

# media *policy brief 1*



## **Creative Destruction and Copyright Protection** Regulatory Responses to File-sharing

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## **Key Messages**

- The DEA gets the balance between copyright enforcement and innovation wrong. The use of peer-to-peer technology should be encouraged to promote innovative applications. Focusing on efforts to suppress the use of technological advances and to protect out-of-date business models will stifle innovation in this industry.
- Providing user-friendly, hassle-free solutions to enable users to download music legally at a reasonable price, is a much more effective strategy for enforcing copyright than a heavy-handed legislative and regulatory regime.
- Decline in the sales of physical copies of recorded music cannot be attributed solely to file-sharing, but should be explained by a combination of factors such as changing patterns in music consumption, decreasing disposable household incomes for leisure products and increasing sales of digital content through online platforms.

## Introduction

*“We disagree with the industry on what should be done with the persistent file-sharers. The industry has said we will suspend their internet accounts. But you can’t just do that, it isn’t possible and neither feasible. The kind of technical measures that are required to implement this get you into dodgy areas such as civil liberties, tracker software and the second thing is that it costs a lot of money to do this, and even if you do it, you are going to drive a lot of people underground into darknets. Our problem is how do you differentiate between a serial infringer and someone who does it in the spirit of discovery” (Ed O’Brian from Radiohead on BBC, 22/09/2009).*

The 2010 Digital Economy Act (DEA) mandates Ofcom to set up a code to regulate the role of Internet Service Providers (ISPs) in curtailing online copyright infringements (HMSO, 2010). In the first phase, the approach is dissuasive. Copyright holders can notify ISPs of IP addresses from which they suspect downloads or uploads of copyright protected content are originating. ISPs are then required to send warning letters to customers who are suspected of infringing copyright law. If the level of copyright infringement associated with file-sharing online is not declining, on the advice of Ofcom, the Secretary of State is mandated to bring a second – more repressive – phase into force which allows for persistent infringers to be disconnected from the internet.

Across the political and legal spectrum it is acknowledged that the DEA was rushed through Parliament without giving adequate consideration to the interests of various stakeholders, to the complex implications of its provisions for changes in cultural production and consumption, or to the changing technologies to produce, distribute and copy cultural content. The Act has been challenged in the UK High Court of Justice by ISPs on the grounds of its disproportionate response to online copyright infringement and its legality. The judicial review of the DEA is being heard in March 2011.

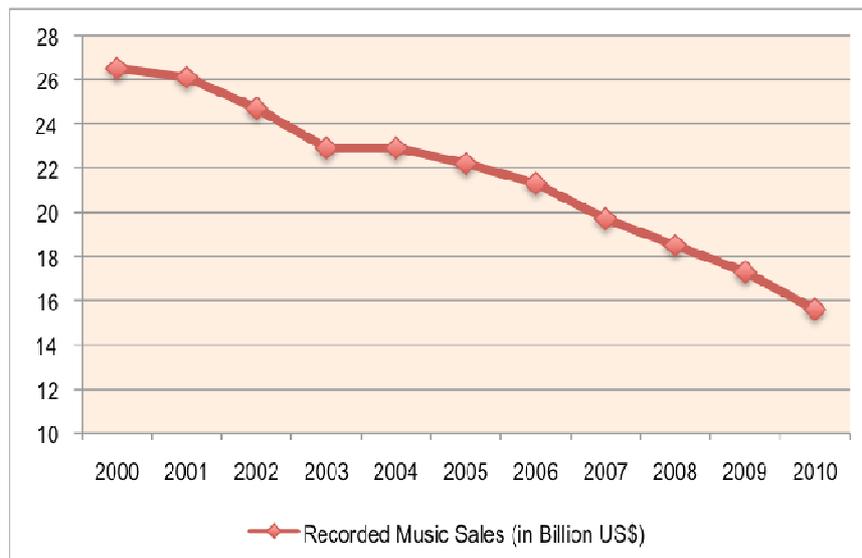
This policy brief contributes to debate on the response to the growing use of the Internet for file-sharing copyright infringing content by focusing on the music industry, one of the most vocal advocates of tackling suspected infringers by involving their ISPs in their identification and punishment. Two main counter-arguments are being developed against the provisions of the

DEA.<sup>1</sup> First, the music industry is performing better than is being claimed and declining sales can be explained by other factors in addition to illegal file-sharing. Second, the negative framing of the debate about file-sharing and copyright protection threatens to stifle the very same creative industry the Act aims to stimulate. The DEA measures are considered in light of the view that measures to protect copyright holders should be balanced and fair. Otherwise, they can suppress innovation or disproportionately restrict access to information.

