Post-ACTA
How to Protect our Digital Freedom
Joe McNamee, 7 June 2012

Introduction

Many thanks to Mr Weidenholzer for the invitation to speak to you this afternoon.

For those of you who don't know EDRi, we are an association of 32 digital civil rights organisations from 20 European countries.

The first and most important thing to say is that ACTA is not dead – the European Commission and very well-funded parts of industry are throwing everything they have at ACTA to try to delay a vote until after the next European Parliament elections. Unless we keep the pressure up, we will lose. Make no mistake about this.

We have spent the last three years working on ACTA, building up our campaign from the scraps of information trickling out of the various leaks in order to alert the public and policy-makers to the dangers.

However, all of the work that we did over the past three years would have been very difficult to convert into votes in the European Parliament had it not been for the activists from across Europe who went out onto the streets to defend our digital freedoms, particularly those in the German speaking countries and Poland, in particular. To them, we say liebe Grüße and buziakai.

The scope of this presentation is huge, so I will break down the issues into three broad strands. What exactly are we trying to defend? What are the threats? How do we protect ourselves?

What are our digital freedoms?

One of the biggest problems in policy-making with regard to the Internet is that there is very little consciousness of where the true value of the information society actually lies. This is important, because if you don't know what you are trying to protect, it is very difficult to protect it.

To understand the core value of the Internet, all you need to do is walk around the streets in this part of Brussels. This whole corner of the city is filled with people whose full-time job is to achieve just one key aim, to create a single market in the European Union. To reduce and eliminate borders, in order to allow commerce to flourish and to allow for the free movement of people from one end of the continent to the other. The European Union started with borders, conflicts and fragmentation and slowly and unsteadily aims to move towards openness, peace and harmonisation. The value of openness for the sake of citizens and business is the value of the European Union.

And it is the openness of the Internet which gives it the huge value that it has provided. Because the technology is simple and open, it is flexible enough to allow for new protocols to be developed, maximising the potential for inventiveness and innovation. FTP, SMTP, HTTP, P2P and any other P anyone would care to invent, all flowing over the comparative simplicity of the Internet protocol.

This creates a global network where anybody can create the "next big thing" and offer their services to a global market. It creates a global network which allows activists from Greece to coordinate with activists from Portugal and Britain in order to defend their civil rights. A simple hashtag and some conviction is all that is needed to create a movement.

If we accept that it is the lack of borders, flexibility and openness that is the value of the Internet, we really

have to wonder how it is that we are faced with so many experiments, being proposed for sometimes the most obscure, marginal and unproven reasons. Experiments which put both the societal and commercial value of the greatest asset created in the last 50 years at risk.

What are the threats?

There is a whole tangle of interrelated measures being proposed, all of which could be the first domino to drop in a process that will significantly undermine our digital freedoms. There is a new Regulation on the protection of personal data. This is unquestionably a good thing, but the copyright lobby is keen to ensure that there is nothing in the Regulation which will prevent internet companies from undertaking privatised policing measures against their consumers.

But they wouldn't, would they? Well, it is not a surprise that the first company to announce plans to police their consumers via the use of "deep packet inspection" is both a content provider and an access provider – Virgin Media. The bigger access providers are increasingly entering the content market and, as some Dutch leaks have shown, the content providers are keen to include spying on consumers as part of their contract terms.

And the bigger access providers are the ones that are lobbying hard against measures to protect net neutrality. Net neutrality is the obligation to treat all online information equally and not to discriminate for non-essential reasons. Reports from the European committee of telecoms regulators BEREC already show that net neutrality is eroding in Europe, with varying degrees of restrictions on both protocols, peer to peer, in particular and services, such as Skype, taking place on an ever-more frequent basis.

Meanwhile, tomorrow the Council of Justice and Home Affairs Ministers is going to announce plans for a Global Alliance against child exploitation online. That's not a problem, of course, except that the document they will announce includes the support for Internet blocking. And there we end up with the same problems as we have with ACTA – seeking to transplant half a sentence from an EU Directive into foreign jurisdictions, with different legal systems, different safeguards and different protections for freedom of speech is nothing short of reckless.

And there will shortly be an announcement that Microsoft will donate their PhotoDNA software to Europol. PhotoDNA is being used already as an upload filter by Facebook in the UK. Does it solve any problems? Do we even know what problems it is supposed to solve? Of course not, who cares about evidence? It is is only free speech and the openness of the Internet that we are experimenting with. The European Commission has announced funding for the development of similar technology that could be used as an upload filter for video as well.

