



Brussels, 29 Septmeber 2010
064VDH10

GESAC's Submission to the Consultation on the Open Internet and Net Neutrality in Europe

Introduction and General Remarks

GESAC represents 34 of the main collective copyright management societies (authors' societies) in the European Union, Norway and Switzerland, that administer the rights and remuneration of almost 500 000 authors, composers and writers of a variety of sectors (music, audiovisual, literary and visual and graphic arts) and music publishers.

GESAC welcomes the opportunity to express its views on the Open Internet and Net Neutrality.

Debates on the Internet Neutrality tend often to centre around the needs and concerns of telecom operators, ISPs, search engines, services providers and end consumers. The interest of authors and right holders are often left outside of the debate. This is unfortunate giving the importance of copyright protected content in the development of the Internet. Any graph on consumer Internet traffic shows that the most bandwidth-hungry applications are those that allow consumers to access copyright protected material (e.g.: P2P, gaming, Internet video, etc.), which therefore should be regarded as the main driver of bandwidth demand.

In fact, Internet is an excellent opportunity for the cultural sector. Consumers can access a vast amount of content in a manner that was unthinkable only a few years ago. We are glad to see that music, movies, TV shows, publications, pictures or videogames are widely sought after by consumers online and we are equally pleased that consumers are increasingly looking for high-speed Internet connections to access the content that our members have so proudly created, performed, written or financed.

However, it is a significant cause of concern to us that this valuable contribution to the development of the Information Society goes largely unrewarded. The reality is that the overwhelming majority of content is accessed outside legitimate channels and that there is no proper recognition and remuneration for those who create, perform or provide them. On just about every measure, the 'black market' for music online is larger than the legal one. One example to highlight is the P2P site Mininova, which celebrated its 10 billionth download

three months before the globally renowned iTunes music store celebrated theirs. Recent BPI¹ research also suggests that a quarter of adults online access unlicensed content, whereas only one-in-ten have made a legal digital purchase.

Albeit copyright protection as such does not appear as one of the issues raised in the consultation paper, we welcome that the Commission is inviting interested parties to submit comments, not only on the technical elements of net neutrality, but also on areas that would be greatly affected by any regulation on the matter, such as cultural diversity.

GESAC's submission is therefore limited to responding question 15:

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?

- ***Net Neutrality***

The first thing that needs to be said is that net neutrality cannot be seen as the Holy Grail of Internet openness. The principles of net neutrality, and more generally Internet openness, have to be put in balance with other values acknowledged by the EU legal framework, amongst which the protection of Intellectual Property and cultural diversity.

Such values and the equilibrium thereof are clearly reflected in the Charter of Fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.²

But even as a principle, we doubt that net neutrality as such can be fully achieved.

As we understand it, net neutrality's basic aim is to prevent discrimination of one service over another – making X better than Y so that X is more attractive to users than Y.

This raises the question of whether or not the Internet can actually be completely neutral. In our view the answer is no. Architecture, equipment used, backhaul capacity, peering, CDN

¹ BPI Statistical Yearbook and monthly trade surveys

² The preamble of the Charter reads as follows: “*This Charter reaffirms [...] the rights as they result, in particular (...) the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.*”

Article 11 and 17(2) of the Charter express equal values.: “*Freedom of expression and information. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*”

Article 17 (2): “*Intellectual property shall be protected.*”

The same equilibrium is reflected in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 10: “*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [...] The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests [...] for the protection of the reputation or rights of others [...].*”

and transit connections will always be different from one provider to the next and will cause differences in the performance on two different networks.

However, as the consultation paper rightly points out, there are situations where operators manage the traffic for a variety of reasons. Therefore what we need to assess is whether and, if so, to what extent it is advisable to limit ISPs possibility to perform traffic management operations.

On this, GESAC has no clear-cut ideological, but we would nonetheless like to share with the Commission our thoughts on the different consequences that traffic management can have for rights holders and cultural diversity.

- *Traffic Management*

As the Consultation Paper rightly points out, “*traffic/network management can be a legitimate tool for the provision of differentiated services and in the interests of the efficient functioning of networks*”. In fact, traffic management has always existed on the Internet and it seems that it has led to efficiencies. We think that it could also be a useful tool **in the fight against copyright infringements in the Internet.**

○ *Potential Benefits of Traffic Management for Rights Holders*

The consultation paper lists a number of situations where traffic management could be positive. One of these situations is “*to ensure that legal obligations are met in some Member States, particularly for example with regard to illegal content.*”

We adhere to this idea. Indeed, traffic management has a key role to play in promoting lawful over unlawful content. Illegal content should not be treated equally to legal content, and traffic management has an important role to play in making legal content more accessible than unlicensed sources.

