



## Response to the EU 2020 Consultation

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## Executive Summary

In the EU 2020 communication, the European Commission calls for "*a new sustainable social market economy, a smarter, greener economy where our prosperity will result from innovation and from using resources better, and where knowledge will be the key input.*" After the relative failure of the Lisbon Strategy, the European Union must **learn from past mistakes and embrace the promises of the networked society.**

We believe that the principles embedded in the Internet – an open communications infrastructure that foster **the free flow of information along the network** – are key to the construction of a thriving knowledge society. But for our societies to reap the full benefits of the Internet, **the EU needs to adopt public policies that encourage rather than deter the circulation of knowledge.** First, this means that the free and open nature of the Internet must be preserved. 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. This will **guarantee the “common good” nature of the Internet** by ensuring that users can keep on engaging in a wide variety of market and non-market activities on the network, **creating and sharing information, thus contributing to the whole knowledge economy.** Second, while Net neutrality rules would eliminate discriminatory practices aimed at blocking or limiting certain information flows, other regulatory regimes, such **the scope of exclusive rights over information and their exceptions should be revised.** For instance, **copyright, must be adapted to the digital age** to support the development of innovative ways of distributing and using content online.

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.** Clearly, European policy has a choice between protecting existing rent-seekers and encouraging the development and new products, services and uses that serve its stated objectives : an **inclusive knowledge society, a sustainable economy, and the promotion of more global justice** in dealing with the transformations we face. If European policy-makers unequivocally choose the latter approach, they will pave the road for Europe's lasting prosperity and gain strong endorsement from citizens. Also, such a path will keep our societies away from the **temptation of securitarian and repressive policies**, which are not only technically ineffective and economically inefficient in the intangible cyberspace, but also 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 users' rights will spark positive outcomes for the knowledge 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 networked society.

### The knowledge society is driven by 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**.

## Access to a free and open information infrastructure as a fundamental right

A free access to the Internet has become an **essential utility**, comparable to water or gas<sup>1</sup>. 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-sharing<sup>2</sup>, 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 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).

Similarly, the European Union has made an important statement regarding the relation of the Internet with fundamental rights through recital 3a) of the Framework Directive of the Telecoms Package:

*“Recognising that **the internet is essential for education and for the practical exercise of freedom of expression and access to information, any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.** Concerning those issues, the Commission should start a wide public consultation.”* (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

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

<sup>2</sup> Decision rendered on June 10th, 2009: [www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009\\_580dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009_580dc.pdf)

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, studies and empirical evidence show that such attempts are ineffective<sup>3</sup>. 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.**

<sup>3</sup> *Internet blocking - balancing cybercrime responses in democratic societies.* Callanan, Gercke, De Marco, Dries-Ziekenheiner. [http://www.aconite.com/sites/default/files/Internet\\_blocking\\_and\\_Democracy.pdf](http://www.aconite.com/sites/default/files/Internet_blocking_and_Democracy.pdf)

## 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 years<sup>4</sup> (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 network management<sup>5</sup> 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. Studies<sup>6</sup> 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

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4 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&](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>.

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

6 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](http://cyber.law.harvard.edu/wealth_of_networks/Download_PDFs_of_the_book)

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 services<sup>7</sup>. **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 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-sharing<sup>8</sup>, 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.

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<sup>7</sup> 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>

<sup>8</sup> Decision rendered on June 10th, 2009: [www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009\\_580dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009_580dc.pdf)

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 years<sup>9</sup>, 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, and ruin the foundations of the knowledge society.

