 <http://www.techdirt.com/articles/20110509/10383514212/ireland-looks-to-add-fair-use-to-copyright-law-this-is-seen-as-radical.shtml>

40 See “Towards A New Core International Copyright Norm: The Reverse Three-Step Test – Daniel J. Gervais” http://works.bepress.com/daniel_gervais/1/ and “Charter for Innovation, Creativity and Access to Knowledge” (Legal Demands, under F) http://fcforum.net/charter_extended#legal

The consequence of this failure is an overly zealous approach to enforcement that is pushing Internet Service Providers towards a position of law enforcement, creating dangerous censorship precedents, and actively impinging on people's right to privacy. This, for little or no proven gain.

Types of infringement are not disaggregated, and there is a failure to undertake distinct critical analyses of each IPR. That leads to a one-size-fits-all approach to enforcement.

Little attempt has been made to establish the different types of infringing behaviour – personal, creative, commercial, non-commercial – and the relative effects of them. All sorts of counterfeiting, sharing and minor infringements are often conflated.

Policy has taken refuge under the catch-all term 'Intellectual Property Rights' and largely ignored differences in the nature and scale of each IPR challenge. That means that issues that are materially distinct in nature and size are dealt with in much the same way.

Counterfeiting is markedly different to forms of online infringement. The former is more likely to involve criminal networks, dealing in physical goods, exchanging money. The latter is more likely to involve myriad forms of behaviour by individuals that can range from sending files to friends using 'cyberlockers', downloading an album, or a movie, through to remixing and sampling. Many forms of infringement lie between those two ends of the spectrum. But that spectrum is sufficiently broad to demand more targeted policy responses than the Directive currently offers.

Safeguarding Europeans' rights

There are two current strands to the EU enforcement strategy, both of which are ill-advised and will bring serious unintended and damaging consequences. The first is the move to push enforcement responsibility to ISPs.

The EU has been actively pursuing content blocking proposals for some time. This would leave decisions about what people are allowed to see and do online in the hands of private companies. It is unlikely to work on its own terms and assumes a perfect overlap between actions taken in the interests of private companies' search for legal certainty, IPR enforcement and the public good. The ultimate affect will be disruption to legitimate traffic and a precedent that censorship as a strategy to combat wrongdoing – rather than the pursuit of those doing wrong – is acceptable. This is particularly dangerous given the censorship aspirations of many territories around the world. The pursuit of blocking in the EU significantly undermines the moral force behind complaints about censorship in repressive regimes.

This encouragement of extra-legal measures to limit access to information, proactive policing of the Internet and the exclusion of law enforcement authorities in investigating serious crimes are factors that contribute to the weakening of the rule of law and democracy.

While these appear to be regressive steps away from freedom the European Commission appears far from perturbed by the dangers for fundamental rights of this approach and appears keen to export the approach.

There is also a move to rebalance rightsholders' right of information with citizens right of privacy. Any such move should be backed by robust evidence that there is currently an imbalance to be solved. Looking at the recent consultation on a proposed revision to the IPR Enforcement Directive, it is quite clear that no such evidence is available. To the contrary, there is plenty of evidence that it is in fact the right of privacy needs greater respect in the balance with the right of information.

Key evidence of the effects of current law governing IPRs and the relationship between rights of information and privacy is the case of ACS:Law in the UK. It is an example of the finest order of why the balance between privacy and the right of information needs to be got right, and be respected –and not readjusted in favour of the right of information at the expense of privacy.

In recent years there have been several large-scale “speculative billing” campaigns. In many cases these have been prosecuted by solicitors' firms enjoying a share of the profits or by companies set up for the purpose, rather than copyright owners.

Typically such law firms have written to individuals whose details they have obtained through 'Norwich Pharmacal Orders', indicating that their accounts have been used for copyright infringement. The letters tend to request that the individual pay an amount of money (typically in the hundreds of pounds) or face legal proceedings.

