

2011-5

Why Discuss Network Neutrality?

LEAD ARTICLE

Net Neutrality and Audiovisual Services

- Introduction
- Regulatory and Policy Context
- Getting the Context Right
- Conclusions

RELATED REPORTING

The Two Sides of the Net Neutrality Coin

- Adequate Infrastructure
- Rules on the Use of the Network

ZOOM

“Net Neutrality” in the United States of America – Who Can Stop the FCC, and Should They?

- Overview of the Telecommunications Legal Infrastructure
- Pre-December 21, 2010
- Post-December 21, 2010
- The Current Situation



IRIS plus 2011-5 **Why Discuss Network Neutrality?**

ISBN (Print Edition): 978-92-871-7246-4
Price: EUR 24,50
European Audiovisual Observatory, Strasbourg 2011

ISBN (PDF-Electronic Edition): 978-92-871-7249-5
Price: EUR 33

IRIS plus Publication Series

ISSN (Print Edition): 2078-9440
Price: EUR 95

ISSN (PDF-Electronic Edition): 2079-1062
Price: EUR 125

Director of the Publication:

Wolfgang Closs, Executive Director of the European Audiovisual Observatory
E-mail: wolfgang.closs@coe.int

Editor and Coordinator:

Dr Susanne Nikoltchev, LL.M. (Florence/Italy, Ann Arbor/MI)
Head of the Department for Legal Information
E-mail: susanne.nikoltchev@coe.int

Editorial Assistant:

Michelle Ganter
E-mail: michelle.ganter@coe.int

Marketing:

Markus Booms
E-mail: markus.booms@coe.int

Typesetting:

Pointillés, Hoenheim (France)

Print:

Pointillés, Hoenheim (France)
Conseil de l'Europe, Strasbourg (France)

Cover Layout:

Acom Europe, Paris (France)

Publisher:

European Audiovisual Observatory
76 Allée de la Robertsau
F-67000 Strasbourg
Tel.: +33 (0)3 90 21 60 00
Fax: +33 (0)3 90 21 60 19
E-mail: obs@obs.coe.int
www.obs.coe.int



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Contributing Partner Institutions:

Institute of European Media Law (EMR)

Franz-Mai-Straße 6
D-66121 Saarbrücken
Tel.: +49 (0) 681 99 275 11
Fax: +49 (0) 681 99 275 12
E-mail: emr@emr-sb.de
www.emr-sb.de



Institute for Information Law (IViR)

Kloveniersburgwal 48
NL-1012 CX Amsterdam
Tel.: +31 (0) 20 525 34 06
Fax: +31 (0) 20 525 30 33
E-mail: website@ivir.nl
www.ivir.nl



Moscow Media Law and Policy Center

Moscow State University
ul. Mokhovaya, 9 - Room 338
125009 Moscow
Russian Federation
Tel.: +7 495 629 3804
Fax: +7 495 629 3804
www.medialaw.ru



Please quote this publication as:

IRIS plus 2011-5, Why Discuss Network Neutrality? (Susanne Nikoltchev (Ed.), European Audiovisual Observatory, Strasbourg 2011)

© European Audiovisual Observatory, 2011

Opinions expressed in this publication are personal and do not necessarily represent the views of the Observatory, its members or the Council of Europe.

Why Discuss Network Neutrality?

Foreword

The freedom to receive and impart information is guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe. As is the case for exercising other fundamental freedoms, the mere recognition of the freedom of expression does not mean that citizens are in a position to enjoy it. For that to happen, they need to be able to communicate with each other, which in the modern world can be made possible through a wide array of communications outlets including the Internet. The European Audiovisual Observatory examines questions related to the exercise of freedom of expression regarding their importance for audiovisual media. In the context of the Internet, this means, for example, looking at the many audiovisual media services that use broadband capacity to reach the consumer or, conversely, at the content that Internet users self-generate and post on Internet platforms. Obviously, the receiving or imparting of content offered by or to audiovisual media services via the Internet presupposes access to communication networks. Whenever such access is restricted we will find somebody to diagnose an impact on the exercise of freedom of expression. Whether this diagnosis is correct and, if this were to be the case, whether the impact qualifies as undue interference with the freedom of expression is one question discussed under the notion of “network neutrality”. It is the very issue looming in the background of this *IRIS plus*.

Yet it is not the only question addressed by this publication. The Lead Article, in particular, focuses on the technical and economic aspects of net neutrality as well as on where legislatures (European and national) stand with regard to ensuring this neutrality. The potential interests (and power) of communication network providers to facilitate or hinder access to communications networks is only one among many shifting parameters that the process of convergence has brought into the interplay between communications and audiovisual media services. Vertically operating telcos or platform providers supply competing services and dispose of more means (such as controlling applications and selection systems) to influence the value chain, as the Lead Article points out. That companies compete does, however, not necessarily imply that they apply restricting measures in pursuance of (illegitimate) business considerations. Limiting access to networks might simply be technically required because of an over-demand for existing capacity. But even when access restrictions merely respond to scarcity, net neutrality remains an issue because restricting measures have the potential to discriminate. Therefore the restraints of limited network capacity should be passed on to potential users in a way that does not amount to an anticompetitive measure or unfair business practice.

The Related Reporting-section of this IRIS *plus* supplies additional information related to principles for the regulation of net neutrality and reports on recent efforts towards extending broadband capacity to avoid or at least reduce scarcity. The amended EU regulatory framework for electronic communications gives member states the opportunity to deal with aspects of network management. In April this year, the European Commission fueled the discussion about network neutrality by releasing its Communication on the open Internet on net neutrality in Europe where it concludes that the Commission “will assess the need for more stringent measures”. The question of whether net neutrality needs regulation has already been answered in the US, the country where one might say the issue of “net neutrality” originated. The Federal Communications Commission (FCC) already engages in regulation and hence, the US discussion centers around whether what the FCC has done corresponds to actual needs and its legal mandate. This more advanced US discussion is explained in the Zoom section and it may turn into a European toolkit for potential solutions at this side of the Atlantic.

Strasbourg, September 2011

Susanne Nikoltchev

IRIS Coordinator

*Head of the Department for Legal Information
European Audiovisual Observatory*

TABLE OF CONTENTS

LEAD ARTICLE

Net Neutrality and Audiovisual Services

<i>by Nico van Eijk, Institute for Information Law (IViR), Faculty of Law, University of Amsterdam</i>	7
• Introduction	7
• Regulatory and Policy Context	10
• Getting the Context Right	17
• Conclusions	19

RELATED REPORTING

The Two Sides of the Net Neutrality Coin

<i>by Christina Angelopoulos (Institute for Information Law (IViR), University of Amsterdam), Martin Lengyel and Sebastian Schweda (Institute of European Media Law (EMR), Saarbrücken/Brussels), Ana Perdigao (Biontino Consultants), Alexander Malyshev (Stern & Kilcullen), Emre Yildirim and Kevin van 't Klooster (Institute for Information Law (IViR), University of Amsterdam), Jonathan Adler (Media Center, New York Law School), Christopher G. Dorman (Phillips Lytle LLP & Media Center, New York Law School)</i>	21
• Adequate Infrastructure	22
• Rules on the Use of the Network	27

ZOOM

“Net Neutrality” in the United States of America – Who Can Stop the FCC, and Should They?

<i>by Michael V. Erzingher, Media Center, New York Law School, United States</i>	33
• Introduction to Net Neutrality in the U.S. and Opposing Viewpoints	33
• Overview of the Telecommunications Legal Infrastructure in the U.S.	34
• Pre-December 21, 2010 – Chronology of Events Up To the Commission’s “Preserving the Open Internet” Rulemaking	36
• Post-December 21, 2010 – Preservation of the Open Internet Order and Issues	37
• The Current Situation – Who Can Stop the FCC, and Should They?	39

Net Neutrality and Audiovisual Services

Nico van Eijk¹

Institute for Information Law (IViR), Faculty of Law, University of Amsterdam

Net neutrality is high on the European agenda. New regulations for the communication sector provide a legal framework for net neutrality and need to be implemented on both a European and a national level. The key element is not just about blocking or slowing down traffic across communication networks: the control over the distribution of audiovisual services constitutes a vital part of the problem. In this contribution, the phenomenon of net neutrality is described first. Next, the European and American contexts are dealt with. The impact for audiovisual services is sketched in the analysis, including the question of whether net neutrality is a new phenomenon and whether parallels can be drawn with previous issues. In the conclusion, we refer to the necessity of seeing net neutrality as a value chain issue. In addition, existing and future regulatory intervention needs to take a more concrete approach to net neutrality.

I. Introduction

1. Net Neutrality: Definition

Discussions about net neutrality in current regulations and policy-making are focussed primarily on net neutrality on the Internet. This is also how the topic landed on the agenda. As mentioned by other authors before, it was Tim Wu who put the subject on the agenda in 2003 with his paper *Network Neutrality, Broadband Discrimination*.² He described net neutrality as “an Internet that does not favour one application (say, the World Wide Web) over others (say, e-mail).” For audiovisual services this would imply the unhindered delivery of, for example, a web-based Video on Demand (VOD) service to consumers. Little by little, net neutrality found its way onto the political agenda as well, first in the United States, later on in Europe. In 2005, the American telecommunications and media regulator FCC (Federal Communications Commission) issued its Internet Policy Statement,³ which included four principles with respect to network neutrality: (1) consumers are entitled to access the lawful Internet content of their choice, (2) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement, (3) consumers are entitled to connect their choice of legal devices that do not harm

1) Nico van Eijk is professor in Media and Telecommunications Law at the Institute for Information Law (IViR, University of Amsterdam (<http://www.ivir.nl/staff/vaneijk.html>)).

2) T. Wu, *Network Neutrality, Broadband Discrimination*, 2 J. on Telecomm. and High Tech. L. 141, 2003. (http://www.jthtl.org/content/articles/V2I1/JTHTLv2i1_Wu.PDF; also: <http://ssrn.com/abstract=388863>).

