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“Kiss and make up? Issues and trends in the EU’s copyright enforcement policy”

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In moving forward with the Digital Single Market the European Commission has to reconcile a broad range of ideas and interests. Online copyright enforcement is a policy area where opinions are highly polarized. This paper answers two research questions: (1) what is the online copyright enforcement policy of the EU and (2) how can it be improved? For this purpose it selects two cases to analyze: the Anti-Counterfeiting Trade Agreement (ACTA) and the intermediary liability provisions in the E-Commerce Directive. The goals of the paper are to provide a comprehensive analysis of the EU’s online copyright enforcement policy in order to identify commonalities in discourses and interests, and propose ways forward for policy. Underlying the paper is the assumption that argumentations and perceptions matter. Discourses are not the only factor determining the direction of the EU’s online copyright enforcement policy, but considering the polarization of the debate identifying common understandings of policy problems and solutions is essential. Drawing on lessons learned from ACTA and the E-Commerce Directive, the paper makes four policy recommendations on online copyright enforcement. In terms of the policy making process, citizen engagement must be embraced, and willingness and trust fostered among stakeholders. There is a need to focus on fixing common problems, while acknowledging each other as active policy stakeholders and knowledge creators, being transparent, precise, and attentive to the broader picture - thereby helping construct partnerships and positive examples for the future. In terms of the policy substance, proposals should always include high fundamental rights safeguards and a critical reflection on the interlinkages with other forms of Internet governance, such as cyber-security, child protection and net neutrality. Finally the paper recommends starting where stakeholders’ views overlap most and easier gains can be found: facilitating the development of legal services and improving the functioning of copyright; clarifying the notice-and-action procedures and hosting provisions in the E-Commerce Directive; and targeting commercially infringing services. Having invested the majority of time and resources in making the market for legal services work, the remaining problems with online copyright enforcement can be tackled. Crucial in this exercise is the balance between improving the efficiency of enforcement measures, streamlining limitations and exceptions, and ensuring fair remuneration for creators.
1. Introduction

While our economy relies more on copyright for the protection of information goods, copyright is harder to enforce and loudly resisted in the digital environment. The Digital Agenda for Europe aims “to deliver sustainable economic and social benefits from a digital single market based on fast and ultra fast internet and interoperable applications” (European Commission, 2010a, p. 1). The European Commission has to reconcile a broad range of ideas and interests in moving forward with the Digital Single Market. Online copyright enforcement is a policy area where opinions are highly polarized: copyright infringers are “thieves” and copyright holders are “censors”. This paper answers two research questions: (1) what is the online copyright enforcement policy of the EU and (2) how can it be improved? The goals of the paper are to provide a comprehensive analysis of the EU’s online copyright enforcement policy in order to identify commonalities in discourses and interests, and propose ways forward for policy. The paper selects two cases: the policy-making process leading up to the rejection of the multilateral Anti-Counterfeiting Trade Agreement (ACTA) and the reassessment of the Internet intermediary liability provisions in the E-Commerce Directive. Together these cases cover both the external and internal dimensions of EU policy-making.

The main research method of the paper is argumentative policy analysis. The paper looks into material and discursive features of the EU’s copyright enforcement policy. It sketches the ecology and legacy of the policy: the legal and political conditions, the available regulatory instruments, and the market and societal context. Further, the paper draws on Maarten Hajer’s work (1993, 2002, 2006) and identifies emblematic issues, story lines and discourses in selected documents and interviews. The analyzed documents include the official ACTA text, speeches, press releases and studies published on this topic in the European Union between May 2011 and July 2012. The expert interviews were conducted with EU policy makers, representatives of the creative industries, Internet industries and civil society in January and February 2013. The interviews pertain to their views on ACTA, the intermediary liability provisions in the E-Commerce Directive and ways forwards in online copyright enforcement. Stakeholders’ own views are particularly important in this paper. Underlying the paper is the assumption that argumentations and perceptions matter. Discourses are central in the creation and representation of meaning. They are not the only factor determining the direction of the EU’s online copyright enforcement policy, but considering the polarization of the debate identifying common understandings of the policy problems and solutions is essential.

This paper pins down what the EU’s online copyright enforcement policy is (sections 2 through 4: context, ACTA and E-Commerce) and what stakeholders think it should be (section 5: argumentative policy analysis).