### **1. Is the music business really doing so badly?**

The IFPI figures for music sales confirm a considerable decline in sales of recorded music over the last decade (figure 1). In the period 2004-2010, the music industry declined in value by 31% (IFPI, 2011). However, the empirical evidence is inconclusive as to the cause of this decline.

**Figure 1:** Global Recorded Music Sales from 2000-2009



**Source:** IFPI, 2010b/2011<sup>2</sup>

#### **1.1 Many reasons for the relative decline in sales of music**

The claims by the music industry regarding the detrimental impact of infringing file-sharing on sales are flawed.

<sup>1</sup> The issue of privacy invoked by the necessity to monitor our online behavior in order to be able to sanction the downloading of copyright protected content is addressed elsewhere (Cammaerts and Meng, 2011).

<sup>2</sup> Figure of 2010 is an estimate based on IFPI's claim that global sales declined by 8% in 2010 (IFPI, 2011).

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According to the international industry lobby group, the music industry and its artists lost out on more than US \$40 billion in revenue in 2008 because of piracy including (illegal) file-sharing (IFPI, 2009: 22). Claims about piracy and revenue losses are often based on the wishful thinking of rights holders. They assume that most unauthorized copies would be replaced by the sale of a legitimate product if file-sharing was effectively controlled. However, as Oberholzer-Gee and Strumpf

(2007: 4) point out:

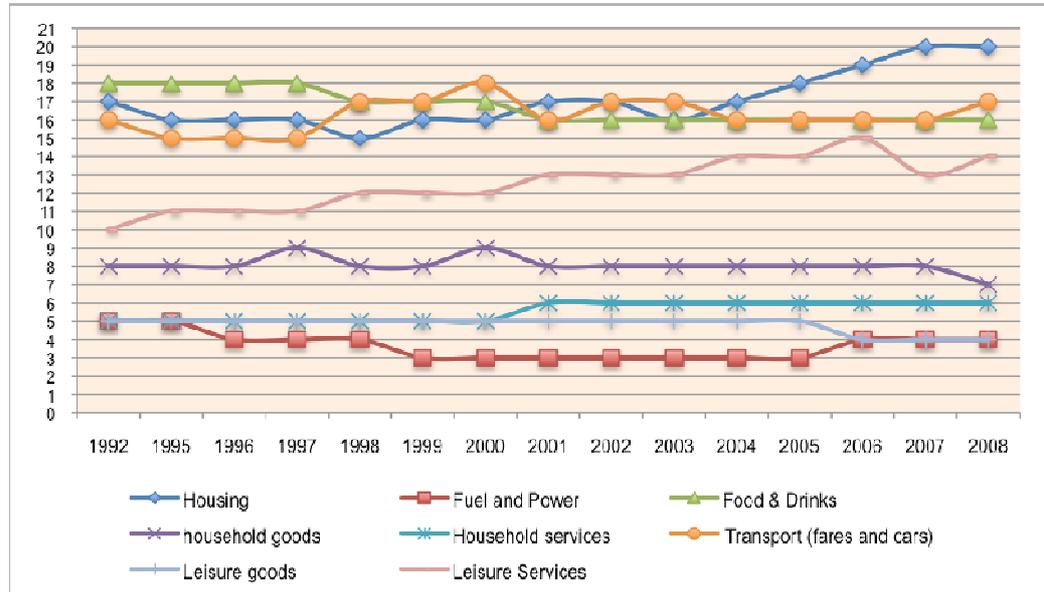
*“While downloads occur on a vast scale, most users are likely individuals who in the absence of file sharing would not have bought the music they downloaded.”*

Moreover, there is evidence suggesting that declining revenues in the music industry should be attributed to other factors (Rob and Waldfogel, 2006; Oberholzer-Gee and Strumpf, 2007; Andersen and Frenz, 2007). In recent decades, music consumption and the role music plays in people’s lives have changed drastically. For music audiences, music has increasingly become something immaterial or ‘ephemeral, its duration becomes compressed, and it becomes more of a process than a finished product’ (Terranova, 2000, p. 48).

This is consistent with evidence from the 2004 US Consumer Expenditure Survey which showed that spending on CDs by people without a computer – and thus unlikely to share digital content online – had dropped by 43% in the period from 1999-2004 (Oberholzer-Gee and Strumpf, 2007: 4). Household budgets for entertainment are relatively inelastic as competition for spending on culture and entertainment increases and there are shifts in household expenditure as well (figure 2).

The downward pressure on leisure expenditure is likely to continue to increase due to rising costs of living and unemployment and drastic rises in the costs of (public) services.

**Figure 2:** Household expenditure as a percentage of total expenditure, 1992-2008



**Source:** Based on FES classification at 2008 prices (Skeltenbery, 2009: 66-7).

The contradictory evidence indicates that there is more involved in our relationships with cultural products than is evident from a narrow focus on file-sharing digital content. Changing consumption patterns and the increasing costs of services such as live music performances mean that households have less disposable income to spend on leisure products.

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### 1.2 Income from live music out-performs sales of recorded music

The IFPI figures exclude income from music publishing and live music performances. Revenues from live performances/DJing have increased considerably in recent years. In 2009 revenues from live music outperformed recorded music sales for the first time in the UK. While the recorded music industry was worth £1.36 billion, the value of the live music industry in 2009 was estimated at £1.54 billion. This includes a staggering £957 million in primary ticket revenues (up 5.8%), £172 million in secondary ticketing revenues (up 15%), and £408 million in additional receipts on the night (up 16%) (Page and Carey, 2010: 4).

This is consistent with data on shifts in household expenditure for culture and entertainment; more is being spent on services, less on goods such as CDs (figure 2).



A study of shifts between sales of recorded music and revenues from live performances by Mortimer, *et al.* (2010: 19) demonstrates that the average ticket price for live concerts has risen steadily in the last two decades. They conclude that:

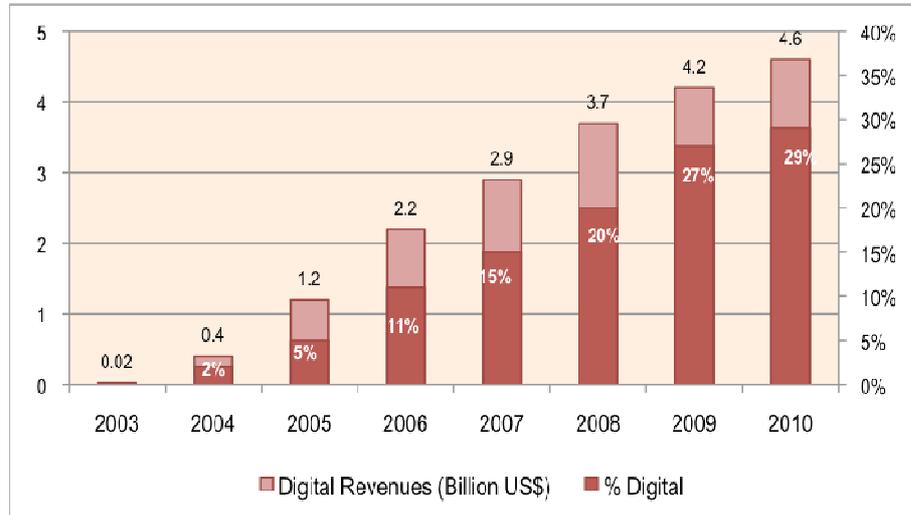
*“While file-sharing may have substantially displaced album sales, it also facilitated a broader distribution of music, which appears to have expanded awareness of smaller artists and increased demand for their live concert performances.”*

### **1.3 Income from the sale of digital music is rising rapidly**

In 2009, global sales of physical products – mostly CDs, but also vinyl – declined by 12.7%. However, the sale of digital recordings through online platforms rose by 9%, while the revenues from performance rights rose by almost 8%. In the UK, total recorded music sales were up 1.9% due to growth in digital sales and performance rights (IFPI, 2010b). Digital revenues from recorded music rose by 47.8% last year in the UK from £127.8m in 2008 to £188.9m in 2009 (BPI, 2010). Furthermore, total digital revenues, which also include online license fees, account for ‘a quarter of record labels’ revenue base’ and one in six albums in the UK were bought online (Page and Carey, 2010: 3). Internationally, a similar picture emerges for online sales of music. Growing from a small base, the value of the global market for digital music increased by 1,000% in the period 2004 to 2010, and by 2010 represented US \$4.6 Billion (figure 3).