The letters directly claimed that the individual was responsible for their Internet connection, and that whether they themselves had carried out the infringement was not a necessary condition of their liability:

“Our client holds you responsible as the person who made the Work available to others, or by authorising others known to you to use your internet connection for a purpose that included infringement of our client's copyright, or by failing adequately or at all to secure and control the use of your internet connection to a reasonable standard so as to allow another person to use your internet connection to infringe our client's copyright. Whichever of these scenarios may apply, our client holds you directly responsible.”⁴¹

Until early 2011, ACS:Law pursued alleged file-sharers using this techniques. The scale of this action was noted with particular reference to ACS:Law by HHJ Birss Q.C. of the Patents County Court, in his ruling on February 8th 2011 in *Media CAT v Adams & others* [2011] EWPC 6 at [15]:

“Tens of thousands of names and addresses have been produced to Media CAT as a result of the 3 or 4 relevant Norwich Pharmacal orders, the earliest of which was in November 2009. There have been other similar Norwich Pharmacal orders in recent years, before November 2009, which although not sought by Media CAT have been based on the same general approach.”⁴²

Judge Birss was dealing with the 27 cases brought to court by ACS:Law in late 2010. In his ruling he was highly critical of the civil actions before him. He emphasised that they have led to significant distress and financial harm, often to innocent people:

“This court's office has had telephone calls from people in tears having received correspondence from ACS:Law on behalf of Media CAT. Clearly a recipient of a letter like this needs to take urgent and specialist legal advice. Obviously many people do not and find it very difficult to do so.”⁴³

Through these cases many innocent people have faced confusing and intimidating letters and have

41 An example letter sent by GCB Limited in December 2010 can be seen here:

<http://acsbore.wordpress.com/2011/01/13/acslaw-letters-issued-by-gcb-ltd/>

42 Ob dict by Judge Birss in *Media CAT v Adams & others* [2011] EWPC 6, para 15

43 Ob dict by Judge Birss in *Media CAT v Adams & others* [2011] EWPC 6, para 21

been coerced into paying large sums of money.

With direct relevance to the debate about rights of information and privacy rights, in September 2010 there were two significant data breaches affecting ACS:Law. Combined they revealed the details of over 13,000 individuals to whom they had written, including around 5,000 suspected of downloading adult films, covering a range of sexual preferences.⁴⁴ Also included in the leaked information were around 1,000 emails between alleged infringers of copyright and ACS:Law, and also credit card details of those who had settled with the law firm.

Our concern is that any 'rebalancing' of the related rights will lead to large lists of very sensitive information being compiled, stored and disclosed to third parties, at a time when in various Member States there are serious concerns about the efficacy of data protection oversight and enforcement.⁴⁵ This is especially fraught given that information about sexuality is supposed to be afforded extra protection.

Concerns about privacy can sometimes be mischaracterised as somewhat intangible fears about liberty. However, the breach detailed above is one example of the substantive concerns many people share about the extent to which highly sensitive information about them can be compiled, stored and simply handed to a number of third parties with minimal effort and oversight.

There is no evidence that the right of information needs to be given greater prominence in the balance with privacy. Quite the opposite, in fact.

Attempts to curb what material is available online through content blocking and the storing of alleged infringers personal data will not simply affect people allegedly infringing copyright. They will be felt by everybody.

This process is gradually strangling the openness that is at the core of the Internet. This openness has enhanced democracy, has shaken dictatorships and has boosted economies worldwide. This openness is what we will lose through privatised policing of the Internet by private companies – or for little and certainly unproven gains.

3.4.3 Private Copying

The issue of private copying is at the heart of the greatest absurdities of European copyright law. When consumers purchase a product in any other environment, they are free to do with it what they will, as long as, for whatever reason, this does not interfere with the rights of others. However, when people buy audiovisual material they are allowed to make private copies in some countries, forbidden in other countries and, in most countries are subject to untransparent levies, calculated in ways that are unclear, collected by monopolies that are uncompetitive and distributed on the basis of nebulous criteria

In the digital environment, exceptions and limitations to copyright are governed by the Directive on Copyright in the Information Society. This gives the 27 Member States a list of 15 non-mandatory exceptions/limitations to be implemented based on their 27 national interpretations of the WIPO “three-step-test”.

This creates a variety of different barriers to the supply and use of creative content in Europe.

⁴⁴ Fresh ACS:Law file-sharing list exposes thousands more, BBC News, 28th September 2010, <http://www.bbc.co.uk/news/technology-11425789>

⁴⁵ See for example 'Are the ICO fit for purpose?', Alexander Hanff, Privacy International, February 1 2011, <https://www.privacyinternational.org/blog/are-ico-fit-purpose>

Firstly, it means that citizens generally do not know what they are allowed to do with content that they purchase. For example, in some countries, private copying is allowed (with content owners being “compensated” for this by a set of untransparent levies, as in Belgium, for example) while in others, it is not (with consumers nonetheless paying higher prices for equipment to subsidise those countries with high levies, in order to keep prices broadly even across Europe).

