



Contribution to the Post-i2010 Consultation

La Quadrature du Net

La Quadrature du Net is an **advocacy group that promotes the rights and freedoms of citizens on the Internet**. More specifically, It advocates for the adaptation of French and European legislation to respect the founding principles of the Internet, most notably the free circulation of knowledge.

As such, La Quadrature du Net engages in public-policy debate concerning, for instance, freedom of speech, copyright, regulation of telecommunications and online privacy.

In addition to its advocacy work, the group also aims to foster a greater understanding of legislative processes among citizens. Through specific and pertinent information and tools, La Quadrature du Net hopes to encourage citizens' participation in the public debate on rights and freedoms in the digital age.

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La Quadrature's Overall Position

The Internet was created as an open communications infrastructure. Its **decentralized infrastructure fosters the free flow of information along the network**. This openness has allowed for the formidable growth of both of the **usages** made of the network and subsequently of the network capacities themselves.

In order for our societies to reap the full benefits of the Internet, **we need to preserve the open and neutral structure of the network**. This is why La Quadrature du Net is a strong proponent of an EU wide legislation that would mandate the principle of Net neutrality to both fixed and wireless Internet providers. While Net neutrality rules would eliminate discriminatory practices aimed at blocking or degrading certain information flows, **other regulatory regimes, such as copyright, must be adapted to the digital age** to support the development of innovative ways of distributing and using content online.

Europe is already lagging behind its main partners when it comes to implementing progressive Information and Communications policies. There is no time to loose. Adjusting EU legislation to the free circulation of knowledge across the Internet – as opposed to moving towards an increased control of the information flow – will benefit society as a whole, **protecting the value of the Internet for enhanced citizenship and intense innovation**. It will keep us away from the **temptation of securitarian and repressive policies**, which are ineffective in the intangible cyberspace, and harm civil liberties by ignoring the **importance of the Internet for the practical exercise of freedom in the twenty-first century**.

I) Focusing on Users' Rights

From a regulatory point of view, and with regard to the history of the development of the Internet, it is obvious that **promoting user's rights will spark positive outcomes for society**. In this respect, as recent jurisprudence makes clear, **the right of free access to the network is an overarching right for Internet users**. Protecting such a right at the European level would give further evidence of the EU's understanding of the importance of this revolutionary communications technology, and would contribute to asserting its leadership role in the emerging knowledge economy.

A communications tool developed for and by end-users

From the beginning, the Internet was built as a “future-proof” infrastructure that would welcome any application. **Openness was to give end-users total freedom in the way they wanted to make use of the network, and so**

control was pushed at the edges. Relying on public protocols, applications and services can now be developed to run across the network and content can be created and distributed on the Internet without the approval or consent of centralized Internet operators.

Overtime, with the arrival of new technologies, Internet applications have become more sophisticated and more demanding in terms of network capacities. Little by little, the Internet has welcome many new forms of media, such as images and videos. Web-based communications, for instance, recently reached a whole new level with the advent of participatory technologies, such as blogs and wikis, which are part of what some call the “web 2.0”. In order to respond to the need **to deliver these constantly evolving innovative services from one end of the network to the other, Telecoms operators have to invest in more bandwidth,** while competition in the telecommunications sector serves to drive prices down. In the end, these different trends have fostered the ability for an always increasing number for people to use advanced communications technologies. It is this development model that has allowed for the formidable growth of network capacities and increased the potency of the global infrastructure we call the Internet.

As the history of the Internet suggests, it is users that make up the wealth of the network. Therefore, by focusing on user's rights, and creating a stable and trustable regulatory regime, lawmakers have the possibility to make the Internet even more welcoming and emancipatory. **It will create a virtuous circle that will have positive consequences on the ICT sector, but also the rest of society.** Whether is it is by guaranteeing modern privacy protections, ensuring that the Internet remains a level-playing field for all citizens and businesses, or by embracing the new uses of cultural works that are developing on the Internet, **the EU has a lot of leeway for further expanding the knowledge society.**

A free and open Internet is a fundamental fight

A free access to the Internet has become an **essential utility**, comparable to water or gas¹. Its importance for social and economic integration as well as democratic participation is more and more widely understood. Although debates about whether or not we should accredit the idea that accessing the Internet is a fundamental right are fairly recent, such recognition is clearly gaining momentum.

In June 2009, in its decision against the HADOPI law implementing “three strikes” policy against file-sharing², the French Constitutional Council found that the law, by granting to an administrative body the power to ban people from the Internet, disrespected the 1789 “Declaration of the Rights of Man and of the Citizen”. The Council underlined that Article 11 of the Declaration:

“proclaims: The free communication of ideas and opinions is one of the most precious rights of man. Every citizen may thus speak, write and publish freely, except when such freedom is misused in

¹ Gordon Brown, *The Internet is as vital as water and gas*. The Times, June 16, 2009.