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1 This paper contains the preliminary analysis of research conducted in the framework of a PhD on EU online copyright enforcement. The author has sought to be as accurate in her representation of stakeholder views as possible and apologizes sincerely for any unintentional errors. All comments for improvement or correction are welcome at trisha.meyer@vub.ac.be.
2 The author thanks Leo Van Audenhove for his comments and Ines Kefel for her help with this paper.
3 In March 2013 the argumentative policy analysis will be expanded to include stakeholder responses to the European Commission 2010 Public consultation on the E-Commerce Directive, in particular to those questions concerning intermediary liability. Relevant documents on intermediary liability published by EU policy makers will also be taken into account.
5: polarization). Building on this material and discursive analysis, it draws lessons from the past and works towards reconciliation (section 6: ways forward).

2. Context: Ecology and legacy

The most relevant EU laws on online copyright enforcement are the Directives on Copyright in the Information Society (European Parliament & Council, 2001), IPR Enforcement (European Parliament & Council, 2004) and E-Commerce (European Parliament & Council, 2000). The Copyright in the Information Society Directive builds on the WTO TRIPS Agreement (1994) and the WIPO Internet Treaties (1996a, 1996b), translating existing economic rights to the Internet and introducing anti-circumvention rules for technological protection measures. It also includes an open list of exceptions and limitations, whose transposition has differed widely between member states and been a major source of contention (van Eechoud, Hugenholtz, Guibault, van Gompel, & Helberger, 2009). Then in 2004 the European Union addressed the issue of infringement with the IPR Enforcement Directive. This directive deals with the civil enforcement of intellectual property rights. Follow-up proposals for legislation on criminal measures (European Commission, 2005) proved too controversial and were finally withdrawn in 2010. Further the limited liability provisions in the E-Commerce Directive (European Parliament & Council, 2000) have been key for copyright enforcement on the Internet. Articles 12 through 15 of the E-Commerce Directive stipulates that intermediary service providers (mere conduit, caching, hosting) are not liable for illegal activity or content on their networks as long as they are not aware of its presence. They do not have the obligation to monitor, but need to take action when notified of illegal activity or content on their networks.

To date there has been much litigation on EU online copyright enforcement, seeking to fine tune the transposition of these directives and grapple with the rapid pace of changes on the Internet. Two recent cases in the Court of Justice of the European Union ("C-70/10 SABAM vs. Scarlet," November 24, 2011; "C-360/10 SABAM vs. Netlog," February 16, 2012) dealt with intermediary involvement in the fight against online copyright infringement. The Belgian collective rights management society SABAM had demanded an Internet Service Provider Scarlet and a social network Netlog to monitor and filter illegal content on their networks. In both cases, the Court considered that these actions would require general monitoring by the intermediary service providers and thus breach Art 15(1) of the E-Commerce Directive. The court also pointed to the necessity to strike a fair balance between intellectual property rights and fundamental rights, such as the freedom to conduct business and the rights to data protection and to receive or impart information (Van Asbroeck & Cock, 2012).

The most common regulatory means on EU online copyright enforcement are directives, green papers, communications and stakeholder dialogues. After the adoption of the aforementioned directives, policy initiatives at a European level seemed to focus more on informal policy making - with the notable exception of the legislative proposal on criminal enforcement. In 2010 the European Commission started looking into possible reviews of the IPR Enforcement and E-Commerce Directives. Concerning ACTA, it is good to clarify that trade agreements do not follow the ordinary legislative procedure in the European Union, which means the role of the European Parliament was limited. Until the Lisbon Treaty entered
into force, the Parliament had no say at all in trade agreements. As is it could not amend ACTA, but its consent was necessary for ratification of the treaty by the EU and its member states (European Parliament, 2012; European Parliament & Council, 2010, Art 289(2)).

The European Commission (2010b)’s European Competitiveness report highlights that the creative industries account for 3.3% of the total EU GDP and 3% of the EU’s employment.\(^4\) The creative industries did well in the period 2000-2007, with an average employment growth of 3.5% a year. The International Federation of the Phonographic Industry is optimistic that the recorded music industry has turned the corner after a shaky start in the digital environment. In their latest Digital Music Report (2013, p. 6) they share that “record companies’ digital revenues for 2012 are estimated at US$ 5.6 billion, up an estimated 9 per cent on 2011 and accounting for more than a third of total industry revenues (34%). Digital channels account for the majority of income in an increasing number of markets including India, Norway, Sweden and the US.” At the same time growth is not uniform across the creative industries. While gaming is a particularly booming industry, employment in the publishing sector has hardly changed (European Commission, 2010b). Similarly although the film industry seems to be flourishing in some markets\(^5\), its window release system is strained and the industry is not in the clear yet.