Of course, we have the protections that are guaranteed by the International Covenant for Civil and Political Rights, the European Convention on Human Rights and the European Charter of Fundamental Rights. Don't we? Well, not exactly. All these instruments are binding on states and not directly on companies. Therefore, regarding online regulation, there is a big shift in thinking away from laws that would be illegal under international law towards "voluntary" measures encouraged by governments but not imposed by them.

That approach is particularly attractive for the United States. It permits easy circumvention of the free speech provisions of the 1st Amendment and, if they can get support from the rest of the world through TPP and ACTA, they can colonise the regulation of the Internet globally through the American companies that all citizens worldwide rely on to use the Internet.

This was most clear in Section 104 of SOPA, which offered complete liability protection for any a service provider, payment network provider, Internet advertising service, advertiser, Internet search engine, domain name registry, or domain name registrar for withdrawing services if they had a "reasonable belief" that the service was infringing on US intellectual property rights.

This is one of the most scary aspects of ACTA – imagine entering into a binding international agreement which requires the USA to promote vigilante enforcement measures by these companies!

This is not the complete list, but if I go on, I might be held liable for depressed participants jumping out of the window and creating a mess downstairs.
Shaping the future in a progressive way

With regard to intellectual property in particular, as this is the topic of this meeting, there are several key positive steps that need to be made:

Rules which are both easy to break and which are not regarded as legitimate will not be respected. Citizens are dancing on the Berlin wall of a copyright regime that is broken. More Stasi and border police are not the solution. The solution is creating a legal regime which does have credibility. The key elements of such a regime would be:

a. A fundamental overhaul of the rules concerning exceptions and limitations to copyright. It sounds unbelievable, but it is true that the European rules on this issue offer European Union Member States over two million different options! It is even more unbelievable to imagine that the legal basis for the EU to introduce this chaos is the creation of an EU single market!

b. An overhaul of licensing. In order to provide content on a pan-European basis, even just one song, you need to follow procedures which fill an entire and rather thick book. Bizarrely, the book on how to license music in the rest of the world is less thick than the one on the European Union.

c. 1The citizens of Europe expect technologically advanced solutions to deal with complex administrative issues. Ownership and licensing information should be embedded in digital files, to permit direct payments to creators or owners. There is a vast amount of waste and expense created by collecting societies adding layers of bureaucracy between creators and citizens.

c. 2. A further way of reducing the barriers between citizens and creators is the use of efficient micropayment systems. How much more money could be generated if music files had payment details built in, permitting software tools to read this data, allowing the citizen to click "pay" whenever they downloaded a song via peer-to-peer that they wanted to keep and to reward the artist for. Compare this to the current situation where you have to pay intermediaries like Apple, that offer very little added value.

d. Policy needs to be based on credible and independent evidence and not on industry research and hysterical lobbying. The European Commission is trying to address this point with the launch of the European Observatory on Counterfeiting and Piracy. However, the input to that organisation is heavily from the rightsholder side. EDRi has been invited to participate, which we obviously will do, if this is possible.

e. There needs to be an end to the Homer Simpson strategy in relation to intermediaries. Homer Simpson tried to get elected to a post to become responsible for rubbish in Springfield. He won using the slogan "can't somebody else do it". The result was that the city got submerged in rubbish. The European Commission, the United States and individual member states look at illegal activity online and come to the same conclusion as Homer Simpson... can't somebody else fix it? Let's ask the Internet providers. We are getting submerged in telecommunications data retention, in filtering, in blocking. In ineffective rubbish.

Conclusion

To summarise, we cannot protect our digital freedoms until policy-makers finally grasp that the openness of the Internet is a huge societal asset and a huge economic asset. They need to grasp the fact that this is not something that can be experimented on without risk. They need to understand that privatising online regulation and exporting it into the hands of foreign, mainly American companies imposing foreign laws is a catastrophically stupid idea. We need measures to prevent companies from taking the law into their own hands, not political support demanding that they do so.

For copyright enforcement, we need laws that have the credibility that will make them enforceable. This credibility can be created by undertaking the reforms that I listed a moment ago.

Finally, the single biggest thing we can do to defend our digital freedoms post-ACTA is for citizens to remain vigilant. And to kill ACTA before dreaming of post-ACTA.