² Decision rendered on June 10th, 2009: www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009_580dc.pdf

cases determined by Law'. In the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services. [...] Freedom of expression and communication are all the more precious since they are one of the cornerstones of a democratic society and one of the guarantees of respect for other rights and freedoms. Any restrictions placed on the exercising of such freedom must necessarily be adapted and proportionate to the purpose it is sought to achieve.” (Emphasis added).

As a consequence, Internet access is now clearly acknowledged as instrumental to the freedom of expression and communication. As such, in a country that obeys the rule of Law, **any restriction to the Internet access falls under the regime of a judicial process**. Indeed, no one other than the judicial authority can guarantee that the rights and freedoms of the suspect - most notably the right to a due process - will be protected, and that the sentence will be proportionate to the original offense.

Making access to the Internet a right that is guaranteed across the EU will give a strong signal that Europe recognizes this communications mean as **a social space that is no less important than the physical space**, and where fundamental rights and freedoms apply. **It will guarantee the rule of Law** by ensuring that no one other than a judicial court, after a due process, can adopt sanctions infringing on the right of access to the Internet (except in particular cases, for instance when public security is at stake). Such principle will also push policy-makers to look for **innovative ways of regulating the Internet**, both at the Community and national levels. Today, many legislative projects tend to enforce old regulatory principles that were relevant to the physical space in the cyberspace. When it comes to “three-strikes policies” or content filtering for example, it is clear that these attempts are ineffective. More dangerously, they also put at risk the open nature of the Internet and rely on unfortunate modes of social control that threaten people's freedoms.

II) Net Neutrality: A Catalyst for Democracy and Innovation

Net neutrality has been an indispensable catalyst for competition, innovation, and fundamental freedoms in the digital environment. **A neutral Internet ensures that users face no conditions limiting access to applications and services**. Likewise, it rules out any discrimination against the source, destination or actual content of the data transmitted over the network. In the words of Tim Berners-Lee, the inventor of the World Wide Web, it is **“the freedom of connection, with any application, to any party”**.

Net neutrality thus guarantees that **the flow of information that runs through the communications architecture is neither blocked nor degraded**

by telecommunications operators, so that end-users can freely and efficiently make use of the network. Thanks to this principle, the Internet remains open and free.

However, **this founding principle is now in danger**. Some Telecoms operators are developing business-models that are harmful to consumers and are based on discriminating, filtering or prioritizing the information flowing through the networks they operate. Affiliated content, services and applications providers could benefit from "fast lanes" on the Internet, available at a high price, when the rest of the Internet traffic would be slowed down through an artificially created scarcity of bandwidth.

An EU-wide Net neutrality policy that would avoid regulatory fragmentation within the Internal market and empower users by letting them free to use their Internet connection in whatever way they want. In return, **enforcing the principle of Net neutrality will bring many rewards(?)**.

Net neutrality spurs investment in fixed and wireless networks

This structure has made Internet the one invention in the history of mankind that has scaled seamlessly from an experiment connecting 4 or 5 local networks of research centers to a global network connecting a billion and a half humans, and on which information is transmitted that represents ten orders of magnitude more traffic in 20 years³ (10000 millions times). **With the arrival of new technologies, Internet applications became more sophisticated and more demanding in terms of network capacities**. To deliver these innovative services to end-users, Telecoms operators have invested in more bandwidth. **It is this development model that has allowed for the formidable growth of network capacities** and increased the potency of the global infrastructure we call the Internet.

Today, some **Telecoms operators would like to create an artificial scarcity of bandwidth**, arguing that network capacities have been reached. The truth is it would allow them to develop new business-models based on the management and valorization of the information flow. With these new possibilities of lucrative anti-competitive practices, operators could switch to a new business model: investing in the control of what is going through the pipes, instead of investing in better networks. This model would create the perfect self-justifying conditions for these policies: *"Internet has become too slow, we are therefore forced to control it and prioritize content, services and applications whose owners are ready to pay the more money."* Such arguments, along with the threat of "the end of the Internet", do not stand in the face of technical reality. **Cheaper bandwidth and ordinary**

³ See: Andrew Odlyzko, *Internet traffic growth: Sources and implications*, <http://www.dtc.umn.edu/~odlyzko/doc/itcom.Internet.growth.pdf>. There is debate on whether this ability to scale up is today endangered by an acceleration of the growth rate of traffic. Andrew Odlyzko, the leading expert on Internet statistics and modeling stresses that this claim is not founded. See Andrew Odlyzko, *Threats to the Internet: Too Much or Too Little Growth?*, http://www.Internetevolution.com/author.asp?section_id=592&doc_id=146747&. For an in-depth analysis of the issues that lie behind the debates on Net neutrality or equitable networks, see : Andrew Odlyzko, *network neutrality, search neutrality, and the never-ending conflict between efficiency and fairness in markets*, <http://www.dtc.umn.edu/~odlyzko/doc/net.neutrality.pdf>.

network management⁴ still allow for a growth of the network based on structural investments.

