

Response to the net neutrality questionnaire

Mr. dr. B. W. Schermer
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LS,

Thank you for providing me with the opportunity to react to the Net Neutrality Questionnaire. As a legal professional interested in the issue of net neutrality and its relation to innovation, cultural diversity, media pluralism and freedom of expression, I would like to respond to question 15 of the Questionnaire.

Question 15: *Besides the traffic management issues discussed above, are there any other concerns affecting freedom of expression, media pluralism and cultural diversity on the internet? If so, what further measures would be needed to safeguard those values?*

1.1 General

When it comes to the issue of net-neutrality I feel it is important to establish that net-neutrality is a means to protect different interests that may be threatened by uncontrolled traffic management on the part of the Internet service providers (ISPs). In the debate on net neutrality we may distinguish roughly three different issues relating to traffic management *viz.*:

- 1) the issue of using traffic management for network integrity;
- 2) the issue of QoS and the differentiation between different services and/or content;
- 3) the issue of the protection of freedom of speech

When it comes to traffic management for the purpose of network integrity (e.g., blocking malware and viruses) there seems to be little disagreement between opponents and proponents of net neutrality: when it comes to network integrity net neutrality does not apply. In this reaction I shall therefore focus on net neutrality and the issue of freedom of speech, and the closely related themes of media pluralism and cultural diversity.

I feel it is important to make a distinction between these different issues, as net neutrality is oftentimes portrayed as a one size fits all solution that addresses all these issues. It is important to discuss these issues, because while (mandated) net neutrality aims to protect important values such as innovation, consumer rights protection, fair competition and freedom of speech, it is questionable whether mandated net neutrality through *ex-ante* regulation will indeed address all of these issues effectively.

1.2 Media pluralism and cultural diversity

How net neutrality will influence media pluralism and cultural diversity is as of yet unclear. The question how net neutrality will influence media pluralism and cultural diversity is very similar to the more general question on how net neutrality will influence innovation.

Proponents of net neutrality argue that the end-to-end principle of the Internet has been the key driver for innovation on the Internet. They fear that when providers are allowed to

differentiate between content and services in their networks, innovation is stifled. Opponents of net neutrality argue that the Internet is not neutral and that denying ISPs the means to differentiate in service provision in their networks denies them the opportunity to monetise their networks. In their view net neutrality hampers the free market and this will stifle innovation.

The pro net neutrality arguments are based on the underlying assumption that providers will discriminate against certain services and content to such an extent that they will become either unusable or very unattractive for consumers. Proponents of net neutrality use the metaphor of highspeed tollroads versus dirtlanes to illustrate this point. While this is indeed a possibility, it is not clear if and to what extent providers will actually engage in such behaviour. Blocking content or slowing certain types of services will likely antagonise customers leading to churn. In this regard the strength of service- and content providers like Google and Apple must also be taken into account. For instance, discriminating against Google services might lead customers to switch providers, because they will not have access to popular services like Maps, Docs and Search.¹

It is also unclear what the effects of tiered services would be on media diversity and pluralism. It is possible that tiered services might shift the balance in media attention to the big conglomerates who have the 'deep pockets' to purchase scarce bandwidth. On the other hand, it could also be argued that cost-differentiation (for instance through tiered services) will introduce more media diversity since different offerings can co-exist and have more opportunity to grow (i.e., the extra money that flows in from premium services can be used to upgrade the network). It could even be argued that mandated net neutrality would actually diminish media diversity and pluralism.

It could for instance be argued that file-sharing (which takes up roughly 50% of the available bandwidth worldwide) is stifling innovation in the area of video delivery, since it is more difficult to create high quality, legal offerings if they are not allowed to differentiate themselves from illegal file-sharing offerings.

Prohibiting traffic management may also lead to an unacceptable degradation in the quality of service for applications such as VoIP, live (video) streaming, and online gaming which rely on an optimal throughput of data with low latency and jitter. This service degradation can manifest itself in longer loading times, service interruptions, or no service at all, adversely affecting consumer satisfaction. This would in turn slow down innovation since services that demand a high quality of service cannot be deployed effectively.