On the Internet, the cost to the infringer caught stealing or promoting illegal copyright content is currently too low and the cost of preventing this too high for rights holders. We potentially see traffic management as a key tool to rebalance this and enable the ISPs to meet their responsibility in cooperating in the fight against copyright infringements in the Internet, and for making sure that consumer access to legal content is faster and more reliable than an illegal alternative.

It should be recalled that the current EU legal framework is at present neutral towards traffic management.³

³ Article 1 (3) of Directive 2002/22/EC (Universal Service Directive) as amended by 2009/136/EC: “*The Directive neither mandates nor prohibits conditions, imposed by service providers, limiting end-users’ access to, and/or use of, services and applications, where allowed under national law and in conformity with Community law, but lays down an obligation to provide information regarding such conditions. Such national measures shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy and due process, as defined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*”.

- Potential Drawbacks of Excessive Traffic Management by ISPs

On the other hand, the consultation paper also echoes the concerns of proponents of the net neutrality “principle”, arguing that enhanced quality of service could be offered to some stakeholders, but not to others, or to certain types of content and not to others. This decision could be taken for a variety of reasons: because one stakeholder is willing to pay extra money for a premium service, because certain types of content are particularly bandwidth-hungry, etc. Similar concerns are reflected in the consultation paper as regards restrictions placed upon consumers to access certain applications.

In our view, a clear distinction should be made.

As indicated above, managing traffic with the purpose of fighting illegal content is not only acceptable, but desirable. It is unfair and violates the EU legal framework as described above that illegal content be treated equally to legal content.

On the other hand, discrimination as regards two services or two types of content that are legal should carefully be assessed from the perspective of service providers, consumers, right holders and cultural diversity.

From a rights holder’s perspective a market where, for instance, only one or a couple of online music providers would have a preferential access to consumers of a nature to effectively leave competitors out of said market would be a negative scenario. This would reduce the outlets of copyright protected content to the detriment of competition, which would in turn be detrimental for consumers, for rights holders and for cultural diversity.

Equally, a situation in which online music providers would be forced to pay for a premium service for fear that they would otherwise be left to crawl in the slow lane would be negative as music providers having to pay to remain competitive would have to pass on these costs to the final consumer, making the service more expensive. Alternatively, notably given the great pressure from free illegal services on prices, they would be tempted to ask rights holders for a reduction in the royalty fees.

Similarly negative would be a scenario where, due to traffic management, certain bandwidth-hungry applications, notably those legally providing copyright protected content, would be slowed down. Unless this is done for emergency reasons, we do not see why a legal application should be discriminated on the grounds that it is more demanded by consumers and therefore uses more bandwidth.

Having said that, and while we ask the Commission to be vigilant on these issues, we trust that there is a good chance that market forces themselves might prevent this from happening. In fact, certain analysts suggest that some of these fears could become true in an uncompetitive market. It is telling that neutrality has become more politically controversial in the US than elsewhere. This might be due to the relative lack of competition in the American broadband market. The result is that the US has a small number of powerful operators prompting concern that they will abuse their power unless they are compelled by a net-neutrality law to treat all traffic equally. In the EU it is more likely that if access providers start limiting what consumers can do they will deflect to another.

We therefore believe that there is no reason for ex ante regulation on traffic management to be introduced in the EU.

- *Conclusions*

Taking into account the above arguments, we believe that the main conclusions that should be drawn are the following:

- Copyright protected content has played a vital role in the development of the Information Society, since it is the main driver of bandwidth demand;
- The interests of rights holders, notably their difficulties in getting adequately rewarded for their work in the Internet, should be a priority in any debate on the future of the Internet;
- Net neutrality should not be regarded as the Holy Grail to preserve the openness of the Internet, since it is impossible to achieve it completely;
- Traffic management has been an effective tool in the past to solve inefficiencies and it could, and should, also become a means to promote lawful over unlawful content, notably copyright protected content;
- As regards management of traffic that would introduce limitations on the access of legal applications, they should be regarded carefully, but in our view there is no need for ex ante regulation on the matter;
- In any case, any regulation with a view to preventing ISPs to interfere with the traffic of content in the Internet should be limited to interferences as regards legal content and applications. In that sense, we would like to point at the principles of the American Federal Communications Commission (FCC) on net neutrality, which do not take for granted that all content sent and received online is legal:
 - o To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the **lawful** Internet content of their choice.
 - o To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, **subject to the needs of law enforcement.**
 - o To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of **legal** devices that do not harm the network.
 - o To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.⁴

⁴ Federal Communications Commission, "Policy statement" adopted on 5 August 2005.