Net neutrality stimulates the innovation ecosystem

Net neutrality is also key to innovation. Studies⁵ show that Net neutrality facilitates innovation and competition, as **economic actors take advantage of the level-playing field in communication networks to launch new services.** The concept of “**innovation without a permit**”, where new entrants compete fairly with the incumbent giants is at the root of the development of Internet as we know it. Entrepreneurs of the Internet have become the linchpin of the emergent knowledge economy. Google, Wikipedia, Skype, eBay, Bittorrent, Twitter and so many other essential parts of the Internet took advantage of an open network and became widely used all over the world only a few months after being created, because it was relatively cheap to produce and distribute their innovative services.

However, when a service provider breaks the neutrality of the network, new entrants become vulnerable to unfair competition, given that their access to the Internet infrastructure can be restricted. Obviously, powerful actors in the telecoms industries have an interest in imposing their control over potential competitors. They do so by, for instance, banning innovative VOIP applications from mobile telecommunications services⁶. **Anti-Net neutrality practices are thus fundamentally anti-competitive and harm consumers as well as economic growth.** They discourage innovation and result in rent-seeking behaviors from established players. They put barriers to entry that do not allow the emergence of the “next Skype” or “next Google”. It follows that an open and equitable access to the communications infrastructure is the foundation of social and economic benefits and needs to be preserved.

Net neutrality benefits consumers and enhances citizenship

The strong innovation allowed by Net neutrality directly benefits consumers as they are constantly able to freely access new services and applications. Citizens also greatly take advantage of the renewed media ecosystem that develops on the Internet. Contrary to older traditional means of communications such as radio or television, producing and circulating information on the Internet does not require significant initial capital. Thus, **the ability to produce information and knowledge on the net is much more equally distributed in society, which have positive effects on democracy as a whole.** Net neutrality ensures that the ability to voice opinions on the Internet does not depend on users' financial

4 Ordinary network management practice allows operators to control their networks against security problems and to share the available bandwidth without discrimination against all users.

5 A thorough overview of the way new networked technologies transform markets is offered in *The Wealth of networks*, by Yochai Benkler: http://cyber.law.harvard.edu/wealth_of_networks/Download_PDFs_of_the_book

6 Such strategy is being pursued by telecom operators like Orange and O2 in Europe or AT&T in the United States. These companies have unilaterally decided to disable the use of the Skype iPhone application over their 3G networks: <http://www.intomobile.com/2009/04/06/skype-for-iphone-banned-by-carriers-in-us-europe.html>

capacities or social status. It gives people the freedom to express themselves as they wish, and to access the information they want without risking to be put at disadvantage by the few actors who operate the network.

In its decision against the HADOPI law implementing “three strikes” policy against file-sharing⁷, the French Constitutional Council outlined the importance of the Internet for citizenship. Finding that the law disrespected the 1789 “Declaration of the Rights of Man and of the Citizen”, the Council stressed that free access to the Internet has become essential for the proper exercise of the freedom of expression and communication. By doing so, the constitutional judges implicitly recognized that **an open Internet provides us with the opportunity to deepen people’s freedom and autonomy**, and therefore improves democratic processes.

For all that, this freedom and autonomy are very much under threat. Media corporations, which have been continuously merging with the telecommunications industries for the past 30 years⁸, would like to re-establish the control they have on traditional media on the Internet. Hence, **if Net neutrality was abandoned or even weakened in Europe, the control of the new, networked media ecosystem would be handed out to private actors**, who could use discriminatory traffic management as a way of achieving control on the network. It would turn the Internet into yet another predominantly commercial media.

Mandating Net neutrality

The public interest agenda in telecoms regulation is to codify protection of network neutrality, as well as clear limits for acceptable network management practices. It must mandate the Net neutrality principle at home in order to avoid regulatory fragmentation, and defend it abroad, bearing in mind that at its core, it ensures that the Internet can be a democratic communications platform.