Another example would be that the strict non-discrimination principles set forth by ex-ante net-neutrality might chill any innovation that requires close co-operation between service providers, content providers, and possibly hardware providers.²

Finally, if net neutrality rules are introduced, the incentive to invest in high quality networks may go down since it will be more difficult to recoup these investments through premium offerings.

Whatever the case might be, it is as of yet unclear if and how traffic management might affect innovation in general and media pluralism and cultural diversity in particular. Therefore, in my opinion, before introducing any type of *ex-ante* regulation further study on this issue is warranted.

¹ <http://www.earthtimes.org/articles/news/335848,demands-fees-google-apple.html>

² <http://techliberation.com/2010/02/11/net-neutrality-means-no-more-iphones/>

1.3 Freedom of expression

When it comes to freedom of expression and net neutrality we must first make a distinction between the protection of freedom of expression in a commercial setting and that in a public setting.

Business, freedom of expression and net neutrality

Proponents of net neutrality argue that mandated net neutrality is necessary to protect the freedom of expression online. Their fear is that without these rules ISPs will be free to determine what type of information their customers have access to. However, examples of ISPs limiting the freedom of expression are anecdotal at best. While it is certainly possible for an ISP to block certain forms of content, customer backlash and damage to the reputation of the ISP should be enough to deter most ISPs from engaging in a limitation of the freedom of expression. If the behaviour of the ISP is deemed a violation of the freedom expression, the parties affected could bring their case before a judge. Moreover, the government can intervene if the behaviour of the provider is anti-competitive.

The question is also whether allowing the free market to set prices for the means in which information is conveyed is a violation of the freedom of expression. While blocking access to information or services would certainly be a violation of the freedom of information (as part of the freedom of expression), it is questionable whether differentiation in price and quality of a connection would count as violation of the freedom of expression. In my opinion, this would only be the case if there is price-discrimination on the basis of the content of the information, or the party sending the information. This would for instance be the case if a left-wing organisation would have to pay more for a premium video channel than a right wing organisation.

As such, it is questionable whether net neutrality rules will provide any additional protection alongside the protection provided by article 10 of the European Convention on Human Rights, and in article 11 of the Charter of Fundamental Rights of the European Union.

Government and net neutrality

In my opinion, the real danger when it comes to freedom of expression is government mandated traffic management. In my opinion net neutrality will not provide any additional protection beyond that already provided by the ECHR and the Charter.

The problem with mandated net neutrality in the area of freedom of expression and government intervention is that rules to protect the freedom of expression would become too 'binary' in their application: either ISPs are allowed to distinguish between particular types of traffic, or they are not allowed to do so. This binary approach to the freedom of expression would go against the legal tradition of weighing rights and balancing interests based on individual cases. Since the binary nature of net neutrality would make policy choices in regulation and enforcement black and white, it is likely that governments will make exceptions to net neutrality rules. This would effectively render net neutrality useless in the area where freedom of expression matters most.

Moreover, there might even be a risk that net neutrality will be counterproductive, since it will mix up the fundamental issue of freedom of expression with that of topics that are of a more economic- or market oriented nature, such as service differentiation, price discrimination and illegal file-sharing. I feel that we should keep these issues separated from the more fundamental debate about the freedom of expression.

1.4 Additional measures

In my opinion a strong and competitive market in tandem with strong and effective oversight should provide adequate protection for cultural diversity, media pluralism, and freedom of

expression. To strengthen the market and bolster oversight the following mechanisms may be employed or strengthened:

Competition

The most effective mechanism to preserve a free and open Internet is to have a strong and competitive market. Apart from the existing rules on competition and fair consumer practices, it is necessary to facilitate the consumer in their abilities to make choices between providers. An important mechanism in this regard is to facilitate easy switching between ISPs. Currently the churn in the telecommunications industry is low. As mentioned in this questionnaire, the cost of switching operators can be high for consumers (loss of connectivity, difficult administrative procedures). In part this is due to bundled services, contractual binding and other mechanisms that reduce churn. Enabling more flexible switching between providers will strengthen competition and give consumers a powerful means to voice any complaints about the traffic management policies of the ISP.

