

## **Common statement from BEUC, EDRI, Wikimedia, Communia regarding the role of civil society groups within the EU Observatory on IPR infringements**

### **I. Background: Mandate of the EU Observatory on infringements on Intellectual Property Rights**

The main tasks and mandate of the European Observatory on infringements on Intellectual Property Rights (hereafter "the EU Observatory") are established in Regulation 386/2012. They comprise the "*collection, analysis and dissemination of relevant objective, comparable and reliable data regarding the value of intellectual property rights and infringements of those rights, identifying and promoting best practices and strategies to enforce intellectual property rights, and raising public awareness of the impact of infringements of intellectual property rights*" (cf. recital 19, emphasis added). Further tasks are described in Article 2 of this Regulation, and include "*enhancing knowledge of best public and private sector practices to protect intellectual property rights*" (Art.2.1.c) and "*assisting in raising citizens' awareness of the impact of infringements of intellectual property rights*" (Art.2.1.d).

According to Article 4(2), the Observatory is required to be composed by "*broad, representative and balanced range of Union and national bodies representing the different economic sectors, including the creative industries, most concerned by or most experienced in the fight against infringements of intellectual property rights*" as well as "*consumer organisations, small and medium-sized enterprises, authors and other creators*".

Currently, the EU Observatory is composed of 28 public institutions, 61 private sector representatives, 7 civil society organisations, 10 organisations acting as observers and other stakeholders grouped as "other contacts"<sup>1</sup>.

### **II. Civil society within the EU Observatory**

Civil society groups joined the EU Observatory from the very beginning, since the field of activities and topics of debate concern important policies of general interest. Our intention was and is to provide positive input and redress the overwhelming imbalance of large industry stakeholders represented in the different working groups. Given the significance of the work of the Observatory for EU policy development and, significantly, the

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<sup>1</sup><https://oami.europa.eu/ohimportal/en/web/observatory/observatory-network>

disproportionate involvement of different actors, we consider that our presence is necessary to ensure that the evidence that is produced by the Observatory by means of studies and assessments contributes to the development of objective and evidence-based policy making.

### **III. Common concerns**

Although each of the signing civil society groups have been critical of much of the work and proceedings of the EU Observatory, we acknowledge that in the last year the staff of the EU Observatory has made significant efforts to improve some of the sub-optimal practices we have identified and continues to make efforts to engage civil society in its work. However, due to the current structure of the working groups, a number of areas need to be looked at in order to ensure the credibility of the outputs of the Observatory.

Below there is a series of recommendations to improve the methodology of the EU Observatory, which are essential to ensure the engagement of civil society groups and to create a constructive dialogue.

#### **A. General issues**

- 1. Establish mechanisms to prevent low-quality outputs in outsourced studies:** The Observatory needs to prepare evidence-based reports which are in line with the mandate of the Observatory, i.e. which analyse the real value of copyright and that are not based on flawed methodologies. Yet, the most widely quoted report on the importance of IP intensive industries has been credibly questioned.<sup>2</sup>

We suggest that consistent and efficient reviewing mechanisms be put in place from the drafting of terms of service through to the publication of the final report. This mechanism should allow enough time for the members of the relevant working groups to provide feedback. Additionally, the suggestions proposed by each stakeholder should be communicated to all of the other members of the working group, for example through tracked changes in documents.

- 2. Do not treat all IP infringements in the same way:** The Observatory needs to differentiate more clearly between copyright infringements and other types of IP infringements. Treating very different IP infringements as if they were the same almost automatically leads to inaccurate and misleading analysis.

Currently there is a general group on IP enforcement, dealing mostly

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<sup>2</sup> <http://copyright4creativity.eu/wp-content/uploads/2014/06/COPYRIGHT-MYTHS-FACTSHEET1-23062014.pdf>

with counterfeit products. We suggest the creation of a sub-group within the EU Observatory to deal specifically with questions related to copyright and its enforcement.

3. **Better assess the risks around copyright enforcement:** The Observatory should engage in a broader discourse on the inefficient (and often abusive) methods of current copyright enforcement and take into account related CJEU jurisprudence such as SABAM/Netlog (Case C-360/10)<sup>3</sup>, Scarlet/SABAM (Case C-70/10)<sup>4</sup> and UPC Telekabel v Constantin (Case C-314/12)<sup>5</sup>.
4. **Establish a balance within different stakeholder groups:** The Observatory should improve the balance of civil society groups and private industry by limiting the number of participants from the private sector – particularly in light of the identical positions taken by many private sector groups. Civil society is severely under-represented and this makes it very difficult to keep track of and provide input to studies proposed and to participate actively in the meetings.