In doing so, the EU could look at the United States’ soon-to-be formal rules regarding Net neutrality, disregarding the worrying reference to “lawful content” (this addendum possibly leaves the door open for interceptions of communications by Internet service providers under the form of monitoring and filtering practices that could threaten citizens’ rights and freedoms). **Inspired by the US Federal Communications Commission, European lawmakers could codify the following principles:**

- 1.** Internet users are entitled to access, send and receive the content of their choice;
- 2.** Internet users are entitled to use and run any content, any application and service;
- 3.** Internet users are entitled to connect their choice of software or hardware that do not harm the network;

⁷ Decision rendered on June 10th, 2009: www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009_580dc.pdf

⁸ See: Bernd W. Wirtz, *Reconfiguration of Value Chains in Converging Media and Communications Markets*. *Long Range Planning*, Volume 34, Issue 4, August 2001

4. Internet users are entitled to choice and competition among network providers, application and service providers, and content providers;

5. Internet users are entitled to an Internet connection that is free of discrimination with regard to type of application, service or content or based on sender or receiver address.

6. Providers of Internet access must be transparent about their network management practices and Internet users are entitled to an Internet connection with a predefined capacity and quality.

III) Copyright: Time for Change

While Net neutrality can ensure that users won't face illegitimate discrimination on the network, **other regulatory regimes must be adapted so that the emancipatory practices that the Internet enables can flourish.** It is the notably the case of copyright, which will necessarily be an important component of the post-i2010 agenda. Copyright has become extremely unadapted to the today's cultural economy, in which it is extremely difficult – if not impossible – to regulate the act of copying.

Acknowledging the need for further exceptions to copyright

Contrary to the worrying national legislative endeavors carried on these past few months in various member States (“three-strikes policies”), **the EU should move toward embracing the new uses made possible by digital technologies while ensuring fair funding for authors and other right-holders.** It can achieve this goal by answering this question: Which system of copyright protection is likely to serve the aims of rewarding creators at large, of ensuring investment in a wide variety of creative works, and of enabling an empowering access to knowledge and culture?

What is for certain is that **today's copyright regime is by far too rigid. New exceptions to copyright must be created.** It requires that member States adopt an open approach to the creation of an instrument of Limitations and Exceptions, for instance going beyond the present work in WIPO on **exceptions for the disabled** by addressing also minimal research and education exceptions. Indeed, mandatory provisions on formats in which works are made accessible for the disabled are useful and even necessary in order to guarantee an effective access. These provisions, like any other provision regarding technology or formats, should not mandate usage of specific formats, but rather define properties of the usable formats. Likewise **for education and research, mandatory exception should also be introduced,** where the definition of beneficiaries is focused on activities rather than on nature of institutions.

Encouraging the advent of a more inclusive cultural sphere

The EU should stress the potential of **extended collective licenses for non-commercial peer-to-peer exchange between individuals of digital works on the Internet** as a possible strategy for ensuring an effective remuneration and funding of creation in a manner that is compatible with the rights and freedoms of all. We call the European Commission to encourage experimentation of such schemes that are increasingly considered by collective management societies in Europe. Alternatively, European copyright legislation should be reformed in order to create a new statutory license for these practices.

Europe also needs rules defining or restating acts that users are authorized to accomplish when making use of copyrighted material in their own productions (remixes), as well as their duties in this respect, provided:

- that these rules never limit the general rights of users such as the right of quotation for the sake of criticism, review or public political expression, and more generally any re-use right that contributes to freedom of expression (concept of “fair-use”).
- that requirements on duties such as attribution do not introduce harmful technical or human complexity in their implementation. We encourage the European Commission to follow the good practice of Creative Commons licenses and of free re-use licenses in this respect, and to create a European register of copyrighted works.

Actions to foster legal security for user-generated content related activities should be conducted with a primary focus on enabling users to conduct these activities. The decision on making or not a specific exception should be based on a consideration of **what can be achieved by way of general exceptions and other user rights**.

Striking the right balance at the International level

Copyright law has been increasingly globalized. Hence, **copyright reform should be defended through the EU's trade relationships**. Generally, the EU should promote a reasonable interpretation of the three-step test (along the line of the declaration *A Balanced Interpretation of the Three-Step Test in Copyright Law*⁹) in the relevant international arenas (WIPO, WTO) and adopt it for the evolution of the European copyright framework.

It should also oppose the inclusion in the trade agreements that are being negotiated - such as ACTA - of any provision that could directly or indirectly further limit the existing or possible exceptions, or otherwise restrict directly or indirectly the rights of users of knowledge in its widest meaning.

⁹ See: http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf