

Human Rights in the Digital Era, Leeds, September 16, 2011

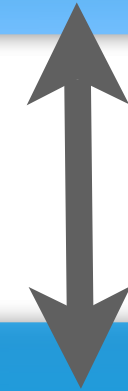
FROM COMPETITION TO FREEDOM OF EXPRESSION: INTRODUCING ART. 10 ECHR IN THE EUROPEAN NETWORK NEUTRALITY DEBATE

Jasper P. Sluijs, Tilburg Law and Economics Center

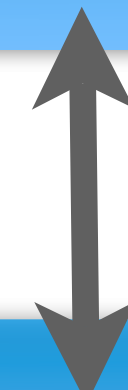


The Internet as a two-sided market

Content/Service providers (Google, Facebook)



Internet Service Providers (KPN, Ziggo)



End-users

Some background

Some background

- Original Internet: end-to-end architecture, best-efforts routing

Some background

- Original Internet: end-to-end architecture, best-efforts routing
- Enter broadband:
 - Increase high-bandwidth applications
 - Increase applications sensitive to delay (YouTube, Skype)

Some background

- Original Internet: end-to-end architecture, best-efforts routing
- Enter broadband:
 - Increase high-bandwidth applications
 - Increase applications sensitive to delay (YouTube, Skype)
- Active network management?
 - Manage congestion, facilitate functional access
 - Possible anticompetitive use, curbing of civil liberties

‘Network management’

‘Network management’

- Blocking: preventing packets to reach final destination

‘Network management’

- Blocking: preventing packets to reach final destination
- Degrading: impairing quality of service of packet streams

‘Network management’

- Blocking: preventing packets to reach final destination
- Degrading: impairing quality of service of packet streams
- Prioritizing: preferential treatment of some packets over others

Network Neutrality Debate

Network Neutrality Debate

- How much network management may ISPs exercise over the content providers' traffic on their network? How actively may they manage their bandwidth?

Network Neutrality Debate

- How much network management may ISPs exercise over the content providers' traffic on their network? How actively may they manage their bandwidth?
- Concerns in literature, ambiguous welfare effects
 - Differentiated traffic v. abuse of dominance?
 - Innovation (on content and network side)?
 - Competition (intermodal; intramodal)?
 - Constitutional issues: freedom of expression, privacy?

The European Response

- Transparency:
 - Light touch regulatory compromise to facilitate market mechanisms:
 - (Non-neutral) network management allowed, but has to be transparent to end-users
 - Standard practice in EU telecoms law

EU telecoms law

- Economically oriented
- ...ever since liberalization and privatization of 1980s and 1990s
- Competition law enforcement by default, ex ante regulatory intervention only in case of 'significant market power'

Meanwhile...

"Thus, in the open internet, users can all freely communicate, fully express themselves, access information and participate in the public debate, without unnecessary [sic] interference by gatekeepers or middlemen. The end-to-end principle provides an important safeguard against censorship, both by public and private actors."

..and what about this?

“Any of these measures regarding end-users’ access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services., OJ L 337/37 at art. 1(3)(a) (2009).

However...

“Freedom of expression and citizens rights, as well as media pluralism and cultural diversity, are important values of the modern society, and they are worth being protected in this context—especially since mass communication has become easier for all citizens thanks to the Internet. However, intervention in respect of such considerations lies outside the competence of BEREC, and we will not comment much on these issues, although it is noted that as public bodies, NRAs are obliged to respect the rights of citizens if restrictions are imposed on end users’ access to or use of services.”

Therefore:

Therefore:

- Practical application fundamental rights in net neutrality disputes ambiguous

Therefore:

- Practical application fundamental rights in net neutrality disputes ambiguous
- No substantial (European) legal research into this—in contrast to US.

Art. 10 ECHR

Statement of Rights

1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Limitations

2. 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 of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Art. 10 violation is:

Art. 10 violation is:

- *Interference* according to 10(1)
 - Expression
 - Public interference

Art. 10 violation is:

- *Interference* according to 10(1)
 - Expression
 - Public interference
- *Breach* of 10(2) when interference is either
 - not prescribed by law [legality]; or
 - without a legitimate aim [legitimacy]; or
 - not proportional [necessity].

Network neutrality?

Network neutrality?

- I. ISPs' network management impedes with end-users' or CSPs' freedom of expression

Network neutrality?

I. ISPs' network management impedes with end-users' or CSPs' freedom of expression

- Blocking, degrading or prioritizing traffic affects freedom to receive and impart information

Network neutrality?

1. ISPs' network management impedes with end-users' or CSPs' freedom of expression
 - Blocking, degrading or prioritizing traffic affects freedom to receive and impart information
2. Network neutrality regulation impedes with ISPs' freedom of expression

Network neutrality?

1. ISPs' network management impedes with end-users' or CSPs' freedom of expression

- Blocking, degrading or prioritizing traffic affects freedom to receive and impart information

2. Network neutrality regulation impedes with ISPs' freedom of expression

- Regulation affects ISPs' freedom to impart information

I) Network management affecting end-users' and CSPs' freedom of expression

"We who have signed this open letter urge the European Parliament to protect the freedom to receive and distribute content, and to use services and applications without interference from private actors. We call on the Members of the Parliament to take decisive action during the ongoing negotiation of the Telecoms Package in order to guarantee a free, open and innovative Internet, and to safeguard the fundamental freedoms of European citizens."

10(1)

10(1)

- *Public* interference?

IO(I)

- *Public* interference?
 - After all, most ISPs are private firms!

10(1)

- *Public* interference?
 - After all, most ISPs are private firms!
- (Ongoing) debate on horizontal application of fundamental rights—*Drittwirkung*—case by case approach by Court

10(1)

- *Public* interference?
 - After all, most ISPs are private firms!
- (Ongoing) debate on horizontal application of fundamental rights—*Drittwirkung*—case by case approach by Court
- Leaves, practically

10(1)

- *Public* interference?
 - After all, most ISPs are private firms!
- (Ongoing) debate on horizontal application of fundamental rights—*Drittwirkung*—case by case approach by Court
- Leaves, practically
 - (Partially) State-owned ISPs

10(1)

- *Public* interference?
 - After all, most ISPs are private firms!
- (Ongoing) debate on horizontal application of fundamental rights—*Drittwirkung*—case by case approach by Court
- Leaves, practically
 - (Partially) State-owned ISPs
 - Positive obligations on States

10(2)

10(2)

- State-owned ISPs:
 - Legality: network integrity; IP enforcement; undesirable content
 - Legitimacy: Disorder/crime; rights of others
 - Necessity: only when not affecting plurality or excessively burdening ISP (*Lentia; Tele I; Krone; Müller*)

10(2)

- State-owned ISPs:

- Legality: network integrity; IP enforcement; undesirable content
- Legitimacy: Disorder/crime; rights of others
- Necessity: only when not affecting plurality or excessively burdening ISP (*Lentia; Tele I; Krone; Müller*)

- Positive obligations:

- Legality: note—of government *inaction!* Property rights ISPs, art. 1 1st Protocol
- Legitimacy: rights of others
- Necessity: complex trade-off expression :: property (*Appleby; 20th Century Fox (UK)*)

I) Concluding:

- Network management affecting end-users' and CSPs' freedom of expression not as straightforward as assumed!
 - Public authority hurdle takes away most cases
 - Positive obligations leads into complex trade-offs

2) Network neutrality regulation affecting ISPs'
freedom of expression

2) Network neutrality regulation affecting ISPs' freedom of expression

- May seem far-fetched, not addressed in literature

2) Network neutrality regulation affecting ISPs' freedom of expression

- May seem far-fetched, not addressed in literature
- Commercial speech, *Citizens United*

10(1)

10(1)

- Clear public interference

10(1)

- Clear public interference
- Is network management expression? Commercial nature?

10(1)

- Clear public interference
- Is network management expression? Commercial nature?
 - *Autronic*: Convention protects transmission of content “since any restriction imposed on the means necessarily interferes with the right to receive and impart information.”

10(1)

- Clear public interference
- Is network management expression? Commercial nature?
 - *Autronic*: Convention protects transmission of content “since any restriction imposed on the means necessarily interferes with the right to receive and impart information.”
 - Echoed by *Oberschlick, Jersild, Unabhängige Initiative Informationsvielfalt, Perna*

10(1)

- Clear public interference
- Is network management expression? Commercial nature?
 - *Autronic*: Convention protects transmission of content “since any restriction imposed on the means necessarily interferes with the right to receive and impart information.”
 - Echoed by *Oberschlick, Jersild, Unabhängige Initiative Informationsvielfalt, Perna*
 - *Autronic* standard applied by national courts (*Marpin, Antelecom*)

10(1)

- Clear public interference
- Is network management expression? Commercial nature?
 - *Autronic*: Convention protects transmission of content “since any restriction imposed on the means necessarily interferes with the right to receive and impart information.”
 - Echoed by *Oberschlick, Jersild, Unabhängige Initiative Informationsvielfalt, Perna*
 - *Autronic* standard applied by national courts (*Marpin, Antelecom*)
 - *Markt intern*: commercial expression protected: “cannot be excluded from the scope of Article 10 § 1 ... which does not apply solely to certain types of information or ideas or forms of expression.”