Transparency

Transparency is of vital importance when it comes to ensuring a free and open Internet. Any traffic management policies should be clear to consumers. In this sense the additional rules set forth by the European Union are hopeful. To further increase transparency, existing oversight mechanisms employed by NRAs might need to be strengthened. One example could be mandatory annual or bi-annual probes into network management practices.

Enforcement

Finally, if existing powers or capacities of NRAs prove insufficient to curb abuses of significant market powers or violations of consumer rights, they should be strengthened. Key to the healthy functioning of any open and free market is a strong regulator that intervenes when necessary. In those areas where different NRAs have jurisdiction (e.g. telecoms regulators and consumer rights regulators) it should be clear who has the mandate to intervene, or how co-operation should be achieved.

1.5 A broader perspective on net neutrality

When we look at the issue of net neutrality we must also take into account the changing landscape of the Internet. While the ISPs used to be the dominant factor on the Internet, the rise of Internet giants such as Google, Microsoft and Yahoo! has changed this situation. Furthermore, hardware manufacturers like Apple, RIM, HP and Nokia are also becoming part of the information supply chain. This means that the ISPs are no longer in as a strong position as they were several years back. While this is good news in the sense that it has limited the power of ISPs (and their ability to abuse traffic management), the downside is that there are now new players that can violate the open character of the Internet by leveraging their market power.

So even if we have net neutrality rules for ISPs, discrimination may still take place in the application layer. The practices of Apple in banning certain applications from the App store, or the neutrality of Google's search ranking illustrate that the issue of an open internet goes well beyond net neutrality. So if we would mandate net neutrality (in effect shifting more power to players such as Apple or Google), we would also require additional rules on 'search neutrality' and 'application neutrality'.

1.6 Conclusion

An open and free Internet is essential for freedom and cultural diversity in Europe. Though ex-ante regulation mandating net neutrality might seem like an effective one-size fits all solution to the issues of freedom on the Internet, it is questionable whether net neutrality will stimulate cultural diversity and media pluralism or provide any additional protection against encroachments upon the freedom of expression. So while net neutrality is often equated with an open and free Internet we must take care not to mistake these two things. Net neutrality is a

regulatory instrument (an example of code as law) and it must be treated as such. Accepting claims that net neutrality is a prerequisite for an open Internet may deny us the use of other possibly more fine-grained legal instruments. Therefore, we should judge net neutrality on its effectiveness as a legal instrument *vis-as-vis* other legal instruments.

When it comes to mandated net neutrality to stimulate cultural diversity and media pluralism I feel that at present the effects of traffic management on these issues is unclear. As such, interference with the current market does not seem warranted at this point in time. While this might change in the future, existing market mechanisms and legal safeguards should provide adequate safeguards.

In my opinion when it comes to freedom of expression, a more flexible approach leveraging the regulating effect of strong competition in combination with the current legal framework is more effective than mandated net neutrality, particularly since governments may wish to bypass the binary nature of net neutrality legislation altogether.

A final issue when it comes to media diversity, pluralism and the freedom of expression is the increased power of content-, platform-, hardware- and application owners. Mandated net neutrality will shift more power to these players, something that is also undesirable when it comes to a free and open Internet.

In summary, net neutrality is too broad a concept in both meaning and application to be an effective regulatory instrument. As of yet it is unclear whether mandated net neutrality rules are necessary, what its impact will be on innovation and the freedom of speech, and how it will affect the different players in the Internet value chain. This conclusion warrants a more context sensitive approach rather than the one size fits all solution of mandated net neutrality.