Finally it is difficult to obtain accurate data on the extent and cost of online copyright infringement. For instance figures on the scale of copyright infringement range from 28 to 95% of online music transactions (IFPI, 2009, 2012) and from 30 to 80% for online audiovisual and film transactions (European Commission, 2009). The cost of copyright infringement per annum has been estimated globally at $6.1 billion for the film industry, but $63 billion for the software industry (BSA, 2012; US Government Accountability Office, 2010). Although the exact magnitude of the problem is not known, it is generally accepted that copyright infringement leads to a significant economic loss for the creative industries. Current challenges in the creative industries are not due to online copyright infringement, however. The transnational nature of digital media use has accentuated some of the inefficiencies of copyright and differences between copyright laws. Licensing is complex and indeed has hindered the development of new business models. There are also many new grey areas in use, as the litigation on intermediary liability shows. For most creative industries there is still a rapid pace of change in business models (Searle, 2011). New markets have developed, but equally new competitors have arrived and existing stakeholders’ roles are challenged and changing.

This outline of the ecology and legacy of online copyright enforcement has provided a first brief analysis of what EU online copyright enforcement policy is. The following two sections look further into two recent policy initiatives: the Anti-Counterfeiting Trade Agreement (ACTA) and the intermediary liability provisions in the E-Commerce Directive.

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\(^4\) The European Commission's definition of creative industries is broad, including not only traditional media industries such as the press, radio, television, film, music, gaming, publishing, performance, and more, but also professional services such as advertising, architecture and design.

\(^5\) For instance, in France more than two million box office tickets have been sold per annum for the last four years.
3. Anti-Counterfeiting Trade Agreement: IPR enforcement

The history of the Anti-Counterfeiting Trade Agreement (2011 Accession Ongoing) is well known. Formal negotiations on ACTA started in June 2008 and ended in November 2010. The final text on ACTA was published in May 2011. Throughout the negotiations, the European Union was represented primarily by DG Trade and its member states. In December 2011 the Council of the European Union adopted the convention unanimously. Quickly thereafter, the European Commission and twenty-two of its member states signed ACTA in January 2012. In the weeks before and after the signature of ACTA, citizens in Europe took to the streets to protest against the trade agreement. As a consequence, European Commissioner for Trade Karel De Gucht announced his intention in February 2012 to request an opinion from the Court of Justice of the European Union on ACTA’s compatibility with the European Treaties, in particular with the Charter of Fundamental Rights of the European Union. Nonetheless citizen and civil society mobilization continued, notably through use of social media and emails. In July 2012 the European Parliament rejected ACTA, denying its consent and prohibiting its ratification by the European Union.

Stakeholders Active on ACTA in the EU

In favor of ACTA

• Council of the European Union
• European Commission
• European Parliament, European People’s Party (EPP)
• Intellectual Property Rights Holders (coalition 130+, May 2012)
  ‣ Industry associations in apparel & textile, audiovisual, automobile, commercial broadcasting, cosmetics, music, publishing, software, sporting goods, toys such as IFPI, MPA
  ‣ Industry coalitions for brands and trademarks such as INTA, ECTA - European Communities Trade Mark Association
  ‣ Industry coalitions against counterfeiting and piracy
  ‣ International Chambers of Commerce such as ICC-BASCAP

Against ACTA

• European Parliament, Progressive Alliance of Socialists and Democrats (S&D)
• European Parliament, Alliance of Liberals and Democrats for Europe (ALDE)
• European Parliament, Greens/European Free Alliance (Green/EFA)
• European Parliament, European United Left - Nordic Green Left (GUE-NGL)
• Internet Industries (ECTA - European Competitive Telecommunication Association, ETNO, EuroISPA, GSMA Europe)
  ‣ Industry associations of fixed and mobile telecoms operators, ISPs and cable companies
• Civil Society (coalition 50+, July 2012)
  ‣ Civil rights organizations & associations such as Article 19, BEUC, Oxfam International
  ‣ Digital rights organizations & associations such as EDRi, Internet Society, La Quadrature du Net, Open Rights Group

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6 The member states of the European Union negotiated section 4 of ACTA on criminal enforcement.
7 Cyprus, Estonia, Germany, the Netherlands and Slovakia did not sign ACTA.
8 It should be noted that many representatives of the creative and Internet industries did not take a formal position on ACTA, preferring no or minimal involvement.
Free and open source software organizations & associations such as FFII
Others such as the International Association of IT Lawyers (IAITL), the Association for Arts and Media (Constant), Reporters Without Borders