10(1)

- Clear public interference
- Is network management expression? Commercial nature?
 - *Autronic*: Convention protects transmission of content “since any restriction imposed on the means necessarily interferes with the right to receive and impart information.”
 - Echoed by *Oberschlick, Jersild, Unabhängige Initiative Informationsvielfalt, Perna*
 - *Autronic* standard applied by national courts (*Marpin, Antelecom*)
 - *Markt intern*: commercial expression protected: “cannot be excluded from the scope of Article 10 § 1 ... which does not apply solely to certain types of information or ideas or forms of expression.”
 - Followed in *Casado Coca* and *Jacobowski*

10(2)

10(2)

- Legality legal basis in directives, national law (NL!)

10(2)

- Legality legal basis in directives, national law (NL!)
- Legitimacy: prevention disorder and crime

10(2)

- Legality legal basis in directives, national law (NL!)
- Legitimacy: prevention disorder and crime
- Necessity:

10(2)

- Legality legal basis in directives, national law (NL!)
- Legitimacy: prevention disorder and crime
- Necessity:
 - > Margin of appreciation in case of commercial expression (*Markt Intern*)

10(2)

- Legality legal basis in directives, national law (NL!)
- Legitimacy: prevention disorder and crime
- Necessity:
 - > Margin of appreciation in case of commercial expression (*Markt Intern*)
 - *Demuth; VgT Verein*: correlation harmonization & MoA

10(2)

- Legality legal basis in directives, national law (NL!)
- Legitimacy: prevention disorder and crime
- Necessity:
 - > Margin of appreciation in case of commercial expression (*Markt Intern*)
 - *Demuth; VgT Verein*: correlation harmonization & MoA
 - Note: EU telecoms law very harmonized field!

2) Concluding:

2) Concluding:

- Network neutrality regulation affecting ISPs' freedom of speech is NOT a hypothetical claim:

2) Concluding:

- Network neutrality regulation affecting ISPs' freedom of speech is NOT a hypothetical claim:
 - Network management is (commercial) expression

2) Concluding:

- Network neutrality regulation affecting ISPs' freedom of speech is NOT a hypothetical claim:
 - Network management is (commercial) expression
- MoA trade-off:

2) Concluding:

- Network neutrality regulation affecting ISPs' freedom of speech is NOT a hypothetical claim:
 - Network management is (commercial) expression
- MoA trade-off:
 - Commercial expression (>MoA) v. Harmonization (<MoA)

2) Concluding:

- Network neutrality regulation affecting ISPs' freedom of speech is NOT a hypothetical claim:
 - Network management is (commercial) expression
- MoA trade-off:
 - Commercial expression (>MoA) v. Harmonization (<MoA)
 - Decided on public interest of network management?

Concluding remarks

Concluding remarks

- Application of ECHR to network neutrality debate is much more complex than often assumed

Concluding remarks

- Application of ECHR to network neutrality debate is much more complex than often assumed
 - The supposedly straightforward freedom of expression violation of ISPs may not be as easily established as implicitly presumed

Concluding remarks

- Application of ECHR to network neutrality debate is much more complex than often assumed
 - The supposedly straightforward freedom of expression violation of ISPs may not be as easily established as implicitly presumed
 - ISPs can also invoke freedom of expression principles under threat of regulation

Concluding remarks

- Application of ECHR to network neutrality debate is much more complex than often assumed
 - The supposedly straightforward freedom of expression violation of ISPs may not be as easily established as implicitly presumed
 - ISPs can also invoke freedom of expression principles under threat of regulation
- First step towards debate based on substance rather than rhetoric

Thank you!

jasper.sluijs@tilburguniversity.edu

twitter: [@jaspersluijs](https://twitter.com/jaspersluijs)

jasperluijs.org