These rises in revenues from digital sales and online license fees do not fully compensate the industry for the decline in sales of CDs, but the decline in the sale of physical products cannot be exclusively or even in large part attributed to file-sharing of copyright protected content.

**Figure 3:** Worldwide online sales of music 2004-2010



**Source:** IFPI, 2009/2010/2011.

### ***1.4 New models are more successful in tackling sharing of copyright protected content than repressive measures***

Evidence in the US indicates that warnings and legal threats are unlikely to drastically curtail file-sharing in the long run. The Record Industry Association of America (RIAA) filed, settled or threatened lawsuits against at least 30,000 individuals in the five year period from 2003 to 2008 (EFF, 2009). Yet the practice of file-sharing continued to grow despite escalating legal threats against individuals.<sup>3</sup>

The proposed measures in the DEA are likely to fuel the ongoing turf-war between the industry and hackers who work to bypass each new technical method of copyright protection and means of detection (Collins and Mansell, 2005). This is apparent in the increased use of password protected encrypted files and commercial file-sharing sites such as Hotfile, RapidShare or MegaUpload, which are operating in parallel with open peer-to-peer networks.

<sup>3</sup> See Posting of Ernesto to TorrentFreak, 'BitTorrent Trio Hit a Billion Pageviews a Month,' (June 11, 2008) (describing three BitTorrent websites—Mininova, The Pirate Bay, and isoHunt—that have entered the list of top 100 most visited websites on the Internet) or Gareth Halfacree, 'uTorrent Doubles Userbase,' April 29, 2008, (describing popular file sharing application uTorrent).



The music industry's recent strategy of providing consumer and user-friendly alternatives enabling legal downloading and licensed streaming services such as LastFM or Spotify are proving attractive to those who might previously have engaged in file-sharing of infringing content. In the UK, a survey of teenagers indicates that increased use of licensed streaming services is displacing file-sharing as a way of accessing music (Brindley and Walker, 2009).

*We conclude that empirical evidence does not establish a conclusive – much less exclusive – link between file-sharing and declining sales of recorded music.*

*Other factors play a much more important role. Providing user-friendly, hassle-free solutions to enable users to download music legally at a reasonable price, is a much more effective strategy to enforce copyright than a heavy-handed legislative and regulatory regime.*

## **2. The DEA gets the balance between copyright enforcement and innovation wrong**

The DEA is a response to the goal of stimulating an innovative, participatory, creative industry in the UK, but it singles out the rights holder industry for protection using an approach that puts in place a regime that potentially harms the creative industry that it seeks to stimulate.

### **2.1 The DEA characterises peer-to-peer file-sharing as piracy and threat**

Peer-to-peer file-sharing is a technology that makes distribution of content on a large scale possible and it is not inherently illegal. By treating this technological advance as piracy and a threat, the DEA is concerned only with its copyright infringing uses because of the economic harms claimed by the industry, while ignoring its socially and economically beneficial uses. Like the creative industry, the DEA fails to acknowledge that peer-to-peer file-sharing is a lawful activity and is often used to share content that creators make freely available and to drive innovation in the sector.

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A prominent example of peer-to-peer led innovation is Free and Open Source Software (FOSS). Although they were initially reluctant and hostile, the computer and software industries have embraced FOSS, often providing venture capital. Big firms, including IBM and Intel, have endorsed the FOSS model. Peer-to-peer technology encourages innovation in software industry business models including creating added value through auxiliary services rather than protecting and charging for the software tool itself, such as customizing platforms and databases, packaging, providing manuals and support for installation or fixing problems (Cammaerts, 2011). FOSS success is indicated by the fact that 67% of the one million busiest websites worldwide run on Apache Open Source operating systems, while Microsoft's share of the web server market is a mere 17% (Netcraft 2010).