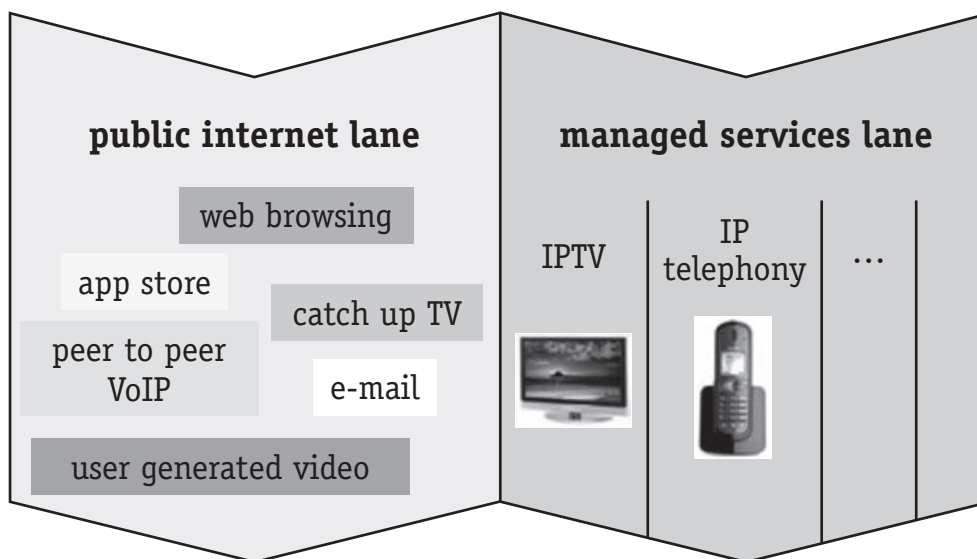
3) FCC Policy Statement on Network Neutrality FCC 05-151, adopted 5 August 2005.

the network and (4) consumers are entitled to competition among network providers, application and service providers, and content providers. The current FCC chairman, Julius Genachowski, added two further principles: non-discrimination and transparency.⁴ These six principles more or less form the core of the net neutrality debate.

2. Technology

In principle, net neutrality is network-neutral. The call for net neutrality is not restricted to certain fixed or wireless networks, thus lending the subject a high impact. For audiovisual services net neutrality is essential. These services are increasingly distributed in other ways than through traditional distribution via terrestrial broadcasting networks, satellite or cable television networks. The Internet, accessible through fixed and mobile networks, is also suitable for providing video services, such as linear services consisting of the distribution of television programmes via IPTV⁵ (a service often provided by traditional telecommunication companies still owning the former telephony-network), or non-linear services like video-on-demand (ordering films, time shifting/catch-up TV). A certain capacity is usually reserved for such services (as part of what is called the managed lane). Both linear and non-linear services are increasingly provided "Over the Top" (OTT). OTT refers to the fact that the respective service is "freely" available on the open Internet (the unmanaged lane).⁶ OTT-services are in principle similar to the ones provided via reserved capacity and therefore include "streaming video" services, downloading films, etc.. Other examples include the so-called peer-2-peer systems that provide access to audio-visual material via file sharing.

The two lane model



Source: Marcus et al (2011), p. 38

4) FCC, news bulletin ("FCC Chairman Julius Genachowski Statement on Open Internet Public Notice"), 1 September 2010.
 5) IPTV (Internet Protocol Television) is a system through which Internet television services are delivered using the architecture and networking methods of the Internet Protocol Suite over a packet-switched network infrastructure (such as the Internet or other access network), instead of being delivered through traditional radio frequency broadcast, satellite signal, and cable television (CATV) formats (<http://en.wikipedia.org/wiki/IPTV>).
 6) As is usually the case with many other services (access to search engines or to web sites, for example).

The transmission of audiovisual services in particular puts a strain on the network because of the capacity demand.⁷ The Internet, or rather the IP protocol used, is intended to slow down information temporarily at times of congestion until transport capacity becomes available. For various applications this deceleration is not relevant. For e-mail it makes no difference if the transfer of messages is delayed by a few (milli)seconds. In contrast, the delay would be unacceptable for viewing video signals live or playing games, as it would have adverse consequences for the end-user's "Quality of Experience" (QoE). Therefore, these services should in principle take priority over other services, or they should have a protected status, for instance. For video distribution via the Internet, through so called Content Delivery Networks (CDN), there is the option of placing video content on servers that are closer to the end-users and the option of giving priority to particular services over others. The available bandwidth is a major factor. Managing the network has always been part of the Internet. In this respect, the idea that "the Internet does not favour one application over others" is an ideal worth pursuing, rather than actual practice. Proper management can prevent visible deceleration. Of course, adding sufficient capacity would also help to reduce the scarcity problem.

Insight into network strain is often obtained by the analysis of traffic flows, either generically or on a highly detailed level. A more generic method is the analysis of the total amount of traffic passing through. Traffic can also be linked to certain "ports" (to which applications can be linked; when these "ports" are managed or switched on and off, the amount of traffic to be transported is increased or decreased respectively). At a detailed level, traffic analysis is possible via "Deep Packet Inspection" (DPI). With DPI the content of individual data packages can be viewed to determine which applications are used and how much traffic they generate. DPI is used on a large scale, but it is controversial due to its impact on the freedom of communication and privacy.⁸

3. Economic Issues

Managing Internet capacity can be necessary for technical reasons (congestion) but can also be relevant from an economic perspective. Management can prevent costs from getting out of hand. Deceleration of certain traffic flows can be used to prevent or handle peaks in network traffic. Internet service providers are known to throttle peer-2-peer traffic if network traffic is busy.

Internet traffic management offers some additional interesting options for "optimizing" the Internet service providers' business models. The Internet Service Provider (ISP) can make strategic use of his position as a bottle-neck for Internet access. Both content providers and end-users depend on him; the market is a two-sided market. A price can be charged for such privileges as guaranteed bandwidth. Services or end-users using too much bandwidth can be cut off. Limiting competition might be another reason for restrictive measurements. Skype is a classic case in point. Providers of mobile telephony consider Skype a threat to their business model that is based on charging time units. Time units are a much bigger source of income than the provision of Internet access. Skype as an OTT service can set its own rates (or offer its service partly for free). By refusing access to Skype, mobile network providers try to prevent their own business model from being cannibalized. The same is going on with SMS services: with a smartphone application like WhatsApp the traditional SMS service can be by-passed. WhatsApp is an extremely popular cross-platform (iphone, Android, Blackberry, Nokia) application which allows users to send text messages to each other over the Internet.⁹

7) More detailed information about the technical aspects of net neutrality can be found in the following study (Marcus et al, 2011): J. Scott Marcus, P. Nooren, J. Cave & K.R. Carter, Network Neutrality: Challenges and responses in the EU and in the U.S., European Parliament, 2011 (<http://www.europarl.europa.eu/document/activities/cont/201105/20110523ATT20073/20110523ATT20073EN.pdf>).

8) In 2008 the European Commission started an investigation on the use of DPI technology in the context of behavioural targeting (IP/09/570). More recently, the use of DPI by the Dutch telco-incumbent KPN raised concerns. Nevertheless, DPI seems to be an established practice, also in the context of video distribution (<http://www.mspnews.com/news/2010/04/30/4760968.htm>).

9) <http://www.whatsapp.com/>

With the distribution of audiovisual media services it is not much different. Providers of these services (e. g. VOD service providers) can agree with ISPs that priority is given to their traffic and that it is available at a certain quality for end-users. The same applies to end-users: ISPs can offer various quality levels to them at different prices. Last but not least, Internet service providers with multiple interests can deploy management to optimize their business model. For example, a cable operator or IP TV provider who simultaneously provides open access to the Internet, can ensure that audiovisual services he provides as part of his basic services are also available, and available at the same quality on the Internet. If this operator or provider is vertically integrated and has interests in the production of content, management can be used to exclude competing services or to distribute them at a poorer quality.

Net neutrality primarily pertains to these choices to be made with respect to not only the technical, but especially also the economic aspects of network management. What should be the ratio between the “public Internet lane” and the “managed service lane” and what priorities can or could be given within either lane to specific services? The perspective of ISPs as well as the position of the end-user, who is looking for open access to the available assortment of services, play a part in this context.

II. Regulatory and Policy Context

1. European Union

1.1. New Regulatory Framework

In Europe, the debate on net neutrality coincided with handling the so-called New Regulatory Framework (NRF). This Framework, primarily focussing on the telecommunications sector, includes five directives.¹⁰ New provisions dealing with net neutrality can be found in the Framework Directive and the Universal Service Directive.¹¹

According to the amended European directives, regulators have to promote the interests of the citizens by promoting the ability of end-users to access and distribute information or run applications and services of their choice.¹² In principle, end-users should be able to decide which content they want to send and receive, and which services, applications, hardware and software they want to use for such purposes.¹³ The market should provide such a choice, and regulators should promote this approach.

To achieve this, transparency is needed first of all. Operators need to provide their users with information on topics such as limitations on use, including the type of content, applications or

10) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) OJ L 108/33 (24 April 2002); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) OJ L 108/7 (24 April 2002); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) OJ L 108/21 (24 April 2002); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) OJ L 108/51 (24 April 2002) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications or e-privacy directive) OJ L 201/37 (31 July 2002).

11) Amendments to the Framework Directive and the Universal Service Directive: Directive 2009/136/EC of 25 November 2009, OJ L 337/11 (18 December 2009) (“Citizens’ Rights Directive”) and Directive 2009/140/EC of 25 November 2009, OJ L 337/37 (18 December 2009) (“Better Regulation Directive”).

12) Article 8.4, sub g, Directive 2002/21/EC (Framework Directive): “(..) The national regulatory authorities shall promote the interests of the citizens of the European Union by inter alia: (...) (g) promoting the ability of end-users to access and distribute information or run applications and services of their choice; (...)”.

13) Citizens’ Rights Directive, Recital 28.

services involved. In Article 21.3 (d) of the Universal Service Directive, there is explicit reference to the need to provide users with information on any procedures on shaping traffic and their effect on the quality of the service.¹⁴ This framework assumes that a competitive market will ensure that end-users get the quality of service they want but also recognizes that in particular cases there might be the need to ensure that public communications networks attain minimum quality levels in order to prevent degradation of service, the blocking of access and the slowing of traffic over networks.¹⁵ In this context, it is recognized that operators apply network management. These practices should be subject to scrutiny by the national regulatory authorities in line with principles set out in the regulatory framework, with a particular focus on discriminatory behaviour which would affect competition. If appropriate, the Directive allows the setting of minimum quality of service requirements. Therefore, national regulatory authorities should have the necessary regulatory powers.