Opinions on ACTA
• European Parliament, Legal Service
• European Data Protection Supervisor
• European Economic and Social Committee
• European Academics (coalition 175+, February 2011)
  › Opinion drafted by Robert D’Erme, Christophe Geiger, Henning Große Ruse-Khan, Christian Heinze, Thomas Jaeger, Rita Matulionyte & Axel Metzger
  › Study commissioned by EP Committee on International Trade, Ansel Kamperman Sanders, Dalindyebo Bafana Shabalala, Anke Moerland, Meir Pugatch & Paolo Vergano
  › Study commissioned by EP Greens/European Free Alliance, Douwe Korff & Ian Brown
  › Study commissioned by EP Greens/European Free Alliance, Sean Flynn & Bijan Madhani
• Organization for Security and Cooperation in Europe, Representative on Freedom of the Media

The box above lists stakeholders who took an active position on ACTA in the European Union. What follows is an overview of the main arguments for and against the controversial convention.

ACTA is a trade agreement aiming at enhanced international cooperation on IPR enforcement. The preambles to the convention point to the necessity of IPR enforcement for economic growth, the financial harm and barriers to trade inflicted by IPR infringements, the links to organized crime and risks to our health and society (Anti-Counterfeiting Trade Agreement, 2011 Accession Ongoing). Indeed stakeholders in favor of ACTA argued that the trade agreement protects industries and jobs dependent on IPR and that its adoption ensures the EU’s competitiveness abroad. The Motion Picture Association (2011) stressed that “intellectual property theft on an unprecedented, global scale is depriving creators and copyright owners of the return they deserve on their massive investments of creativity, expertise, and hard work, undermining the creative sector in every country”.

In addition to praising the value of ACTA, proponents were also keen to address widespread criticisms of ACTA. They emphasized that the Anti-Counterfeiting Trade Agreement would not serve as a backdoor change to EU laws. In the draft opinion of the European Parliament’s Legal Affairs committee on ACTA, MEP in the EPP group Marielle Gallo (2012, p. 3) stated that “ACTA does not create new intellectual property rights for the Contracting Parties. In other words, that which is currently protected by European legislation remains protected; that which was not protected is still not protected.” Although ACTA was not as precise as corresponding international and EU laws, the intention was not to change today’s acquis communautaire, but rather to ensure high protection of rights outside of the EU. Moreover, proponents argued, the EU is bound by the Charter of Fundamental Rights of the European Union and the recent jurisprudence of the Court of Justice of the European Union on SABAM vs. Scarlet and SABAM vs. Netlog. As a consequence, ACTA should not be perceived as a threat to the freedom of the Internet or civil liberties.
In reaction to criticisms on the lack of transparency throughout the ACTA negotiations, DG Trade emphasized that member states were present and had first hand information on ACTA. Moreover at the request of the European Parliament, the Commission had pushed for the release of the draft texts on ACTA. It had also held debriefing meetings with the European Parliament and stakeholders during the negotiations and had responded to MEP’s numerous oral and written questions. Several interview respondents expressed that they felt there had not been much room to debate the merits of ACTA and lamented that many citizens’ opinions had been limited to the eight letter slogan “Stop ACTA”.

Opponents objected to ACTA’s exclusive focus on IPR enforcement. On the one hand, they argued that it was premature to negotiate a trade agreement on a topic so heavily disputed within the European Union. On the other hand, they feared that other trading partners would be forced to adopt ACTA, who do not have an IPR framework as developed and balanced as found in the EU. The European Parliament ALDE group (2012) indicated that they had “doubts about the overall effectiveness of a 'catch-all' agreement that does not include the countries that are the main source of counterfeit goods”.

Despite the reassurances that ACTA complied with the international and EU laws, many stakeholders contended that its imprecise wording and lack of specific safeguards would endanger fundamental rights, increase “privatized enforcement” by intermediary service providers, stifle innovation and hinder trade in generic medicines and seeds. Indeed the European Commission had not issued an impact assessment of ACTA, and every external opinion & study on ACTA discouraged unconditional consent to the trade agreement. The European Data Protection Supervisor (2012, p. 16) stated that, “the Agreement does not contain sufficient limitations and safeguards in respect of the implementation of measures that entail the monitoring of electronic communications networks on a large-scale. In particular, it does not lay out safeguards such as the respect of the rights to privacy and data protection, effective judicial protection, due process, and the respect of the principle of the presumption of innocence.” To illustrate, opponents had difficulties with