*These examples confirm that to stimulate the creative industry, the use of peer-to-peer technology should be encouraged to promote innovative applications.*

*Focusing on efforts to suppress the use of this technological advance and on protecting out-of-date business models will stifle innovation in this industry.*

The film industry, as well as other creative industries working with large digital files, increasingly uses peer-to-peer technologies in the production process as well as for distribution. In 2009, a Norwegian lab launched an EU funded experiment to distribute copies of films to local theatres using peer-to-peer technology (<http://farnorthlivinglab.org/>). A first of its kind, this experiment shows that file-sharing is making a significant contribution to the development of digital cinema, and creating a new distribution opportunity for independent filmmakers.

These examples confirm that to stimulate the creative industry, the use of peer-to-peer technology should be encouraged to promote innovative applications. Focusing on efforts to suppress the use of this technological advance and on protecting out-of-date business models will stifle innovation in this industry.

## **2.2 History shows that new technologies are disruptive and industry innovates to accommodate them**

Technological innovations are disruptive and often lead to conflicts between industry incumbents, particularly when the use of new technologies challenge traditional business models and threaten old regulatory frameworks. For example, consider the Xerox photocopier and cassette player:

### **Xerox photocopier**

The Xerox 914 copier made it much easier to reproduce printed material. From 1959 there were many court cases as photocopiers

became available to the consumer market and publishers tried to protect their business. Settlements ensured that publishers and authors receive compensation. The Authors' Licensing and Collecting Society (ALCS) in the UK, for example, collects and re-distributes fees for photocopying books and journal articles, paying out more than £25 million in 2010 to authors with 70% of the income being generated by collective licensing arrangements.<sup>4</sup>

### **Cassette player**

Cassette tapes in the 1970s provoked the reaction that 'Hometaping is killing the music industry'. The techniques used to prevent copying of vinyl onto tape failed. In the UK a twin cassette recorder introduced by Amstrad in 1988 prompted CBS Songs to sue Amstrad for facilitating copyright infringement. The ruling in favour of Amstrad stated that equipment that facilitates the dubbing of cassettes did not amount to copyright infringement and that when copyright legislation is 'treated with such contempt [it] should be amended or repealed' (CBS Songs v. Amstrad, 1988: 610).

The history of these disruptive technologies shows that ways are found to generate revenue for producers of content that do not require repressive legislation.

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In today's era of increasing internet use and file-sharing, a levy on internet access could be considered and there should be a debate about what constitutes fair use in a digital environment.

Debate should focus on the appropriate distribution of levy proceeds and on who benefits from file-sharing rather than on its perils. This would encourage a peer-to-peer participatory culture and transparency for consumers.

### **2.3 Innovative responses by the music industry**

In recent years, the music industry has started to embrace the online sale of recorded music, witnessed by the steep rise in revenues from digital online sales (figure 3). Some artists and music labels are making full use of file-sharing and the participatory culture it sustains rather than rejecting it

<sup>4</sup> See: [http://www.cla.co.uk/copyright\\_information/copyright\\_information/](http://www.cla.co.uk/copyright_information/copyright_information/).



(Williamson and Cloonan 2007). In the process, these artists and music labels are developing useful alternative models for revenue generation.

Innovative music industry strategies are especially visible in the independent and alternative music segments of the industry. Revenues from live performances are being shared between artists and record labels; many labels are acting as booking agents for their artists and the proceeds are

*Positive exposure online promotes brand recognition, notoriety and fame which draw potential music buyers to concerts. Online music sampling through downloading also encourages music purchasing by file-sharers.*

flowing into new releases (Webb 2007; Cammaerts, 2010). Some labels are publishing music exclusively online under creative commons licenses and accepting donations; a good example is the Sheffield netlabel, Planet Terror Records,<sup>5</sup> among many others.

Compared to the value of the mainstream music market, dominated by the 'big four',<sup>6</sup> these are relatively marginal activities, but the independent segment is connected to the mainstream players industry in many ways. Independent labels and artists serve as research and development divisions for the major labels, testing innovative models, identifying emerging (sub-) genres and upcoming talent (Negus, 1992: 17; Hesmondhalgh, 2006: 222).

By embracing the online participatory culture, (some) artists are developing close relationships with their fans by connecting with the innovative potential of this vibrant participatory culture. Positive exposure online promotes brand recognition, notoriety and fame which draw potential music buyers to concerts. Online music sampling through downloading also encourages music purchasing by file-sharers (Oberholzer and Strumpf 2007: 38).