In the second place, as part of the regulations on quality of service, rules can be set with respect to network neutrality: "In order to prevent the degradation of service and the hindering or slowing down of traffic over the network, Member States shall ensure that national regulatory authorities are able to set minimum quality of service requirements" However, in good time before setting such requirements, the relevant national regulatory authorities have to provide the European Commission with a summary of the grounds for action, the envisaged requirements and the proposed course of action. Furthermore, this information must also be sent to the Body of European Regulators for Electronic Communications (BEREC). The European Commission can make comments or recommendations in order to avoid negative effects on the internal market. Although not binding, the national regulatory authorities have the obligation to take very much into account such comments/recommendations when deciding on specific net neutrality requirements.

It should be mentioned, that the Directives as such neither mandate nor prohibit limiting access to or the use of particular services or applications but only impose an obligation to provide information about it.¹⁶ However, governments that do want to limit access, need to comply with existing fundamental rights including the freedom of expression, the right to privacy and rules on due process. It is for this reason that the Framework Directive encompasses a provision on respect for fundamental rights. In Article 1.3(a) Better Regulation Directive, explicit reference is made to the European Convention on Human Rights.¹⁷ All in all, the wording of this article is very strong, and the article is of substantial interest for the free flow of information, including audiovisual services.

1.2. Consultation European Commission

In the context of the implementation of the new regulatory framework for the communications sector, several national supervisory bodies and governments entered into consultations and looked

14) Article 21.3, sub d, Citizens' Rights Directive: "Member States shall ensure that national regulatory authorities are able to oblige undertakings providing public electronic communications networks and/or publicly available electronic communications services to inter alia: (...) (d) provide information on any procedures put in place by the provider to measure and shape traffic so as to avoid filling or overfilling a network link, and on how those procedures could impact on service quality; (...)"

15) Preamble Citizens' Rights Directive, Recital 34 ; Article 22.3, Directive 2002/22/EC (Universal Service Directive).

16) Preamble Citizens' Rights Directive, Recital 29.

17) Article 1.3a: "Measures taken by Member States regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.

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 and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed."

into the matter of net neutrality.¹⁸ The European Commission, too, asked the market for input.¹⁹ In total 318 comments were sent.²⁰ The main outcome was put into a short report by the European Commission.²¹ According to the analysis, there seems to be widespread agreement about the fact that there are currently no problems with the openness of the Internet and net neutrality in the European Union. However, it is also clear that traffic management exists; the BEREC comments²² signal several cases of unequal treatment. In its response, BEREC gives a list of examples, including the blocking of Voice over IP (VoIP, such as Skype) and the throttling of file-sharing networks (Peer-to-Peer).

But responses from the broadcasting sector also include various issues that have arisen concerning the distribution of audiovisual services.²³ In particular the EBU reports that several of its members and other media organisations have been degraded because of network congestions and traffic management practices applied by the network operators.²⁴ According to the EBU, these practices are in particular significant in case of live programmes (coverage of popular sport events). This has created consumer confusion, also due to the lack of transparency: the quality was less than expected and/or access to video streams was limited because of too great a demand. The problems are primarily linked to television because the distribution of video signals demands high bandwidths. Furthermore, the EBU is concerned about discriminatory behaviour, which risks undermining the open and neutral character of the Internet, ultimately resulting in consumer harm and citizen detriment. The EBU is of the opinion that sufficient competition is lacking and regulatory intervention is needed to address net neutrality issues. In this context, IPTV as a managed service is mentioned as a typical example: these services should be open for all interested content providers contrary to what – at least according to the comments of the EBU – seems currently practiced by some ISPs. Elsewhere in its response the EBU refers to Fair, Reasonable And Non-Discriminatory (FRAND) access as a basic principle for the provision of managed services. The EBU belongs to the group of respondents who emphasize the role of net neutrality in the context of freedom of expression and plurality.

Several of the EBU remarks were supported by reactions from individual broadcasting organisations, such as The Groupe Canal+ (underlining the need for further national implementation),²⁵ VOD provider Dailymotion²⁶ (given an example of its services being blocked) or the Netherlands Public Broadcaster NPO²⁷ (illustrating congestion when streaming sport events). However, the Association of Commercial Television in Europe (ACT) states that it is not aware of

18) For example: the Autorité de régulation des Communications électroniques et des postes (ARCEP), "Discussion points and initial policy directions on Internet and network neutrality", May 2010; Office of Communication (Ofcom), "Traffic Management and 'net neutrality, a Discussion Document'", 24 June 2010. Or more recently, The Autorità per le garanzie nelle comunicazioni (AGCOM), "Delibera 40/11/CONS, Public consultation on Net Neutrality", 3 February 2011

19) IP/10/860 of 30 June 2010 ("Digital Agenda: Commission launches consultation on net neutrality"). In this contribution we will mainly focus on the first two questions on current problems with net neutrality and on future issues that might arise.

20) The responses can be found here:

http://ec.europa.eu/information_society/policy/ecomms/library/public_consult/net_neutrality/comments/index_en.htm

21) European Commission, "Report on the public consultation on 'The open internet and net neutrality in Europe'", 9 November 2010; IP/10/1482 of 9 November 2010 ("Digital Agenda: consultation reveals near consensus on importance of preserving open Internet").

22) BEREC, Response to the European Commission's consultation on the open internet and net neutrality in Europe, 30 September 2011, document code BoR (10)42.

23) We focus here on responses by the broadcasting sector, but also other interested parties, such as the producers, distributors and right holders of audio visual works responded (FIAD - Fédération internationale des associations de distributeurs de films; MPA - Motion Picture Association; GESAC - European Grouping of Societies of Authors and Composers and FEP - Federation of European Publishers). These reactions addressed similar concerns, but in addition discussed related issues such as the illegal distribution of audiovisual works.

24) EBU, The EBU response to the questionnaire for the public consultation on the open internet and net neutrality in Europe, 30 September 2010.

25) *Réponse du Groupe Canal+ à la consultation publique sur l'internet ouvert et la neutralité du net en Europe*.

26) Dailymotion, contribution de Dailymotion à la consultation publique sur l'internet ouvert et la neutralité en Europe, 29 septembre 2010

27) Response of the Nederlandse Publieke Omroep (NPO: Netherlands Public Broadcasting) to the EC Questionnaire for the public consultation on the open internet and net neutrality in Europe: publication date: 30 June 2010.

any problems with Internet access to date.²⁸ Nonetheless, national regulators should deal with net neutrality issues and ensure that the open Internet is not compromised in the future.

As far as the future is concerned, respondents to the questionnaire of the European Commission indicated that new Internet business models might need to be taken into account. Managed services like IPTV could present problems when network operators favour certain services over others. Furthermore, certain content providers signalled the risk that network providers might want to charge them, accusing them of being “free riders”.²⁹ Such behaviour would be in contrast with the idea of an open Internet and would disregard the investments made by content providers. Network providers argued that such concerns were not justified.

BEREC mentioned three possible issues for the future: (1) the scope for discrimination leading to anti-competitive effects, (2) the potential longer-term consequences for the Internet economy affecting innovation and freedom of expression and (3) confusion among or harm to consumers due to lack of transparency. However, the general opinion – at least according to the interpretation of the European Commission – was that the new regulatory framework should be able to deal with these future issues and that no immediate regulation was needed.

The necessity of network management – a concern explicitly expressed by the broadcasting sector (see the response of the EBU mentioned earlier) – was broadly recognized and seen as an essential part of the operation of an efficient Internet. Network management was not considered to be incompatible with net neutrality. However, certain respondents addressed privacy issues in relation to net management, such as the use of Deep Packet Inspection. With respect to prioritisation, various references were made, in line with reactions from broadcasters, to Content Delivery Networks (CDNs). Prioritization can help to improve the services delivered to end-users but does carry the risk of discrimination. Interestingly, content providers also emphasized the need for more clarity about managed services. They underlined the necessity of a level playing field in which any managed services are offered to all content and application providers on equal terms and without discrimination. Most comments, however, showed agreement that additional regulation was not yet necessary. The question about possible concerns affecting freedom of expression, media pluralism and cultural diversity did not generate many responses, but those responding included content providers.

1.3. Communication European Commission

Although no direct action has arisen from the consultation, the European Commission issued a communication in April 2011 that can be regarded as a precursor of further measures to be taken.³⁰ The communication includes a summary of the state of affairs and provides some insight into the further steps the European Commission intends to take. First, in collaboration with BEREC a study will be performed exploring practices of blocking, throttling and commercial practices of equivalent effect, transparency and quality of service as well as the competition issues relating to net neutrality such as discriminatory practices by a dominant player. The report on the findings is expected by late 2011. On the basis of these findings, the European Commission will decide if additional guidance with respect to net neutrality is necessary. If significant and substantial problems should come to light, more stringent measures may be required, for instance in the form of specific regulations on traffic management, including a ban on blocking lawful services. The wording shows that the European Commission was inspired by the United States, where such ban is already in place. The American situation will be discussed later on in this article.

28) Association of Commercial Television in Europe (ACT), The Response of the Association of Commercial Television in Europe to the Net Neutrality Consultation.

29) I.e. by arguing that network providers have to invest in more bandwidth from which the content providers benefit.

30) Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee on the Regions, The open internet and net neutrality in Europe, Brussels, 19 April 2011, COM(2011) 222 final. Also: “The internet belongs to all of us”, speech by Nelie Kroes, European Commission Vice-President for the Digital Agenda, Brussels, 19 April 2011, SPEECH/11/285.

2. Council of Europe

The Council of Europe closely follows the question of net neutrality. The Council of Ministers adopted a resolution on Internet governance and critical Internet resources in Reykjavik in 2009.³¹ In the resolution, attention is drawn to the relationship with tools such as the European Convention on Human Rights, and further action is called for. Setting up an Ad Hoc Advisory Group on Cross-border Internet is one of the results. In April 2011, this Advisory Group published a draft for a Declaration of the Council of Ministers on Internet Governance Principles.³² One of the principles is about net neutrality. The classic point of departure is subscribed to: "Users should have the greatest possible access to Internet-based content, applications and services of their choice, whether or not they are offered free of charge, using suitable devices of their choice." The next sentence is about the traffic management issue: "Any traffic management measure or privilege should be non-discriminatory, justified by overriding public interest, and must meet the requirements of international law on the protection of freedom of expression and access to information."

In fact these more recent activities build on earlier Council of Europe instruments such as the Committee of Ministers Recommendation on the public service value of the Internet.³³ This value should be understood as people's significant reliance on the Internet as an essential tool for their everyday activities (communication, information, knowledge, commercial transactions) and the resulting legitimate expectation that Internet services be accessible and affordable, secure, reliable and on-going.