According to one study, 73% of British consumers⁴⁶ did not know what they were “allowed” to do with music that they had already purchased. The same research indicated that a large proportion of consumers (38%) consciously break the law by copying their legally purchased music onto MP3 players. While certain politicians talk about “educating” consumers to respect copyright law, practice in the real world involves often farcical laws educating them to do the exact opposite.

If we then look at the cross-border environment in the “single market”, the situation becomes even more ridiculous. A Belgian buying a CD from UK company Play.com, for example, would be permitted to make a personal copy while a British person would not. The meaning of the exceptions/limitations regime for use of copyrighted content for creative activities, such as audio-video “mash-ups” in a social networking environment is anybody's guess. In a context where more and more Internet users are adding creative content on the Internet, this lack of clarity limits the freedoms of citizens, reduces opportunities for innovation by creative and cultural industries and undermines the perceived legitimacy of intellectual property law.

This incoherence and lack of clarity about the law means that the use of creative content for the kind of social experiences and networking is close to impossible from a legal standpoint. This also has the knock on effects of rendering the copyright legal framework essentially illegitimate in the eyes of citizens. This is an illustration of the fact that Directive 2001/29/EC creates, rather than removes, barriers to citizens' rights and the single market.

The European Commission's 2010 Green Paper on “unlocking the potential of the creative industries” correctly pointed out, “a need to recognise and support new ways of experiencing culture, which plant the seeds of curiosity, analysis and demystification for a lifelong relationship with culture”. There is, as yet, no sign of this need being addressed, let alone fulfilled.

3.4.4. Access to Europe's cultural heritage and fostering media plurality

A major and growing impediment to access to Europe's cultural heritage is the issue of the so-called orphan works. This should be resolved as soon as possible and no extension of either form of IPR should be considered from this perspective. A strategic approach might be the attachment of registration obligations to the transferrability of IPRs as well as 'use it or lose' it obligations to the transferees. Moreover, an explicit exception to any IPR for cultural heritage purposes, including the digitisation of Europe's cultural heritage is in order.

3.4.5 A review of the IPR Enforcement Directive

There are moves to reassess the IPR Enforcement Directive. European Digital Rights believes that:

- a thorough assessment of the failures of legitimacy of online intellectual property legislation is necessary before any credible new legislative or non-legislative measure on intellectual property enforcement can be proposed;
- repression, such as HADOPI, has created significant "collateral damage" for both fundamental rights and the credibility of European defence of fundamental rights (as shown

46 <http://www.consumerfocus.org.uk/policy-research/digital-communications/copyright>

by France now being the first European country on the "countries under surveillance" list of Reporters without Borders¹⁸). For practical (they risk further undermining the credibility of the legal framework) and legal (the Commission's legal obligations to respect the Charter) reasons, support for further repressive measures (either directly or via support for injunctive measures) should be avoided;

- facile statements regarding "rebalancing" of rights and imbalance must be avoided in the interest of ensuring credible and meaningful policy development;
- it is important to avoid conflating entirely different phenomena, such as manufacture and distribution of counterfeit medicines and small-scale private downloading of unauthorised music files. It follows from this that effective, logical and proportionate definitions of "commercial scale" and "counterfeit" be found to ensure that any future proposal on criminal sanctions does not cover trivial infringements;
- personal data should not be communicated except under judicial order and only to enforcement authorities. Otherwise, techniques seen in some countries that more closely resemble a "wild west" protection racket than law enforcement in a modern society based on the rule of law, are likely to multiply;
- in the interests of all of the interests at stake, a full impact assessment looking at all of these issues and explicitly respecting the Commission's own "fundamental rights checklist" is essential before any new proposal is made.

3.5. New initiatives on intellectual property

3.5.1 Observatory on counterfeiting and piracy

The European Commission needs to undertake thorough independent research on the societal effects – both negative and positive – of the infringement of intellectual property rights on the internet. The European Observatory on Counterfeiting and Piracy is not in a position to perform such analysis, as it already operates under the assumption that infringements need to be addressed without seriously analyzing the societal effects thereof (for example, the introductory text on the Commission's website reads: "the Observatory also functions as a central resource for gathering, monitoring and reporting crucial information that will improve our knowledge about the dangerous phenomenon of counterfeiting and piracy, and will allow us to target our enforcement resources").

3.5.2 Co-operation with developing and emerging countries

Piracy numbers are very high in emerging economies. The study *Media Piracy in Emerging Economies*⁴⁷ provides essential insights into the problem. *Media Piracy in Emerging Economies* is the first independent, large-scale study of music, film and software piracy in emerging economies, with a focus on Brazil, India, Russia, South Africa, Mexico and Bolivia.

