The case for creation and innovation vs. ACTA

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According to a Chinese proverb, "*when a wise man points at the moon, the fool looks at his finger*".

I thank very much the organizers of this conference to have invited me to question the merits of ACTA in the fight against counterfeiting. Yet, it seems to me a bit like discussing the merits of the finger, while we should be discussing about how to reach the moon.

What is the moon, in our case? It is innovation and creation. We are all conscious that, in a knowledge economy, innovation and creation mean intellectual, technical, cultural and commercial leaderships, that is, jobs, wealth and well-being for our fellow citizens, and even for the rest of the world.

Innovation and creation are at the heart of the Lisbon agenda. Our society, thanks to the digital revolution, is increasingly a knowledge economy. Hence, it is of the utmost importance to target our policies toward fostering of innovation and creation.

The knowledge economy differs in a fundamental way from the traditional economy. Immaterial goods are not rival: if I give you my watch, I no longer have it. If I give you an idea, you have it and I still have it.

Because of this essential difference, lawmakers have created distinct regimes. While material goods have perpetual property rights attached to them, immaterial goods receive temporary exclusion rights: after a definite period of time, all immaterial creations belong to mankind. The duration of this period defines a balance between the rights of the public and the creators' rights. The latter must thus not be seen as due rights for individuals, but as a collective trade-off. If exclusion rights do not result in an incentive, they should not be granted, nor extended, because in such a case the harm to the public is not compensated.

For instance, look at authors' rights. The European Council extended them up to 70 years after the death of the author (93/98/EEC). Do you think that rewarding someone 70 years after his death will encourage him to create? Indeed not. So, whose rights do they protect now? The rights of editors, indeed. But do you think an editor that is payed back only after one century is a good editor? Indeed not. So what?

One thing not to forget is that the amount of money one can spend in one's yearly culture budget is limited. It is even more so because of the crisis. By extending the duration of authors' rights, editors manage to keep old works out of the public domain, where they could reach the public for just print price and compete with the works they advertise. Authors that are no longer edited have no revenue, as their works are locked in editors' closets. Is this good for authors? No. Is this good for the public? Neither. Because of continuous copyright extension, no work more recent than 1921 has reached the public domain. Every time Mickey Mouse™ is about to go public domain, a new extension is voted. See you in 2018 to see what happens then.

Here comes the digital revolution. In the digital world, copies cost zero. Copying is at the heart of the digital world. When you view some webpage on your computer, the data does not disappear from the web server it originates from; it is copied from machine to machine, until it reaches your screen. Trying to forbid copy on the Internet is forbidding the Internet.

No automatic system can discriminate between a legitimate act of copying and an allegedly illegitimate one. This is why digital rights management devices, which the Parliament voted to accept in 2001 with the EUCD directive, are also a dead end.

All our devices are now digital. All of the works of which we own a copy, we digitize them, all the more doing so preserves them from the destruction of their original medium. Digitizing is preserving. Copying is even more so, because a given media can fail: a disk crash can happen. DRMs prevent users from copying, so they are circumvented. The directive you voted says this is bad, but users know it is good. Note that the EUCD directive also badly harmed interoperability, which is a key principle in the digital era, but this is another story.

Because people want to share things they like, they put digitized works on the Internet, where others can access them. Distributors say it prevents them from getting legitimate revenues. Is it true? The question is complex, but evidence shows this assertion seems to be false. Even the HADOPI, the French administrative authority in charge of tracking down file sharers, acknowledged in its 2011 report (p. 45) that users who share most are those that spend more on their culture budget. We all know this fact, since the era of the audio cassette. I am not the most qualified to discuss that matter, so I will leave it to others.

So, let us consider "the finger" again. Can ACTA impact the behavior of sharing? This question can be easily solved by answering the more general question: can any law change this behavior? The answer is: no.

Let us face facts: the closing down of MegaUpload did not result in any sales increase for legal sites. Instead, it fostered the development of several other means for sharing. Your kids will tell you more about that than me.

Hence, ACTA would be useless as far as digital file sharing is concerned. But would it be just useless, or harmful?

I developed in a previous note some arguments on the deterrent effect ACTA would have on the developers of innovative software tools and services. Providing criminal offenses for "aiding and abetting" infringements, which goes well beyond the *acquis communautaire*, can be used in many harmful ways, for instance against websites leaking documents on the misbehavior of some corporation. It enables private censorship without any prior decision of justice, at the detriment to freedom of expression and communication. Indeed, it places technical providers in an unbearable position as private censors: they become liable if they do not do it, and also liable if they do it and are sued back. In psychology, it is called a "double bind", and makes people go crazy.

In the US, they found a solution: new planned laws would guarantee immunity to providers that would act against their users. In Europe, because of our history, we already know the consequence of such a complete immunity: "*kill them all and let God sort them out*". Private justice has little to do with justice. Yet, it is this very slippery slope that all of these laws ultimately follow when privileging private interests against public interest. Some laws in this domain already violate the proportionality principle that funds our legal system, and ACTA is a further step in this direction.

As an engineer and scientist, my experience is that, every time a proposed solution is ugly and does not really solve the problem, it is because we try to solve the wrong problem.

The vision borne by ACTA is the one of a Maginot line: spending our money in 18th century-like fortifications that happen to be overturned by blitzkrieg and aviation. The energy we waste in obsolete constructions makes us vulnerable to players that invest now in real innovation.

Look for instance what happened to our patent system. Because patent offices found more profitable for themselves to grant ridiculous patents, and extended the system to fields where it is economically inapplicable such as software, innovation is endangered by patent trolls, which extort resources out of innovative companies without any benefit to consumers. Stockpiling patent portfolios and cross-licensing make big companies live in a world without patents, and innovative SMEs and consumers pay the price for lawsuits and ludicrous licensing fees. Money is wasted in

legal fees, not in innovation.

Big companies base on patents to off-shore jobs. They think that their patents will prevent laid-off personnel from being competitors on their markets, and will maintain subcontractors of emerging countries into the position of docile executors of their research departments, without any ability to acquire themselves the knowledge necessary to the conception of the goods they produce. History showed how wrong they are. The off-shoring of production units prevents the necessary return of experience between production and research units, weakening the latter, or leads to the off-shoring of research departments, that is, more laid-off personnel. As a consequence, former subcontractors acquire know-how and become world leaders themselves, as Japan did three decades ago, as China is currently doing.

It is not innovation that creates unemployment, but ill-designed laws that encourage short-term profit and tax evasion.

I am a researcher. I have shares in a biotech company that I helped a friend to start. I plan to start another company with a PhD student of mine. I co-preside an association that fosters open innovation in the Aquitaine région. Let a “grassroots” guy tell you this: ACTA and its likes are not good for innovation. They are just good for their writers.

The proponents of ACTA act just as hedge funds do. Some large banks found more profitable to them to misuse the money that flowed through their circuits, rather than invest in productive activities. Writers of ACTA do not care about innovation and creation. They represent big players that want to control the circulation of goods and maintain their rents, even if it results in less innovation and jobs. In their time, gas companies tried to preserve their rents against the emerging electricity technology. So did railroad tycoons against automobile, with the “locomotive act”. Same causes, same effects.

So, to conclude, would ACTA “prevent counterfeiting”, as the title of this panel says? Of course not.

Does ACTA need to be rejected? Of course yes. It is a wrong solution to an ill-specified problem.

We have to re-think globally our innovation and creation policies, so as to take advantage of the digital revolution instead of combating it. As lawmakers, this is your challenging mission.