3. United States³⁴

While the consultation on net neutrality was taking place in Europe, the United States had already moved on to the next stage, and the supervisor, the FCC, adopted a "Report and Order" in December 2010, which for the first time introduces specific regulation for the open Internet and net neutrality.³⁵

Several experiences, including those with audiovisual services, caused the FCC to deal with the topic. In the zoom section of this IRIS *plus* Michael Erzingher describes the Comcast-case (an Internet service provider throttling traffic).³⁶ Google and telecommunications operator Verizon tried to hammer out a deal excluding mobile from open Internet rules.³⁷ Another conflict arose between Comcast and Level 3.³⁸ Level 3 is responsible for the distribution of the very popular video service Netflix and Comcast claimed fees from Level 3 because Netflix demand was using too much bandwidth.

At the heart of the FCC regulation, there are three rules, the broad outlines of which are briefly discussed here. They concern transparency, the prohibition of access blocking, and the prohibition of unreasonable discrimination.

31) http://www.coe.int/t/dghl/standardsetting/media-dataprotection/conf-internet-freedom/REYKJAVIK_RESOLUTION_INTERNET_GOVERNANCE.pdf

32) <http://www.coe.int/t/dghl/standardsetting/media-dataprotection/conf-internet-freedom/Internet%20Governance%20Principles.pdf>

33) Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet (Adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers' Deputies).

34) For more details on the US situation see the zoom contribution.

35) FCC, Report and Order, 21 December 2010, FCC-10201. The rules have gone into effect in July 2011. There is no particular difference between net neutrality and the open internet. As the FCC puts it "Network neutrality is just another way of referring to open Internet principles" (<http://www.openinternet.gov/open-internet-faq.html>).

36) The FCC decision in the case: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf

37) <http://www.wired.com/epicenter/2010/08/google-verizon-propose-open-vs-paid-internets/>

38) <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112907024.html>

Providers of broadband Internet access must publicly disclose accurate information on network management, performance and commercial terms of the provided broadband service. This needs to be done at a level that allows consumers to make informed choices. The Order includes further details as to the type of concrete information to which it refers, without making these details binding. But the use of phrases like “effective disclosures will likely include” is very telling. It should be noted that the FCC does not regard transparency as an independent means to tackle the problem of net neutrality. This is why the two additional rules are set.

Blocking access is not allowed. An Internet provider “shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.” This rule applies to providers of fixed Internet access; for mobile providers the rule is limited to accessing lawful web sites. Blocking applications that compete with the providers’ voice or video telephony services, however, is not allowed (again “subject to reasonable network management”). This second rule means that end-users are to have free access to the Internet, both to retrieve information and to disseminate it. Although the rules for mobile networks are less stringent, the FCC believes that blocking providers of Voice over IP must be prohibited. In addition, in the FCC’s view there is no difference between blocking and degradation of traffic. Making non-blocking dependent on payment of compensation is not allowed under the anti-blocking rule either.

The third rule has two elements. First, there is the prohibition for providers of fixed broadband Internet access services to discriminate unreasonably in transmitting lawful network traffic over a broadband Internet access service chosen by the consumer. Second, it is ruled that reasonable network management shall not constitute unreasonable discrimination. According to the FCC, a network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband access services. Next, several examples of legitimate purposes are mentioned, including avoiding congestion of the network.

The FCC’s remarks about prioritising certain traffic over other traffic are particularly important. This is a tricky issue, for there is increasing pressure on certain service providers that generate much traffic to give their traffic “priority” in return for payment. Some service providers are prepared to pay for quality transport as well. Stating various considerations, the FCC suggests that pay for priority is unlikely to comply with the rule on unreasonable discrimination. From the text it follows that the rule prohibiting unreasonable discrimination as such does not however apply to mobile services. The argument provided is that mobile Internet use is still under development and that intervention by the FCC therefore remains restricted to “measured steps”.

Finally, in the context of reasonable/unreasonable network management, the FCC recognizes the “specialized services” phenomenon (sometimes, including in this article, referred to by the term “managed services”). The respective services share capacity with broadband Internet access, such as certain IP protocol based voice telephony and video services. The development of these services will be monitored closely and, as the FCC notes, the definition of broadband Internet access service also includes services that are functionally equivalent or intended to circumvent the new rules.

4. National Developments

4.1. The Netherlands

The FCC’s pioneering role clearly has had an impact in Europe. As already indicated, the communication of the European Commission explicitly refers to the American model, but some of its key elements are also found in the first national regulation within the European Union that goes beyond the strict implementation of the directives discussed earlier. In June 2011, the Dutch parliament voted in favour of an amendment to a newly proposed article of the Telecommunications Act prohibiting service blocking: “Providers of public electronic

communication networks which deliver Internet access services and providers of Internet access services must not hinder or slow down applications and services on the Internet (...).³⁹ Only a limited group of four exceptions is allowed (including reasonable network management).⁴⁰ Furthermore, the article forbids providers of Internet access services to make the price of the rates for Internet access services dependent on the services and applications which are offered or used via these services.⁴¹

The idea that "Internet service providers will increasingly take measures to hinder or slow down Internet traffic, either at their own initiative or under pressure from third parties, unless this is prohibited", is a main driver behind the new provision according to the Explanatory Memorandum.⁴² And although congestion may legitimize traffic management the best solution to congestion is avoiding it by adequate investment in capacity.

4.2. Other Initiatives

What about other European Countries? As far as the member states of the European Union are concerned, 20 of them are still in the process of implementing the revised directives. Actually, the European Commission has started legal action against these member states.⁴³ The other countries have mainly implemented the directives without explicitly regulating net neutrality (as the Dutch did). Worth mentioning are developments in Finland and Norway. Finland has introduced a constitutional right to Internet access, but it is unclear to what extent this includes obligations concerning net neutrality. In Norway, the regulator has formulated non-binding principles on net neutrality.⁴⁴ The three principles are clearly inspired by the US doctrine on net neutrality. Consumers are entitled to a transparent Internet connection (predefined capacity and quality), should be able to make their own choices (regarding sending/receiving content, use of hardware and applications) and the non-discrimination rule should apply (no discrimination based on application, service, etc.).

5. Further Steps

Net neutrality is getting further and further concretised, for instance in US and Dutch legislation. On the basis of the findings of the envisaged study by the European Commission and BEREC it will be decided if further actions are necessary. It is most likely that the European Commission will issue a communication in 2012 proposing steps that are consistent to a large extent with the regulation in the United States. As already stated, the latest communication from mid-2011 provided the corresponding signals.

This means that in line with US regulation it might be established that transparency about net neutrality, however important, is not a means in itself, as already stated by the FCC. Transparency in the context of net neutrality, on the one hand, aims at informing users about the service they are getting but, on the other hand, transparency shall also enable the user to make - based on the

39) The proposal still needs approval from the Senate, but it is not very likely that the Senate will refuse to support the changes on net neutrality. For a non-official translation of the provision (Article 7.4a of the Telecommunications Act) and its underlying considerations: <https://www.bof.nl/2011/06/15/net-neutrality-in-the-netherlands-state-of-play>

40) Allowed restrictions are according to the text of the amendment: "a. to minimize the effects of congestion, whereby equal types of traffic should be treated equally; b. to preserve the integrity and security of the network and service of the provider in question or the terminal of the end-user; c. to restrict the transmission to an end-user of unsolicited communication as referred to in Article 11.7 Telecommunications Act, first paragraph, provided that the end-user has given his prior consent (this article deals with spam filtering); d. to give effect to a legislative provision or court order."

41) "Providers of Internet access services do not make the price of the rates for internet access services dependent on the services and applications which are offered or used via these services."

42) Supra FN 39.

43) European Commission, "Digital Agenda: Commission starts legal action against 20 Member States on late implementation of telecoms rules", IP/11/905.

44) <http://www.npt.no/ikbViewer/Content/109604/Guidelines%20for%20network%20neutrality.pdf>

information obtained – deliberate choices between accepting to stay with a service once chosen or switching to another. Practice will probably show that transparency has only a limited effect on switching. Information is definitely not communication and might thus not be endorsed properly by the consumer. The danger is that information overkill may lead to information not being read instead of fully penetrating. The challenge will be to provide end-users with clear, precise and relevant information on (i) the services and applications that they can access through their data transmission services, (ii) the traffic management practices employed on the networks of the providers, (iii) the technical quality of services offered and their possible limitations etc. The next challenge is to provide this wide range of information in a form end-users are able to digest. Whether consumers then actually decide to change providers on the basis of the information obtained, depends on many factors. It is not without reason that consumers switching access services in order to reduce costs are receiving more and more attention.⁴⁵ Questions are asked about whether there is a genuine choice or whether offers are equally good or rather equally bad? How easy is it in the event of dissatisfaction about broadband access to change once a bundle of services has been purchased? How complex are the change procedures (red tape, contractual terms, deadlines etc.)?

Based on the outcome of the investigation by the European Commission and BEREC, measures such as a no blocking rule and questions such as how to deal with managed services will be looked into.

III. Getting the Context Right

Putting net neutrality in the right context is essential in order to answer these questions. It should be acknowledged that net neutrality is part of a value chain and that technological questions are not isolated.

1. The Value Chain and Business Model

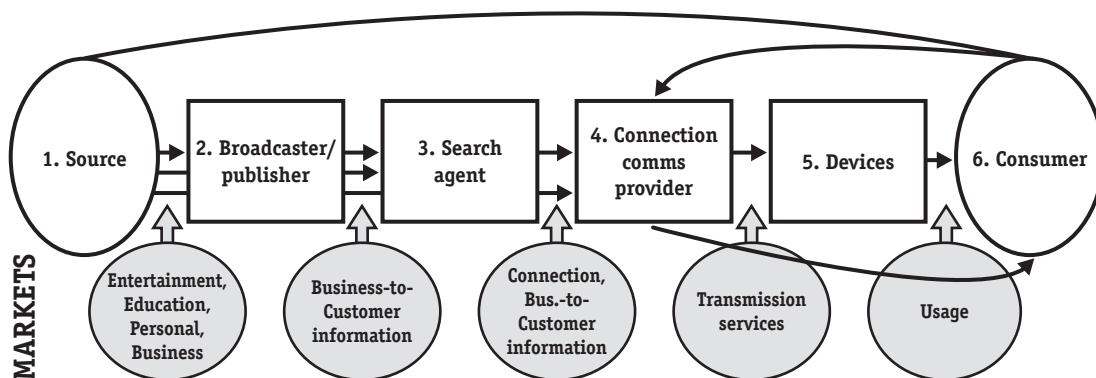
At the beginning of this contribution, we provided a definition of net neutrality. In a much quoted article, Lessig and McChesney also defined net neutrality as an end-to-end issue: “Net neutrality means simply that all like Internet content must be treated alike and move at the same speed over the network. The owners of the Internet’s wires cannot discriminate. This is the simple but brilliant ‘end-to-end’ design of the Internet that has made it such a powerful force for economic and social good.”⁴⁶ In such end-to-end approach, a complex value chain is embedded.

The players in this converging value chain have a mutual and permanent dynamic relationship. The telecommunication companies and the access providers on the one hand, and the content (platform) providers on the other hand, are obviously inclined to obtain the value that has been realized earlier or elsewhere in the value chain.

45) See for example the BEREC-study “BEREC report on best practices to facilitate consumer switching”, October 2010 (http://www.erg.eu.int/doc/berec/bor_10_34_rev1.pdf).

46) “No Tolls on The Internet”, L. Lessig & R.W. McChesney, in: *The Washington Post*, 8 June 2006 (<http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060702108.html>).

Today's Converging Information Delivery Chain



(Source: Rand Europe, *Responding to Convergence*, p. 9)⁴⁷

Every link in the value chain is potentially weak: every position in the chain can develop into a bottle-neck. Should net neutrality obligations restrict Internet service providers in their possibilities to influence (i.e. prioritize) traffic, the problem of potential discrimination of certain services will probably shift to another spot in the value chain. Also, we should be aware of the fact that net neutrality issues already exist elsewhere in the chain. Platform providers and peripheral equipment suppliers try to affect “net neutrality” by granting favours to their own providers by controlling applications, selection systems (search, recommendation/reputation systems, Electronic Program Guides (EPGs)), and vertical integration. Cable operators providing Internet access themselves, discover they have allowed the Trojan Horse in: after all, the services they provided previously (traditional cable TV) can now be substituted by services received via the Internet (for example via OTT video services). This explains why various stakeholders prefer to safeguard sufficient space to manoeuvre with regards to net neutrality. However, solutions that do not take the value chain dynamics into account only fight the symptoms, not the disease. A value chain approach is inevitable.

Net neutrality is therefore not (just) about something “technical”; it is only one aspect of a problem that has existed since much longer: who takes control of the eyeballs, who takes control of the content? The party taking control of the users and/or content, also takes control of the major income flow. From this perspective, the Internet has much in common with the classic broadcasting organizations in terms of its earnings model.

2. Technological Challenges

This does not mean that technical aspects are unimportant. On the contrary, technology as an enabler/disabler can have a major influence. Scarcity in capacity, whether this scarcity is artificial or not, increases the strain on available capacity. Capacity providers can use technology to optimize their business model (invest more to increase capacity, probably with the result of higher prices for end-users or take advantage of scarcity and make information providers pay along). The question about quality guarantees requires technical measures anyway. This applies to the video content distribution described earlier, for instance. These types of specialized/managed services make the Internet “flatter”: services are no longer part of the “cloud” but are more directly supplied by the Internet service provider based on special agreements with content providers. Such agreements may also be required to regulate other aspects, such as access to selection systems or payment mechanisms. Yet, all these interventions can be translated into economic or policy-based choices.

47) Rand Europe, *Responding to Convergence: Different Approaches for Telecommunication Regulators*, 2008.

IV. Conclusions

Net neutrality is an interesting phenomenon with many facets. Currently, we are still in an explorative stage in which net neutrality is being mapped out in further detail. It is remarkable how little is known about what is happening exactly in the complex process between providing and purchasing audiovisual media services, in both a technical and economic sense. This should lead to the actual issues becoming visible. Only then, we will get to the heart of the matter. In the regulation concepts formulated so far, much emphasis is on reasonableness: reasonable net management is allowed, "unreasonable net management" should be forbidden. In the next few years, this basic principle will have to be given further attention. In particular, the role of capacity consumption and the quality of service aspects of audiovisual services will increase more and more. Should capacity be reserved for such services? And if so, how? What would be the position of the "open Internet" in all this? These questions also have a cultural dimension. Part of the net neutrality debate is not new: several showdowns took place in the past about access to distribution networks for instance. Not surprisingly a comparison is made in the literature with policy and regulation in the field of cable TV networks.⁴⁸ Countries introduced regulation on must carry obliging operators to carry specific programmes and/or regulation allowing content providers to claim access to analogue or digital channels. But also basic practices such as the allocation of frequencies based on content related criteria and access rules opening up communications networks and giving providers of services a right to claim capacity at regulated conditions can be seen as examples. Bringing previous experiences to the task can be useful, but it can also open a can of worms. It is something that requires a cautious approach because previous experiences can be bad experiences or carry a risk of suffering from oversimplification. This does not alter the fact that there is unmistakable convergence between the (tele)communication and media domain and that net neutrality is to be discussed within this wider context. In this process, increasing conflicts will probably be the main driver for policymaking and regulation.

48) For example: R. Frieden, "Winning the Silicon Sweepstakes: Can the United States Compete in Global Telecommunications?", Yale University Press, 2010, pp. 275-289.

The Two Sides of the Net Neutrality Coin

The network neutrality issue would not be on our agenda if it were not for a new problem of scarcity. Many of us will associate scarcity primarily with the allocation of the “scarce” frequencies on the 800 MHz band to the transmission of analogue “frequency eating” television services. The IRIS *plus* 2010-6 “Switchover to the Digital Dividend” explained how the digitisation of audiovisual media services has transformed that scarcity issue into the challenge of how to best distribute the liberated spectrum (i.e. the digital dividend) while respecting such diverse goals as flourishing internal markets and the promotion of Human Rights.

Scarcity in the context of net neutrality might be a different animal but it causes similar problems. It addresses the shortage of Internet capacity that might occur because of (possibly only temporary) high broadband consumption. Audiovisual media services delivered over the Internet may demand significant broadband capacity and could run against problems of digital data congestion on the available networks. One probate tool to counter this type of scarcity would be to provide sufficient transmission capacity, a goal proclaimed by the EU’s Digital Agenda and pursued by the EU member states, for example, in their implementation of the changes to the EU regulatory framework for electronic communications. The first five articles of this IRIS *plus*’ related reporting-section describe some recent activities addressing this option. However, as long as the goal of sufficient capacity is not achieved, or not even aimed at, it will be necessary to choose between letting the free market forces determine how the Internet may be used or influencing its use by regulation. The last five articles give information about recent developments concerning this choice of regulating (or not) in favour of net neutrality.

Adequate Infrastructure

European Commission

New Digital Agenda Unveiled

*Christina Angelopoulos
Institute for Information Law (IViR), University of Amsterdam*

On 19 May 2010, the European Commission presented its Communication on a Digital Agenda for Europe, the first of seven flagship initiatives under the "Europe 2020" strategy for reviving the European economy. The Communication asserts that, in the face of the current downturn in the economy, demographic ageing and global competition, Europeans will have to work harder, work longer and work smarter if they are to achieve sustainable economic and social benefits. The Digital Agenda is focused on the last of these three approaches.

The Agenda outlines seven priority areas of action:

1. Creating a new Single Market to deliver the benefits of the digital era
2. Improving ICT standard-setting and interoperability
3. Increasing Europeans' access to fast and ultra-fast Internet
4. Boosting cutting-edge research and innovation in ICT
5. Empowering all Europeans with digital skills and accessible online services
6. Unleashing the potential of ICT to benefit society
7. Delivering the Digital Strategy for Europe

The final goal is the creation of a well-functioning virtuous cycle of growth. This can happen when attractive content and services are made available in an interoperable and borderless Internet environment, thereby stimulating demand for higher speeds and capacity, which then in turn gives impetus for investment in faster networks, thus finally leading right back to the creation and implementation of new innovative services and content. The final result is self-reinforcing flow of activity, which however is only possible in a business environment that fosters investments and entrepreneurship.

The aforementioned measures will be put into place or proposed over the next 2-3 years and will be succeeded by follow-up actions. The initiative will evolve and develop over the next 10 years. To implement the objectives of the Digital Agenda, the European Commission will sustain regular dialogue with the European Parliament and establish a High Level Group of Member State representatives, while all interested stakeholders are also invited to participate in action-oriented stakeholder platforms, as well as the annual Digital Assemblies, which will be assessing progress and emerging challenges. The first Digital Assembly is scheduled to be held in the first half of 2011.

- European Digital Agenda Website
<http://merlin.obs.coe.int/redirect.php?id=12516>
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on "A Digital Agenda for Europe", COM (2010) 245, Brussels 19 May 2010
<http://merlin.obs.coe.int/redirect.php?id=12517>
- Communication from the Commission on "Europe 2020 - A strategy for smart, sustainable and inclusive growth", COM (2010) 2020, Brussels 3 March 2010
<http://merlin.obs.coe.int/redirect.php?id=12518>

Germany

Bundesrat Criticises EU Commission's Broadband Plans

Martin Lengyel

Institute of European Media Law (EMR), Saarbrücken/Brussels

The *Bundesrat* (upper house of parliament) has issued a statement criticising parts of the Digital Agenda published by the European Commission. The Digital Agenda includes proposals to build a European high-speed network, with the objective of equipping all European households with Internet speeds of at least 30 Mbit/s, and at least half of European households with more than 100 Mbit/s by 2020 (see IRIS 2010-7/4).

Although, in principle, the *Bundesrat* welcomed the Commission's proposals to develop suitable funding instruments for the broadband sector and reduce investment costs, it criticised the Commission for failing to offer sufficient practical support. It disapproved of the Commission's plan to play only a planning, coordinating and monitoring role in relation to the member states' activities. The lack of concrete information about the "role of the market and the importance of private investments in the expansion of broadband" was also criticised.

In principle, state aid should always be a last resort and remain limited to market failures. However, particularly in rural areas, aid might now be necessary, although EU state aid rules might prevent it. The use of such aid would increase the administrative burden and there was insufficient scope for the promotion of next generation access networks in regions with weak markets. There was therefore an urgent need for the proposals to be simplified and, if necessary, for a special NGA aid programme.

Although there was currently a sufficient number of terrestrial wireless and satellite services, the *Bundesrat* doubted that these would be able to achieve the target of 30 Mbit/s. These technologies should therefore only be supported if they could prove their ability to deliver the required bandwidth to end users.

The *Bundesrat* firmly rejected the Commission's suggestion that in-building wiring could be made a condition for the granting of building permission. On the one hand, the costs of implementing this measure would not reduce the cost of new infrastructure. On the other, the cost would generally be paid by the owners of buildings rather than the operators of the new infrastructure. Furthermore, building regulations in the *Länder* did not include any requirements in terms of the technical equipment of homes. Rather, public law provisions merely contained a set of minimum requirements for a building, which did not include a particular "quality standard" (compulsory provision of telephone, radio or television).

- *Stellungnahme des Bundesrates vom 5. November 2010 (BR-Drs. 566/10)* (Bundesrat statement of 5 November 2010 (BR-Drs. 566/10))
<http://merlin.obs.coe.int/redirect.php?id=12844>

IRIS 2011-1/24

Cabinet Adopts Government's Draft Amendment to the Telecommunications Act

Sebastian Schweda
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 2 March 2011, the German cabinet adopted and published the government's draft amendment to the *Telekommunikationsgesetz* (Telecommunications Act - TKG). The main purpose of the proposal is the implementation of the changes to the EU's regulatory framework for electronic communications adopted at the end of 2009. Under the conditions established by the Directive, the implementation must be completed by May.

As early as September 2010, the ministry responsible, the *Bundesministerium für Wirtschaft und Technologie* (Federal Ministry for the Economy and Technology) forwarded the ministerial draft to the other government departments for approval (see IRIS 2010-10/24). Amendments to a number of aspects have been incorporated into the draft now adopted by the cabinet.

[...]

The faster expansion of "high-capacity" public next generation networks (NGNs) is to be included as a new regulatory objective. In addition, the draft provides for the current regulatory objective of guaranteeing the range of universal services to be modified to ensure that urban and rural areas have the same basic provision of services. The intention is also to reduce the digital divide.

Changes are also planned with regard to access regulation: when it comes to imposing access obligations, for example, the government's draft states that incentives for efficient infrastructure investment are to be taken into account. It also provides for network operators with considerable market power to be obliged to offer a standard service in the future if they are subject to access obligations as far as their network infrastructure on the wholesale market is concerned.

In the area of consumer protection, a new provision that has been inserted is an explicit obligation to activate the customer's number within one day of a change of provider.

[...]

The draft law is now before the Bundesrat and is due to be debated in the Bundestag for the first time on 15 April 2011.

- *Entwurf eines Gesetzes zur Änderung telekommunikationsrechtlicher Regelungen vom 2. März 2011* (Draft of a law amending telecommunications regulations, of 2 March 2011)
<http://merlin.obs.coe.int/redirect.php?id=13142>

IRIS 2011-5/17

Italy

AGCOM Launches Public Consultation on Digital Television Dividend

Ana Perdigao
Biontino Consultants

On 24 March 2011, AGCOM launched a public consultation on the deliberations of the authority that lays down the procedure for assigning the frequencies of the digital television dividend and for the other frequencies available for broadband mobile systems.

This also includes the rules that ensure efficiency and conditions for competition in the use of radio spectrum.

The deliberation proposes rules that are beneficial for the whole mobile electronic communications sector.

It sets out the conditions for the entry of new competitors into the mobile market, including the best conditions possible for selecting the quantity and the type of frequencies necessary to meet the various needs of different business while reaping the benefits from the synergy between the different bands in the auction.

This aims to follow the objectives of the digital agenda.

Several proposals focus on the need for efficient use of the spectrum, with the possibility of leasing the spectrum, wholesale offers and share of frequencies amongst other issues.

Some discounts are possible for those who want to go green.

Those that succeed in the auction will have to follow the principles of Net neutrality in their activities.

The consultation is open for 30 days.

- *Delibera n. 127/11/CONS, Consultazione pubblica sulle procedure e regole per l'assegnazione e l'utilizzo delle frequenze disponibili in banda 800, 1800, 2000 E 2600 MHz per sistemi terrestri di comunicazione elettronica e sulle ulteriori norme per favorire una effettiva concorrenza nell'uso delle altre frequenze mobili a 900, 1800 e 2100 MHz, 24 marzo 2011 (Delibera n. 127/11/CONS, public consultation on the deliberations of the authority that lays down the procedure for assigning the frequencies of the digital television dividend and for the other frequencies available for broadband mobile systems, 24 March 2011)*
<http://merlin.obs.coe.int/redirect.php?id=13151>

IRIS 2011-5/29

United States

FCC's Fiscal Year 2011 Budget Estimates

*Alexander Malyshev
Stern & Kilcullen*

Recently the Federal Communications Commission (the "FCC" or "Commission") submitted its Fiscal Year 2011 Budget Estimates to Congress. The Commission requested a budget of roughly USD 350 Million. While a precise comparison with the entire Federal budget is not possible – in part because the Federal budget has a deficit of roughly a trillion dollars – it is fair to say that the Commission's budget is a small fraction of the Federal budget. The Commission chose to highlight four areas of funding that it considers critical for its mission in its submission to Congress: (1) support for the "Commission's cyber-security role"; (2) implementation of the "Broadband Plan"; (3) an overhaul of the "Commission's data systems and processes;" and (4) a general modernization of the FCC by "ushering in 21st Century tools and expertise."

Allocation of Funds:

The Commission set out six strategic goals as part of its performance plan for the next five years that account for the entire budget. These strategic goals are: (1) Broadband at USD 88 Million (25%); (2) Consumer Protection at USD 38 million (11%); (3) Competition and Innovation at USD 109 Million (31%); (4) Continual Improvement at USD 51 million (15%); (5) Public Safety and Homeland Security at USD 43 million (12%); and (6) International issues at USD 22 million (6%). For the most part, the four critical goals articulated to Congress would fall within the strategic goals that are allocated the most money.

Specific Goals of the Budgeted Items:

The goals of the Broadband section, the second largest budget item, are to: (i) enact the recommendations of the National Broadband Plan to broaden the deployment and adoption of broadband technologies to all Americans; (ii) ensure that the US broadband infrastructure advances job creation, public safety, consumer benefits, energy efficiency and the availability of health services (among others); (iii) ensure a "harmonized" regulatory treatment of competing broadband services; and (iv) encourage and facilitate an environment that stimulates "investment and innovation" in broadband technologies and services.

[...]

- Fiscal Year 2011 Budget Estimates Submitted to Congress - February 2010
<http://merlin.obs.coe.int/redirect.php?id=12290>

IRIS 2010-4/42

Rules on the Use of the Network

Committee of Ministers

Declaration on Network Neutrality

*Emre Yildirim
Institute for Information Law (IViR), University of Amsterdam*

On 29 September 2010 the Committee of Ministers of the Council of Europe adopted a Declaration on network neutrality. The Declaration focuses on the protection and promotion of human rights on the Internet and the possible disturbance thereof by the absence of network neutrality.

The Declaration notes the significant reliance of people on the Internet as a tool for their everyday activities. It acts as a tool for communication, information, knowledge and commercial transactions and thus helps to ensure, inter alia, freedom of expression and access to information, pluralism and diversity. These rights might however be adversely affected by non-transparent traffic management, content and services' discrimination or impeding connectivity of devices.

The Declaration stresses that access to infrastructure, irrespective of which device the end-user utilises, is a prerequisite for the greatest possible access to Internet-based content, applications and services. Due to an exponential increase in Internet traffic and the use of bandwidth, operators of electronic communication networks may have to manage Internet traffic. This could possibly affect the quality of service, the development of new services, network stability and resilience or the combating of cybercrime.

In so far as traffic management is necessary in the context set out above, the Declaration notes that it should not be seen as a departure from the principle of network neutrality. Any exceptions to this principle should be considered with great circumspection and need to be justified by overriding public interests. The Committee of Ministers calls for attention to be paid to the provisions of Article 10 of the European Convention on Human Rights and the related case law of the European Court of Human Rights. It thereby also refers to the European Union regulatory framework on electronic communications.

According to the Declaration, the users and providers of services, applications or content should be able to gauge the impact of network management measures on their fundamental rights and freedoms and be notified of their existence. Those measures should be proportionate, appropriate and avoid unjustified discrimination; they should be subject to periodic review and not be maintained longer than strictly necessary. Procedural safeguards, in the form of adequate avenues to challenge network management decisions, should be provided for.

The Committee concludes the Declaration by noting its commitment to the principle of network neutrality and emphasising the need for the compliance of any measure that breaches the aforementioned principle with the requirements set above.

- Declaration of the Committee of Ministers on network neutrality, adopted on 29 September 2010 <http://merlin.obs.coe.int/redirect.php?id=12789>

IRIS 2010-10/3

Italy

AGCOM Launches Public Consultations on Net Neutrality, and on Peer-to-Peer and VoIP

Ana Perdigao
Biontino Consultants

Net neutrality, and Peer-to-Peer and VoIP are priorities for the Italian authority, as stated in a recent press release. The first public consultation will be on the results of a survey into consumer protection and competition protection relating to the VOIP and Peer-to-Peer mobile services. After approval of the final version the public consultation was launched.

The study of VOIP and P2P had the aim of analysing the new challenges of the mobile sector from a broad perspective, the changes in the market, the legal and economic aspects, and the technical implications. The purpose was to receive as much input as possible from stakeholders.

Results from this field of study reveal that this discussion is very crucial in Europe and in the USA in relation to Net neutrality.

As a consequence, the Italian authority decided to launch a separate consultation for Net neutrality.

On this occasion many questions will be integral to the discussion, such as the evolution of the sector, the new technical perspective, and the transformation of the market structure. Consumer guarantees and the protection of competition are at the core of the study and the debate.

The public consultation will last for 60 days.

- *Delibera n. 39/11/CONS, recante "Indagine conoscitiva concernente 'Garanzie dei consumatori e tutela della concorrenza con riferimento ai servizi vocali suprotocollo internet (VoIP) ed al traffico peer-to-peer su rete mobile': approvazione dellarelazione finale e avvio della consultazione pubblica", 3 febbraio 2011 (Delibera 39/11/CONS, Public consultation on the results of a survey into consumer protection and competition protection relating to the VOIP and Peer-to-Peer mobile services, 3 February 2011)*
<http://merlin.obs.coe.int/redirect.php?id=13149>
- *Delibera 40/11/CONS, Neutralità della rete: avvio di consultazione pubblica, 3 febbraio 2011 (Delibera 40/11/CONS, Public consultation on Net Neutrality, 3 February 2011)*
<http://merlin.obs.coe.int/redirect.php?id=13150>

IRIS 2011-5/28

Netherlands

The Netherlands take Pole Position in the Regulation of Net Neutrality

Kevin van 't Klooster
Institute for Information Law (IViR), University of Amsterdam

On 8 June 2011 Maxime Verhagen, Dutch Minister of Economic affairs Agriculture, and Innovation, accepted an amendment to the Dutch Telecommunications Law that guarantees net(work) neutrality.

In its purest form, net neutrality is the principle that all users on the Internet should be able to communicate with each other without interference by third parties, such as Internet Service Providers (ISPs).

The need for an amendment came after telecom companies declared that they had plans to start charging users for the use of Internet applications and services, such as WhatsApp and Skype. The main spark that started the fire was an announcement last month by KPN's Head of Mobile Services Division, Marco Visser, who declared that KPN uses Deep Packet Inspection (DPI) to determine the content of the packages that users send over the Internet. Vodafone joined the debate by stating that they use the same technology, however they hurried to add that DPI benefits users, since it enables Vodafone to streamline and prioritise content. This has stirred up a lot of controversy among digital rights organisations, such as the Dutch NGO Bits of Freedom, as well as in the Dutch Parliament.

After the announcement a few members of the opposition, lead by Kees Verhoeven, a member of the Dutch Parliament for the democratic party D66, took a head start by drafting the proposed amendment of Article 7.4a the Dutch Telecommunications Act (DTA). Their proposed definition of net neutrality is similar to the one proposed by Tim Wu (professor at Columbia Law School and supporter of net neutrality). This amendment was accepted by Minister Verhagen and will most likely pass through Parliament on Tuesday 14 June. It reads as follows:

“Suppliers of public electronic communication networks that provide Internet access services and Internet service providers will not block or delay Internet services or applications, unless it is necessary to block or delay these services:

- a. to limit the effects of congestion, where similar traffic is treated equally;
- b. for the integrity and safety of the network and service of the supplier;
- c. to limit the transfer of unwanted communication to the user (e.g., spam), as mentioned in Article 11.7 (1) DTA, provided that the user has granted his permission, or
- d. to follow up a legal requirement or court order. (...)”

The Netherlands is the second country in the world, after Chile, and the first European country to regulate net neutrality in its national legislation.

- *Wijziging van de Telecommunicatiewet ter implementatie van de herziene Telecommunicatierichtlijnen* (Amendment of the Dutch Telecommunications Act implementing the revised Telecommunications Directives)
<http://merlin.obs.coe.int/redirect.php?id=13377>

IRIS 2011-7/33

United States

FCC Proposes Network Neutrality Rules

*Jonathan Adler
Media Center, New York Law School*

On 22 October 2009, the Federal Communications Commission (“FCC”) released a Notice of Proposed Rulemaking (“NPRM”) (a document that solicits comments on a proposed federal rule) seeking public input on draft rules to preserve an open Internet.

Response by interested parties was immediate. Many severely criticize the effort, claiming it to be overbearing, unnecessary, and likely to result in unintended negative consequences for investment, innovation, and entrepreneurship. Proponents give two major supporting arguments. First, they aver that the rules are necessary to prevent Internet access service providers (“ISPs”) from reducing or even eliminating innovation by Internet content and telecom service companies. Second, without rules, ISPs can suppress free speech and civic discourse on the Internet. The FCC also has created a vessel to stir up public debate by launching openinternet.gov, a blog-like website where the public can easily post their own ideas as well as vote or comment on others. As of 1 December 2009, 1,744 people have contributed 159 posts, 1,040 comments, and 14,506 votes.

If promulgated, all ISPs, including wireless and satellite providers, will be required to abide by the rules. Broken down, the rules would restrict ISPs from preventing or discouraging users from sending, receiving, running and using lawful content, applications, and devices connected to the Web, or from favoring one type of content, application or device over another. They would also require disclosure of network management and other practices employed to prevent the transfer of illegal content.

This NPRM is based on the FCC’s 2005 Policy Statement regarding Internet and broadband. The four principles contained there entitled consumers to (i) access lawful Internet content, (ii) run applications and use services, subject to the needs of law enforcement, (iii) connect their choice of legal devices that do not harm the network, and (iv) compete among network providers, application and service providers, and content providers. The NPRM expands on the Policy Statement in two important ways. First, the language has been reformatted in order to make the rules legally binding. Second, the FCC proposes an exceptionally broad non-discrimination principle that delineates unqualified prohibitions on ISPs. This is significantly stronger than the general prohibition on “unjust or unreasonable discrimination” required by common carriers.

Opponents state that the broadband industry is still in its infancy and should be left to self-regulation by the marketplace. In essence, government should not try to fix what is not broken. FCC Commissioner Robert M. McDowell cautioned that he “does not agree with the majority’s view that the Internet is showing breaks and cracks and that the government . . . needs to fix it.” USTelecom believes that “it would be a mistake to replace today’s open and dynamic environment with a government-managed ‘mother may I’ approach to innovation.” Verizon states that “the Commission should not adopt rules that would effectively dictate the structure of what is still a new and developing area by treating [Internet content and telecom service companies] and [ISPs] as separate parts of the broadband Internet ecosystem.” Many postings on openInternet.gov subscribe to this free market line of thought.

Another point of contention is centered on the definition of “reasonable network management.” ISPs are against any regulation that limits their ability to attenuate congestion and fear that an attempt to define reasonable practices will have a negative effect across the country. AT&T has stated that the imposition of “a non-discrimination standard that does not contain some form of reasonableness limitation would be more restrictive than the prohibition against ‘unreasonable discrimination’ adopted for monopoly-era telephone companies in the Communications Act of 1934.”

Proponents are most concerned with the stifling of innovation and civic participation. They are united on one overarching point — government inaction will essentially grant network providers the right to block, degrade, or slow down any content on the Internet for any reason. They bolster their arguments by pointing to specific examples, provided in the NPRM, where carriers have discriminated against applications, services, and even particular users. Some think the proposed rules are not strong enough and require clarity to ensure that they will be effective and enforceable.

Recently, an alliance of Internet content and telecom service companies including Google and Facebook wrote to the Commission pressing for a strong anti-discrimination policy because ISPs currently have the legal right to block their products from the marketplace. This complements Lawrence Lessig’s argument (quoted in the NPRM) that “If the principle of end-to-end is abandoned . . . innovators must now include in their calculation of risk the threat that the [ISP] might either block or tax a particular application. That increased risk will reduce application investment.”

The debate continues with both sides cooperating by providing comments that the FCC will turn to regulations to both protect the openness of the Internet as well as promote innovation.

- FCC Notice of Proposed Rulemaking In the Matter of Preserving the Open Internet Broadband Industry Practices
<http://merlin.obs.coe.int/redirect.php?id=12154>
- FCC Policy Statement of 5 August 2005
<http://merlin.obs.coe.int/redirect.php?id=12155>

IRIS 2010-1/41

Court Invalidates FCC Internet Jurisdiction

*Christopher G. Dorman
Phillips Lytle LLP & Media Center, New York Law School*

In *Comcast Corporation v. Federal Communications Commission* (D.C. Cir., 6 April 2010), the District of Columbia Circuit Court found that the FCC did not have the legal authority to regulate an Internet service provider's (ISP's) network management practices. Many observers view the decision as a setback for "net neutrality," the principle that users should have open access to Internet content without carrier interference. Others view it as the demise of the National Broadband Plan, which the Federal Communications Commission (FCC) had issued on 16 March 2010. Despite the politically-charged nature of the issue, the court's decision was narrowly based on the absence of adequate statutory basis for FCC jurisdiction over the Internet.

The underlying dispute arose when subscribers to Comcast Corporation's (Comcast's) high speed Internet service discovered that Comcast was slowing particular service providers' peer-to-peer networking traffic and filed a complaint with the FCC. The subscribers argued that Comcast violated the Commission's policy that "consumers are entitled to access the lawful Internet content of their choice . . . [and] to run applications and use services of their choice." Comcast defended its action as necessary to manage network capacity, as peer-to-peer networking consumed a significant amount of bandwidth.

The FCC agreed that Comcast's action ran afoul of its policy, noting that Comcast had other options to manage network traffic. Since Comcast already had agreed to adopt alternative methods for managing its network, the FCC ordered Comcast ("Order") to disclose implementation of its new approach, but advised that it was prepared to issue an injunction if Comcast failed to keep its promises.

In challenging the Order, Comcast argued that the FCC had: (i) failed to justify exercising jurisdiction over its network management practices, (ii) circumvented the rule-making requirements of the Administrative Procedure Act (Act) as well as violated the Due Process Clause, and (iii) acted in an arbitrary and capricious manner in its reasoning for the Order. The first point was decisive in favor of Comcast's position.

Acknowledging that it had no express authority to regulate such activity, the FCC asserted that its authority derived from Title I of the Act, which provides, in section 154(i), that "the [FCC] may perform any and all acts, make such rules and regulations, and issue such orders, that are not inconsistent with the Act, as may be necessary in the execution of its functions". This invoked the Commission's "reasonably ancillary authority" to regulate, as articulated in the United States Supreme Court's decisions in *United States v. Southwestern Cable Co.* 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), and *FCC v. Midwest Video Corp.*, 440 U.S.

689 (1979) – all decided in the context of recognizing FCC jurisdiction over the then new cable television medium.

Citing its own decision in *Am. Library Ass'n v. FCC.*, 406 F.3d 689 (D.C. Cir. 2005) wherein the court summarized the holdings of these cases, the court stated that the FCC could exercise ancillary authority provided: (1) the FCC's general jurisdictional grant under Title I of the Act covers the regulated subject, and (2) the regulations are reasonably ancillary to the FCC's effective performance of its statutorily mandated responsibility.

But the court concluded that the FCC had failed to satisfy the second part of the test. Analyzing a line of cases considering "ancillary authority" the court found that such authority must have a statutory basis in the Communications Act – such as the Commission's jurisdiction over broadcasting in *Southwestern*. Here the court found, however, that the Commission had relied only on Congressional policy. Policy statements may "illuminate" the authority of administrative agencies, but the authority must ultimately derive from the statute. Without reference to substantive regulatory provisions of the Communications Act, the FCC's ancillary jurisdiction could be unbounded.