Similar practices to reduce imbalances in expert groups are put in place when, for example, the European Commission organises roundtables and limits the number of stakeholders from specific sectors. We believe that the EU Observatory should follow this approach. To achieve a higher relative representation of non-economic interests, we recommend limiting the size of groups as a structural measure, as suggested by the EU Ombudsman in relation to its inquiry into the DG AGRI's civil dialogue group (<http://www.ombudsman.europa.eu/cases/summary.faces/en/60875/html.bookmark>).

5. **No Chatham House rule for working group meetings:** As stated on several occasions and by letter to the EU Observatory's Director, we believe that working group meetings should not be held under the Chatham House rule. The explanation by the Observatory that this is due to the need for public representatives to be able to speak out does not match the reality of the working group meetings, where public servants rarely participate and where their views are seldom in contradiction with the reports.
6. **Transparency and accountability in the EU Observatory newsletter:** The EU Observatory should allow groups to show their views in the Observatory newsletter without being censored, as it happened with one EDRI article<sup>6</sup>. When BEUC linked the aforementioned EDRI blog post in their contribution to the October 2015 edition of the Observatory Newsletter, a similar situation

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3[https://edri.org/sabam\\_netlog\\_win/](https://edri.org/sabam_netlog_win/)

4[https://edri.org/scarlet\\_sabam\\_win/](https://edri.org/scarlet_sabam_win/)

5<https://edri.org/tag/telekabel/>

6<https://edri.org/did-agcom-censor-an-article-about-agcom-censorship/>

occurred: the link to EDRi's article was originally in the contribution submitted by BEUC but then disappeared in the published version of the newsletter. This is unacceptable.

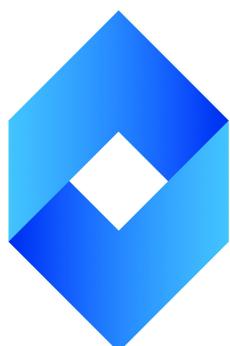
7. **Be transparent with public funding:** The recruitment of contractors should be much more transparent. In particular, detailed information needs to be provided when a project is awarded to a contractor without this being put to tender. In general, all details which are published in relation to a European Commission tender process must also be published in relation to tenders managed by the Observatory.

## B. Practical issues

8. **Keep documents readily available:** The private section of the website is not easy to manage for daily work or for following up on the progress of studies. We would recommend that the EU Observatory improve the way information is distributed among stakeholders in order to avoid navigating between several folders and files.
9. **Keep us regularly informed on the status of the studies:** We recommend the EU Observatory to send regular (e.g. monthly or bi-monthly) updates on the status of studies, with links to the latest draft if they are open to discussion and taking into consideration our recommendations in point 1.
10. **Better scheduling of meetings:** We recommend that the EU Observatory avoid setting up working group and plenary meetings on dates which are too close to each other, as happened in the last quarter of 2015.
11. **Interim civil society meetings:** As already happens with interim meetings with other stakeholders, and in order to co-ordinate the positions of the civil society groups and ensure representativeness of different working groups, we suggest organising meetings only with the civil society representatives in Brussels. This will also allow open discussions with the staff of the EU Observatory about how civil society could better contribute to the different activities of the Observatory.
12. **Request Member States to have fixed designated representatives:** Representatives of national governments seem to change every meeting and therefore their involvement in meetings, except for some exceptions, is often very limited. If the views of Member States are limited and civil society is under-represented, the work of the EU Observatory risks of being influenced by the view of a very limited number of private stakeholders, who are already the most powerful and resourced group.

#### **IV. Follow up**

These points represent the main concerns of the co-signing civil society groups within the EU Observatory. Our continuous participation within the network will be affected by how these twelve points are improved in the following months. We will review our future participation accordingly. We remain open to discuss these concerns with you and to keep engaging in a constructive dialogue to improve the work of the EU Observatory.



**EDRi**



**BEUC**

The European  
Consumer  
Organisation



**WIKIMEDIA**



**COMMUNIA**