*The history of technological innovation and efforts to enforce copyright show that it is crucial to strike a balance between the interests of creative industry right holders and the interests of consumers, citizens, and the economy as a whole.*

*There is a danger that the proposed measures in the DEA will stifle innovations in technology and in business models aimed at providing new services.*

<sup>5</sup> See: <http://www.planetterrorrecords.com/>.

<sup>6</sup> EMI, Sony, Warner Music Group and Universal Music Group dominate the global music industry.

*The option consistent with stimulating the contribution of the creative industries to economic growth is to encourage the industry to take the lead in building upon the potential of online participatory culture and to encourage consumers and citizens to participate in this culture.*

## Conclusion

In November 2010 David Cameron announced a government review of copyright, “to see if we can make IP laws fit for the internet age” (Cameron 2010). The societal and financial costs of enforcing copyright law in the digital services era, where consumer and citizen practices online diverge from legal expectation, are very high.

It is imperative that reform of copyright enforcement provisions takes account of changing cultural practices and rapid technological innovation. The legal framework for copyright needs to be better aligned with the potential for innovation in the online everyday practices of consumers and citizens.

Some contribution to the production of creative industry content is also needed so that creative talent is supported. This means copyright reform in the UK and beyond should:

### ***Involve multiple stakeholders in discussing the fair dealing of digital content***

Fair dealing is a very important provision of copyright law that balances the interests between right holders and users. In a social media-rich environment where people share what they like and dislike online, fair dealing should be extended to this kind of sharing to encourage innovation and a collaborative online culture.

### ***Debate the feasibility of putting levies on blank media and/or internet access***

There is ample evidence that music fans are ready to pay a contribution, providing it is a reasonable amount and the process is not too complicated or restrictive. Consideration should be given to a levy on blank media use and consumer recording equipment. A levy could be included in the cost of an internet connection – a kind of



'licence to download'.<sup>7</sup> Debate should then re-focus on the alternative means of redistribution of the proceeds from such levies.

***Encourage new talent by distributing creative artist's fees in ways that achieve this goal***

At present there is no transparency as to what happens to the copyright licensing fees collected on behalf of content producers when they are redistributed internationally and nationally. Greater accountability would be consistent with boosting the legitimisation of existing fees or levies and help to encourage consumer and citizen acceptance of new proposals. Transparency would also provide a basis for explicit measures to stimulate innovation and diversity in the music industry by supporting alternative artists and new talent through adjustments to the distribution of funds within different segments of the industry.

These suggestions are designed to take the debate forward, acknowledging the forces of creative destruction in the creative industries. The music industry may not yet be fully engaging in the online participatory culture, but efforts to discipline a growing mass of online copyright infringers are inconsistent with the industry's interests, with citizen and consumer interests, and with the goal of stimulating the creative industries' contribution to economic growth.

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<sup>7</sup> This is distinct from a so-called bit-tax which would also require large scale monitoring of online behavior and conflict with civil liberties and privacy principles.

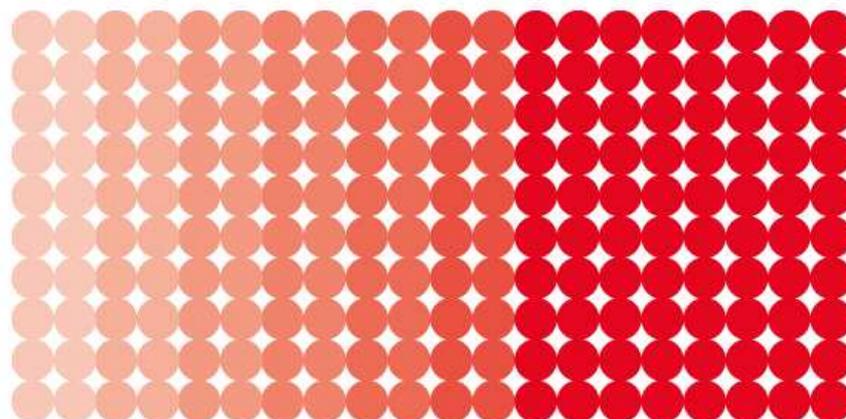


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# LSE *media policy project*



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