## 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;
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.

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<sup>9</sup> See: Bernd W. Wirtz, *Reconfiguration of Value Chains in Converging Media and Communications Markets*. *Long Range Planning*, Volume 34, Issue 4, August 2001

### III) Copyright: Time for Change

While a proper dose of IPR might be important for innovation, numerous scientific studies<sup>10</sup> show that the strengthening of proprietary rights over information – which has been the landmark of cultural and technological policy for more than thirty years – actually **stifles innovation and investment in new informational productions**. For copyright too, the extension of exclusive rights impose an unnecessary and therefore illegitimate burden on society. As William Patry, Copyright Counsel to the U.S Congress, has put it, “we are well past the healthy dose stage and into the serious illness stage”<sup>11</sup>. Not only is abusive copyright regime economic non-sense, but its ruthless enforcement also severely threatens civil liberties. **It is time for the EU to embrace a radically new approach regarding these issues.**

#### **Acknowledging the need for further exceptions to copyright**

This evolution, by systematically discouraging the circulation and re-utilization of creative content, has hindered the advent of the knowledge economy. It has also failed to **take into consideration the need of more fragile parts of the population in relation with cultural works**, most notably persons with disabilities and individuals whose economic situation severely constrains their access to cultural goods.

The EU must recognize that copyright law has been suffering from an obvious lack of symmetry between exclusive rights on the one hand, and limitations and exceptions on the other hand. The real **harmonization of copyright regimes across the EU requires that mandatory exceptions be imposed to Member States**. Contrary to the claims of rights holders, it is clear that contractual licensing would seriously compromise the swift and successful introduction of exceptions on which there is a broad consensus. This is notably the case of exceptions for disabled persons and education and research. For these two specific needs, mandatory exceptions should be urgently introduced at the EU level as we argued last year in our response to the Green Paper on Copyright in the Knowledge Economy<sup>12</sup>. Naturally, any measure - such as technical protection measures (TPMs) - infringing on these exceptions should be deemed illegal.

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<sup>10</sup> See, for example, Josh Lerner, *Patent Protection and Innovation Over 150 Years*. Working paper n° 8977, National Bureau of Economic Research, Cambridge, USA, 2002. Josh Lerner studied changes in intellectual property law in sixty countries over a period of 150 years. He found that when patent law was strengthened, investment in innovation for local firms slightly decreased.

<sup>11</sup> <http://williampatry.blogspot.com/2008/08/end-of-blog.html>

<sup>12</sup> La Quadrature du Net, *Comments on the Green Paper on Copyright in the Knowledge Economy*, November 2008. Available at <http://www.laquadrature.net/files/LQdNcommentsonCopyrightGreenPaper.pdf>

## Encouraging the advent of a more inclusive cultural sphere

Information and Communications Technologies (ICTs) bring about **new affordances**<sup>13</sup>, enabling people to engage in a wide variety of practices that previously required significant amounts of capital investment in order to be carried on. This is arguably the biggest contribution of the Internet to freedom and democracy in modern societies, as this structural change profoundly reorganizes the media landscape. Creating information, whatever it may be; circulating this information and exchanging it with others; commenting on existing information and building upon such information or re-contextualizing it in order to make up new claims: all these activities represent a **radical shift in the political economy of communications**, one that is not restricted to the artistic field but permeates to other fields of the informational sphere, such as political and public expression or science. It is the clear public interest to create policies that can foster these evolutions, rather than ruthlessly maintain proprietary regimes relying on scarcity and restraining access to informational resources.

In order to **recognize the public's status not only as a consumer but also as a participant in the cultural ecosystem**, new rights must be created. Non-commercial file-sharing between individuals, which has been at the center of the debate regarding online creative content and is especially popular among young people (the so-called digital natives<sup>14</sup>), must now be recognized and integrated in a reformed copyright regime. Likewise, the EU should encourage an appropriate framework for non-commercial re-uses (“remixes”) of creative works.

## 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<sup>15</sup>) in the relevant international arenas (WIPO, WTO). Likewise, the EU must adopt a more **progressive stance on limitations and exceptions in international norm-setting arenas**, and **support the proposed treaty for visually impaired persons at WIPO**.

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.

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13 An affordance is a quality of an object, or an environment, that allows an individual to perform an action (source: Wikipedia).

14 John Palfrey and Urs Gasser, *Born digital : understanding the first generation of digital natives*, Basic Books, 2008.

15 See: [http://www.ip.mpg.de/shared/data/pdf/declaration\\_three\\_steps.pdf](http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf)

## 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.