(a) “commercial scale” in Art 23.1 ACTA which includes “commercial activities for direct or indirect economic or commercial advantage” fearing that this would lead to a criminalization of Internet users due to the unclarity of its application in ACTA’s chapter on enforcement in the digital environment;

(b) the inclusion of all TRIPS IPR infringements (except patents and test data) under border measures which could cause the detention of generic medicines if suspected of ordinary trademark infringements;

(c) the consequences for “privatized enforcement” in promoting “cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement” and allowing parties to provide “competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement” in Art 27.3 and 27.4 ACTA;

(d) “fair process” in Art 27.2 ACTA being referred to as a fundamental principle rather than a right and legally confusing the concepts of “fair trial” and “due process”; and more.
Much criticism pertained to the chapter on enforcement in the digital environment. This led many to state that the trade agreement should have been limited to counterfeiting. Finally, stakeholders opposing ACTA resented that the European Commission and member states had skirted around the European Parliament and the traditional international forums to deal with IPR enforcement, namely the World Trade Organization and the World Intellectual Property Organization. The ACTA negotiations were perceived as being highly secretive, aiming to push higher enforcement standards on other trading partners, limit democratic participation, and favor commercial interests. La Quadrature du Net (2012)’s opinion was that, “ACTA is one more offensive against the sharing of culture on the Internet negotiated by a small ‘club’ of like-minded countries. Negotiated instead of being democratically debated, ACTA bypasses parliaments and international organizations to dictate a repressive logic dictated by the entertainment industries.” Innocenzo Genna, Public Affairs Advisor at the European Internet Service Providers Association (EuroISPA), aptly coined this lack of transparency and democratic process “the original sin” of ACTA.

4. E-Commerce: Intermediary liability

The E-Commerce Directive (European Parliament & Council, 2000) contains provisions for a periodical assessment. For this purpose the European Commission held a public consultation in 2010. Regarding intermediary liability most EU stakeholders expressed that they did not wish a review, but rather a clarification of the provisions. They felt that the directive was working relatively well and/or feared a loss of the current careful balance struck between the obligations of intermediary service providers and the ability of rights holders to enforce their rights. Kostas Rossoglou, Senior Legal Officer at the European Consumers’ Organization (BEUC), put it in the following way: “[t]o be honest, if we open the E-Commerce Directive, it is going to be pandora’s box. We are going to lose a lot of things, it is going to be a mess and we don’t know what the outcome will be. For us the holy grail are the articles on ISPs’ liability, for sure we are going to lose a lot of things.” So far four cases have been brought before the Court of Justice of the European Union concerning intermediary liability, all dealing with intellectual property rights ("C-70/10 SABAM vs. Scarlet," November 24, 2011; "C-236/08 to C-238/08 Google vs. Louis Vuitton Mattelier & Others," March 23, 2010; "C-324/09 L’Oréal vs. eBay," July 12, 2011; "C-360/10 SABAM vs. Netlog," February 16, 2012). In 2012 the European Commission held a second public consultation on notice-and-action procedures for hosting providers (Art 14 E-Commerce). They are currently completing an impact assessment to determine the appropriate scope and measure.

At a technical level, the preferred option for European Commission action is a combination of a legislative instrument and non-binding guidance. On the one hand, legislation would put down minimum quality standards for notice-and-action procedures. These could contain

(a) procedural safeguards that notices would need to be adequately substantiated and sufficiently detailed, including at least a URL, contact details and a brief description;
(b) a general principle that the content provider should be informed;
(c) a general principle of feedback to the notice provider;
(d) a general principle that the hosting provider should be able to be notified; and
a general principle of transparency about procedures; citizens should know what happens to content if the hosting provider takes it down.

Currently a directive is considered the most appropriate legislative instrument. On the other hand, the non-binding guidance could relate to

(a) a non-mandatory list of best practices, for instance, that the notice provider first seeks contact with the content provider. This can make sense for intellectual property rights, but does not seem appropriate for child pornography. Another best practice could be that access is disabled rather than removed; and

(b) a clarification on the E-Commerce Directive, in particular what hosting is and what factors should be taken into account to determine whether a hosting provider acted expeditiously.

Here a communication is considered the best option. It is important to note that these proposals have not yet been subject to a Commission inter-service consultation and consequently are not certain.

The undercurrent discussion of intermediary liability, which is avoided in this reassessment of the E-Commerce Directive, is who should be responsible for illegal content and what role service providers should play. Rights holders point to the possibilities for technical intervention and to revenues gained through the volume of illegal traffic exchanged on service providers’ networks. However increased enforcement by private actors on the Internet is seen as potentially harmful to fundamental rights and freedom on the Internet. This concern resounded clearly in the external opinions and studies on ACTA. Civil and digital rights groups are wary of what they call “privatized enforcement” or “Internet policing”. Joe McNamee, Executive Director of European Digital Rights (EDRi), contends that there is a push to “privatized enforcement” in international customary law, such as ACTA, but also across sectors in terrorism, child protection and intellectual property rights. The danger of delegating enforcement to intermediaries is a lack of evidence-based analysis, procedural safeguards, transparency, and checks & balances. Moreover for Konstantinos Komaitis, Policy Advisor at the Internet Society, a crucial point with this type of enforcement relates to the costs that service providers have to incur, and more importantly whether these are ultimately borne by Internet users. He stresses that the Internet should be accessible and cheap, and that measures seeking to address issues of Internet governance, including those of intellectual property, should respect the open architecture of the Internet and encourage “innovation without permission”. Innocenzo Genna (EuroISPA) agrees, further stressing the freedom of service providers to conduct business and the necessity to distinguish between access and hosting providers. He clarifies that spam is a hosting activity and that filtering at the level of access providers is neither technically feasible nor desirable. Stakeholders must be aware that any technical measures imposed will at the same time affect economics and democracy.

The following section draws on these two policy initiatives to elucidate the polarization between stakeholders on online copyright enforcement, but with the clear intention to draw lessons from the past and work towards common discourses and interests. The paper ends with this author’s modest recommendations on ways forward in online copyright enforcement to the benefit of all stakeholders involved.
5. Polarization: Copyright versus the Internet?

"The things are what they are. You have to choose to be on the side of those who are heard. Those who are heard are the ones with extremist positions. That is the way of the story. But in fact that is the reason why we do not progress."

Edouard Barreiro, Former Director of Public Affairs and Studies at UFC Que Choisir

"There appears to be two schools of thought being voiced: those who want to wrap themselves into emotional arguments about the principles of copyright, and then those who just want to get paid. What can be a little disturbing is that these two views are often expressed by the same person. So, when someone gets vocal on the conference circuit or blogosphere about exclusivity and moral rights, they may well also settle for a quarterly cheque from their society and not check the finer details of where their content was used and at what unit price it was licensed. I think this obscures the debate - the reality is people want to get paid for their art, and if there is no legal online business - there is nothing to licence and no one gets paid. Eight percent of zero remains zero."

Will Page, Director of Economics at Spotify

In online copyright enforcement, discourses seem to entrench stakeholders’ views rather than serve as bridges to develop common understandings of the policy problems and solutions. Cécile Despringre, Executive Director of the Society of Audiovisual Authors, deplores the current polarization. She contends that, “[w]e lost the possibility to hold technical debates. Any initiative that was taken since 2001 has become a big political debate. It was not possible anymore to hold a technical discussion. This is something we regret very much, because it has frozen all possible evolution in the sector. In the case of the audiovisual author, it is a big problem. The 2001 Directive [on Copyright in the Information Society] provided for the making available right, but because of the contractual practices in the audiovisual sector and the transfer of right to the producers, audiovisual authors do not benefit from this right.” The polarization has negatively affected the creators whom everyone seems so keen to protect. Many also state that current discussions are too simplistic. ACTA was about sound bytes, about “people voting with their tweet”. They argue that citizens should be applauded for their engagement and be encouraged to contribute constructively to online copyright dialogues. For instance, one interview respondent points out that user generated content rightly symbolizes freedom of speech on the Internet and that its value for society should be underlined. At the same time, detailed discussions are needed on how to share revenues and how to deal with infringements of moral rights, such as the use of a song in a neo nazi videoclip.

Stepping away from a heated debate seems desirable and necessary in the aftermath of ACTA. Stakeholders emphasize that online copyright enforcement is “politically toxic” at the present time. Building on argumentative policy analysis, this paper identifies overlaps in argumentations and perceptions. As the reader will tell, the list below starts with those issues on which the author believes most consensus can be found. There are irreconcilable views. They are ideological in nature and pertain to the relation between property, creativity and society. Not all divides will be closed, nor should they. However perhaps by committing to approach online copyright holistically and by focusing on common problems we can build trust and start to view each other less as adversaries.
Stakeholder Views on Online Copyright Enforcement

**Strong agreement**

- **Facilitate legal services on the Internet**
  
  According to most stakeholders, the best solution to reduce piracy is to ensure that the development of attractive and easy-to-use online legal services in the EU is not hindered. This implies a focus on reducing transaction costs, facilitating licensing and matching user demands. Stakeholders mention that legal services can compete with free when they offer a wide repertoire of content, attractive pricing, accessibility across member states, and a simple and user-friendly experience. Will Page (Spotify) stresses the importance of viewing Internet access providers as potential partners, in order to provide access to legal content through access to the network: less litigation, liability and lobbying, more of another L, legal offers. Rene Summer, Director of Government and Industry Affairs at Ericsson, states that in his view, “there is in one way less polarization, because we have both sides agreeing that legal services are important. Of course there is still polarization on enforcement. But if legal services are the common ground and more is better, then the more of it we have the less enforcement we need. I think that is the common line that is converging now. Then the question is how do we agree on legal services? If you look at the music industry in Europe, the discussion on the collective rights management directive proposal is how do we make digital multi-territorial licensing happen? Of course you have the different views of rights holders, ISPs and others on how to do it. But the fact that we have a discussion on a solution.”

- **No criminalization of Internet users; target commercially infringing Internet services**
  
  Further, there is strong consensus that everyday practices of Internet users should not be criminalized. They are the consumers of creative content. The desired focus is not to “sue teenagers”, but rather to tackle Internet services designed to infringe copyright for commercial purposes. Marco Pancini, European Senior Policy Counsel at Google, contends that, “the way we need to go is to improve the functioning of take down measures, and on the other side to try to think of what other measures, proportionate and effective, we can together think of to attack what is the driver of counterfeiting and piracy, which is the commercial exploitation. Sometimes in this debate, and also in ACTA, we lose track that this is not supposed to be a war between users and right owners. It is supposed to be a war against criminal organizations exploiting counterfeiting and piracy online.” Some stakeholders point to the links with organized crime and social abuse. Cooperation is sought with advertising and payment providers to effectively starve the services of their revenues. In this regard, Google commissioned a EDHEC study investigating potential ways forward (Manara, 2012). Burak Özgen, Senior Legal Advisor at the European Grouping of Societies of Authors and Composers (GESAC), also mentioned that societies have several endeavors in this respect, for instance in the UK, PRS for Music proposes to implement traffic-lights on search engines, in order to make it clear to Internet users which sites are legal and illegal.

**Weak agreement**

- **Streamline limitations & exceptions and enhance creators’ contracts**
  
  Many stakeholders agree that improvements can be made to the Copyright in the Information Society Directive (European Parliament & Council, 2001). On the one hand, the fragmentation of limitations and exceptions on copyright across 27 member states is perceived as a problem. Civil and digital rights organizations call for a strengthening of the provisions to more adequately balance the rights and interests of copyright holders and Internet users. Rene Summer (Ericsson) argues that copyright is spread quite thinly and has difficulty accommodating all protected forms
of creativity. He recommends considering more flexible rules for sharing of publicly financed works. On the other hand, original rights holders seek remuneration for online exploitation and an improvement in contractual practices with licensed rights holders. Fair remuneration is widely supported by stakeholders.

**Improve the efficiency of online copyright enforcement**

Although non-rights holders would prefer time and resources to be invested in facilitating legal services, most deem improvements to existing online copyright enforcement policies acceptable. As mentioned above, stakeholders agree that specification of notice-and-action procedures and clarification of the hosting provisions in the E-Commerce Directive is desirable. Some right holders point out that the intermediary liability provisions are irrelevant with regard to illegitimate services, which by definition have no intention to comply with the law. More contentious is the review of the IPR Enforcement Directive (European Parliament & Council, 2004). One interview respondent suggests that piracy is due to either lack of access to justice or lack of access to works. Rights holders underline that piracy is a major obstacle to the development of legal services. They would welcome more efficient judicial procedures to block or take down illegitimate services: faster decisions, recognition across national borders and more closely aligned rules of evidence would be helpful. Finally, civil and digital rights organizations and most intermediary service provider strongly oppose attempts to increase “privatized enforcement”. They stress that enforcement should not be used as a tool to enforce status quo interests rather than rights. Some stakeholders also argue that the causes of losses in the creative industries need to be further assessed, and that piracy is only one among several factors affecting the business models of the creative industries.

**No Agreement**

**Reduce the scope and length of copyright**

There is no consensus among stakeholders on how to stimulate creativity. Civil and digital rights organizations, such Bits of Freedom, European Digital Rights and La Quadrature du Net, seek to reduce the scope and length of copyright. Their views arise from the honest observation that online copyright enforcement legislation is out of sync with the everyday practices of Internet users. A joint press release on ACTA signed by more than 50 civil society organizations (2012) reads: “[a]ccess to and sharing of knowledge and culture are essential for building open and democratic societies. We call on European lawmakers to look beyond the rejection of ACTA and to work towards a new framework that nurtures our practices rather than destroying them, a framework fit for the digital age.” The sharing of creative works is considered beneficial to society, while copyright mainly supports the commercial interests of unadapted creative industries. One proposal is a mutualized funding mechanism for creative works. To civil and digital rights organizations, discussions on the management or enforcement of copyright are highly unsatisfactory, as the underlying problem definition is not questioned. The author of this paper recognizes that her pragmatic approach to online copyright enforcement likely does not appeal to these stakeholders, but nevertheless hopes that it might offer some acceptable ways forward.

6. **Ways Forward**

What lessons can we draw from this analysis of the ecology and legacy, recent policy developments and debate on online copyright enforcement? This paper recommends four
ways forward, pertaining to both the policy process and substance of online copyright enforcement.

In terms of the policy making process and in first instance, citizen engagement must be welcomed. Online copyright enforcement is a form of Internet governance. As Marco Pancini (Google) says, "[w]hen the Internet is put under government discussion, trade discussion or policy proposal, the user wants to have a stake. The user feels empowered because of the Internet. The Internet is a very important communication tool and media for the public. Therefore any policy process affecting the Internet, affecting the ability of citizens to express themselves, to access information, has to be transparent, has to be inclusive, has to take into consideration feedback from all the interested parties." We need to encourage involvement beyond the eight letter slogan “Stop ACTA” and listen to citizens’ expectations on Internet policy making. As long as copyright is not considered legitimate by a majority of society, increased enforcement will be virtually fruitless. In second instance, no solutions will be found if there is a lack of willingness and trust among stakeholders. Willingness and trust cannot be forced, they can be fostered by approaching the policy making process as a multi-stakeholder discussion, focusing on common problems to create partnerships and interdependencies. In this process transparency in terms of lobbying, actions and aims is key. Moreover, allegations, exaggerations, and vagueness must be avoided. Innocenzo Genna (EuroISPA) states that, "[i]f you don't explain exactly what you are doing and the scope you want to achieve, then you permit polarization against you." Being precise and acknowledging differences between, for instance types of rights holders, creative industries and funding mechanisms, can help paint a more accurate picture and bring reason to the debate.

In terms of policy substance and in third instance, stakeholders involved in discussions on online copyright enforcement need be attentive to the broader picture, both regarding the causes of change in the creative industries and the effects that existing and proposed policies have on fundamental rights and Internet governance. Piracy is not the only factor affecting the creative industries. There are multiple problems and multiple solutions. Further proposals should always include high fundamental rights safeguards and a critical reflection on the interlinkages with other forms of Internet governance, such as cyber-security, child protection and net neutrality. In fourth instance and considering the political sensitivity of online copyright enforcement, it seems wise to start where stakeholders’ views overlap most and easier gains can be found. Everyone agrees that we need to facilitate the development of legal services and improve the functioning of copyright. To reiterate some of the common arguments, this would stimulate economic growth and jobs in Europe, reduce the attractiveness of illegal services and correspond with user demand. Moreover the planned clarification of the E-Commerce Directive regarding hosting provisions and notice-and-action procedures seems desirable. A combination of a legislative instrument and non-binding guidance would create more legal certainty, while retaining the carefully sought balance in online enforcement. Further the stakeholder and policy reflections to follow the money and target commercially infringing services look promising. Here a common enemy and goal has certainly been found. Finally having invested the majority of time and resources in the development of legal services and functioning of copyright, the remaining problems with online copyright enforcement can be tackled. Crucial in this exercise is the balance between the IPR Enforcement Directive and the Copyright in the Information Society Directive, in
terms of improving the efficiency of enforcement measures, streamlining limitations and exceptions, and ensuring fair remuneration for creators.

To kiss and make up in online copyright enforcement is not easy. However neither is the EU project. Chris Sherwood, Director of Public Policy at Yahoo!, contends that in a few more years, once money is flowing digitally and content is made available digitally to consumers, this debate on online copyright enforcement will have seemed “an immense tangent, a diversion, a storm in a teacup”. It is my sincere hope to see this change happen to the benefit of all stakeholders. Let us continue, slowly but surely, to fix common problems, acknowledging each other as active policy stakeholders and knowledge creators, being transparent, precise, and at the same time attentive to the broader picture, thereby helping construct partnerships and positive examples for the future.

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