The study is based on three years of work in emerging economies across the world. It finds that enforcement policies have largely failed and that the problem of piracy is better conceived as a failure of affordable access to media in legal markets:

"Media piracy has been called "a global scourge," "an international plague," and "nirvana for criminals," but it is probably better described as a global pricing problem. High prices for media goods, low incomes, and cheap digital technologies are the main ingredients of global media piracy. If piracy is ubiquitous in most parts of the world, it is because these conditions are ubiquitous."

⁴⁷ <http://piracy.ssrc.org/>

The report argues that the 'centrality of pricing problems to this dynamic is obvious, yet strikingly absent from policy discussions.'⁴⁸

The Commission sees training measures and capacity-building activities of the EU as essential in order to support developing and emerging countries in their fight against organised intellectual property infringements. But when some 90% of the people in emerging markets can only turn to illegal copies, training measures and capacity-building activities will not solve the piracy problem. Stronger enforcement will only harm people.

The Commission is willing to make exceptions for less developed countries, and only for limited issues, like biodiversity, or food security, while problems with many other issues in (large parts of) emerging economies are just as big.

This final point is particularly pressing given the precedent that such rules create for Internet policy making globally. Coupled with a desire to export IPR enforcement to third countries, there is a very real danger of crippling the Internet as a force for social and democratic progress based on highly flawed evidence of what harm infringement is doing to the EU's creative economy.

3.5.3. Protection at EU borders

Transparency and observer status for NGOs are important in international organisations, like WTO and WIPO. Policy has to be evidence based. ACTA will create a redundant international organisation, requests to include language that the ACTA would operate in an open, inclusive and transparency manner were ignored.⁴⁹

3.5.4. Access to Europe's cultural heritage and fostering media plurality

The UK Hargreaves Review observes: "At the same time, Government should take long overdue action to update copyright law in ways designed to increase consumer confidence in the way the law works. It should begin by legislating to release for use the vast treasure trove of copyright works which are effectively unavailable – "orphan works" – to which access is in practice barred because the copyright holder cannot be traced. This is a move with no economic downside."

Media plurality is stimulated by a fair use exception.

3.5.5. Performers' rights

Regarding the extension of performers' rights, the UK Hargreaves Review observes: "The Government's own economic impact assessment subsequently estimated that extension would cost the UK economy up to £100m over the extended term. One justification for extension might be that Ministers wished to afford extended copyright as a mark of respect and gratitude to artists and their families – a perfectly legitimate argument, though one that ignores the fact that very often artists' rights are owned by corporations. Independent research commissioned for the Gowers Review suggested that the benefits to individual artists would be highly skewed to a relatively small number of performers."

48 See <http://piracy.ssrc.org/about-the-report/>
and <http://www.scribd.com/doc/50196972/MPEE-1-0-1>

49 <http://keionline.org/node/962>

Artists are much better off with a better copyright contract law. The Dutch government proposes a better copyright contract law in its recent letter to Parliament⁵⁰.

4. CONCLUSIONS

It is clear, when reading the Commission's assessment of the scale of infringements in the EU and internationally, that current thinking on intellectual property has failed. Further, looking to the best available evidence, it is clear that policy reflects a mistaken assumption about what digitisation is doing and could do to the EU creative economy. Evidence does not tell us what policy suggests. Any EU strategy on IPR needs to begin with a renewed effort to collect robust, objective evidence of the role of IPRs in the digital economy.

The results of a failure to do this will be collateral damage for citizens globally as their rights are increasingly infringed by disproportionate enforcement measures and this, in turn, will further delegitimise the legal framework and encourage further infringements. Those measures put at risk in a very clear, tangible fashion the very freedoms which the Internet was supposed to afford – greater freedom of expression and greater means for democratic expression, buffered by a respect for privacy.

The result is also damage to audiovisual industries. They are given a legal framework which permits stagnation and inaction, and which criminalises their customer base, rather than encouraging and demanding innovation.

In the interests of citizens, creators and the wider economy, there is a desperate need for a fundamental re-think of the approach to creation and consumption in the digital age. Once again, we can only echo what was said clearly and unequivocally in the UK Hargreaves report:

We urge Government to ensure that in future, policy on Intellectual Property issues is constructed on the basis of evidence, rather than weight of lobbying, and to ensure that the institutions upon which we depend to deliver intellectual property policy have clear mandates and adaptive capability. Without that, the pile of IP reviews on the Government's doorstep – four in the last six years – will continue to accumulate.

50 www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2011/04/11/speerpuntenbrief-auteursrecht-20-20/5692923-tk-def-2.pdf