The FCC also argued that several other provisions of the Act, including parts of Title II, gave the FCC ancillary jurisdiction over Comcast, but the court disagreed with the FCC's analysis of these provisions.

The court concluded that "while Congress gave the FCC broad and adaptable jurisdiction to keep pace with rapidly evolving communications technology - the Internet being just such a technology – arguably the most important innovation in communications in a generation – the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities of which the statute fails to confer FCC authority."

The FCC may look for other existing statutory bases – such as its longstanding jurisdiction over common carriers under Title II of the Act – or encourage the Obama Administration to introduce legislation giving the Commission Internet jurisdiction. Given the state of affairs in Washington today, however, enacting such legislation will likely prove to be a long and perhaps uphill battle.

- *Comcast Corporation v. Federal Communications Commission* (D.C. Cir., 6 April 2010)
<http://merlin.obs.coe.int/redirect.php?id=12427>

IRIS 2010-6/43

“Net Neutrality” in the United States of America – Who Can Stop the FCC, and Should They?

Michael V. Erzingher
Media Center, New York Law School, United States

I. Introduction to Net Neutrality in the U.S. and Opposing Viewpoints

“Net neutrality” has recently taken the spotlight in U.S. telecommunications. In the U.S., like abroad, the term has been loosely defined. Under one definition, “net neutrality” holds that companies providing access to the Internet should treat all sources of data equally.¹ “Net neutrality” legislation according to this definition would prohibit Internet service providers (“ISP”) from engaging in certain network management practices, ranging from charging premiums for certain content to throttling, delaying, or outright blocking user access according to content.

Under another guise, “net neutrality” is defined to prohibit online content providers from charging ISPs premiums to carry their content – or the converse, ISPs from charging content providers premiums to carry their content – in addition to prohibiting ISPs from engaging in network management as mentioned in the preceding paragraph. The first definition seems to have taken a stronger stance in the U.S., quite possibly because the term “net neutrality”, viewed through the factual lens of a recent and highly publicized U.S. federal appellate decision *Comcast v. Federal Communications Commission*, prompts such an understanding.² Those familiar with Comcast or its surrounding media should use caution in order to prevent limiting one’s understanding of the term’s definition, and thus application.

ISPs tend to disfavor rules limiting their ability to manage their networks. Collectively, they argue that they own the networks and have been making substantial investments in them. Regarding network congestion, some ISPs maintain that network management is necessary to protect the majority of consumers from a minority who utilize a disproportionately greater amount of bandwidth thereby clogging the network. They argue that they should be able to manage their networks as a preventative measure in order to avert network congestion ensuring the stability of

1) See *Net Neutrality*, Times Topics, The New York Times (Dec. 22, 2010 http://topics.nytimes.com/topics/reference/timestopics/subjects/n/net_neutrality/index.html New York Times Article).

2) *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (“*Comcast*”). In *Comcast*, petitioners filed suit against Comcast Cable Corp., seeking enjoinder of Comcast’s network management practices. Comcast throttled Petitioners’ access to certain P2P online content to an extreme low, making impracticable Petitioner’s ability to use P2P services.

the network. Critics argue that although many bandwidth-intensive media files are illegal, many are legal. Those using the Internet to access “the lawful content of their choice” should not be hindered by the network management practices used to thwart the illegal uses, but having the consequence of eliminating certain legal uses.³

Legal viewpoints on net neutrality in the U.S. are largely partisan, yet they lie along a continuum with extremists on one side holding that government should take no action to preserve the open Internet and extremists on the other side favoring government adoption of detailed and rigid regulations.⁴ Those leaning towards government inaction ground their views on the history and tradition of the open Internet. They maintain that a lack of broadband Internet access regulation has allowed the Internet to prosper through which the U.S. economy has received vast economic benefits. Therefore, government should maintain a hands-off approach so the U.S. continues to experience similar gains. Interestingly, those favoring government action base their views on similar grounds.⁵

The point of contention is centered on risk. Those favoring government action are more risk averse than those favoring government inaction. The risk averse seek to maintain the Internet so that it remains “accessible to all” and is “...not handed over to a handful of gatekeepers who can control our access”.⁶ They fear that a lack of net neutrality rules (or what those favoring government inaction would call “regulation”) may be the recipe for disaster, one with irreversible consequences only to the detriment of consumers.⁷ They maintain that the risk of irreversible harm can be prevented only by swift government action. A popular argument against net neutrality laws – the roots of which are a hallmark argument used time and time again against government regulation – is that “[n]othing is broken in the Internet access market that needs fixing.”⁸ According to Commissioner McDowell, dissenting, “[p]olicies that promote abundance and competition, rather than the rationale and unintended consequences that come with regulation, are the best antidotes to the potential anticompetitive behavior feared by the rules’ proponents.” Nevertheless, in order to gain an insightful understanding of the current legal situation on net neutrality from which these viewpoints arise, it is necessary to have a basic foundation on U.S. telecommunications legal infrastructure.

II. Overview of the Telecommunications Legal Infrastructure in the U.S.

U.S. Congress created the Federal Communications Commission (“Commission”) to regulate certain areas of telecommunications. U.S. telecommunication policy is created largely by *rules* promulgated by the Commission within its authority granted by Congress, and *legislation* produced by U.S. Congress. They are enforced by Commission and court *orders*. Since federal law preempts state law, and telecommunications are largely interstate – thus granting the Commission jurisdiction – U.S.

3) *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, ¶ 4 (5 August 2005), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf

4) *Preserving the Open Internet*, Statement of Chairman Julius Genachowski, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, 135, (Dec. 21, 2010) available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf

5) *See Id.* at 140 (Copps, Comm’r concurring) (“Allowing gigantic corporations...to exercise unfettered control over American’s access to the Internet not only creates risks to technological innovation and economic growth, but it poses a real threat to freedom of speech and the future of our democracy.”).

6) *Id.* at 140.

7) *See Preserving the Open Internet* at 23 (“...edge [content] providers could make investments in reliance upon exclusive preferential arrangements with broadband providers, and network management technologies may not be easy to change. If the next revolutionary technology or business is not developed because broadband provider practices chill entry and innovation by edge providers, the missed opportunity may be significant, and lost innovation, investment, and competition may be impossible to restore after the fact. Moreover, because of the Internet’s role as a general purpose technology, erosion of Internet openness threatens to harm innovation, investment in the core and at the edge of the network, and competition in many sectors, with a disproportionate effect on small, entering, and non-commercial edge providers that drive much of the innovation on the Internet.”)

8) *See Id.* at 146, Dissenting Statement of Commissioner Robert M. McDowell

telecommunications laws are largely federal.⁹ Accordingly, little authority is left for individual state regulation.

The Commission consists of five commissioners, each of which is appointed by the U.S. President and subsequently confirmed by the U.S. Senate.¹⁰ No more than three commissioners can be from the same political party at any given time. It is therefore sensible that the President will appoint three commissioners belonging to his or her political party. Although the Commission is an “independent” governmental agency, this characteristic does not ascribe complete non-partisanship. This attribute merely means that the Commissioners can only be removed with cause.¹¹ Yet, by and large, the Commission acts according to the will of the current U.S. President.

U.S. telecommunications laws treat broadband access to the Internet as an “information service”. Under the Communications Act of 1934 (“Act”), as amended, information service providers are typically subject to little regulation.¹² As such, few legal obligations are attached to providers of broadband Internet access.¹³ Moreover, U.S. law bifurcates access to the Internet from Internet content. Internet content regulation runs afoul freedom of expression provisions of the U.S. Constitution. Laws purporting to regulate Internet content have been subject to the highest judicial scrutiny. Child pornography on the Internet, for example, is not prohibited because of its “content”. Rather, it is prohibited because of its damaging and irreversible effects on the children themselves. This is an extreme example that puts into perspective the traditional role of U.S. regulation of Internet content. However, the Commission’s December 21, 2010 rulemaking may have changed this role. The rulemaking, discussed in further detail below, may or could be content regulation packaged in a different manner.

U.S. Congress through the Communications Act of 1934, as amended, (“the Act”) has afforded the Commission substantial authority to create and enforce rules. However, rules promulgated by the Commission, even those clearly within its authority, may be subsequently overturned or modified by Congressional legislation. Moreover, subsequent Commissions have overturned or significantly modified prior rules within short time periods.¹⁴ The Commission does not, however, have unfettered discretion to engage in these practices and any such action would face various judicial review procedures should suit arise.¹⁵

-
- 9) Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, available at: <http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=BROWSE&TITLE=47USCC5> (“For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States...”)
- 10) The U.S. Senate together with the U.S. House of Representatives, compose the United States Congress – the U.S. legislative branch. *See generally*, U.S. Const. Art. I.
- 11) Assuming that the holding of *Weiner v. United States*, 357 U.S. 349 (1958), extends to the Commission.
- 12) *See Communications Act of 1934*, as amended, *supra* note 9.
- 13) In contrast, providers of “telecommunications services” are subject to more legal obligations (i.e. contributing to what is known as the Universal Service Fund; various non-discrimination rules, etc.). *See Nat’l Cable and Telecom. Ass’n v. Brand X*, 545 U.S. 967 (Scalia, dissenting) for an interesting discussion on whether cable Internet access is an information or telecommunications service using pizza delivery service as an analogy; also see the Telecommunications Act of 1996 – the last major overhaul of U.S. telecommunications law – at which time it should be noted that broadband Internet access was still in its infancy. The present U.S. regulation scheme regulates according to the medium in which the user accesses particular application rather than regulating according to applications themselves. If broadband Internet access was more developed, or the overhaul occurred at some later point in time, the U.S. regulation scheme may have more closely resembled present-day Europe where the audio-visual industry is more often regulated according to application.
- 14) For example, DSL (Digital Subscriber Line) Internet access service was originally a telecommunications service, but later classified as an information service at a time when broadband Internet access, an information service, was flourishing under a more lenient regulatory legal regime. Such changes in classification determine the amount of legal obligations to which a provider must adhere.
- 15) *See Administrative Procedure Act*, 5 U.S.C. § 706, available at: <http://www.gpo.gov:80/fdsys/pkg/USCODE-2010-title5/pdf/USCODE-2010-title5-partI-chap7.pdf>

III. Pre-December 21, 2010 – Chronology of Events Up To the Commission’s “Preserving the Open Internet” Rulemaking

1. Comcast

A critical point in the timeline of net neutrality in the U.S. arose on 6 April 2010, the day *Comcast* was decided. *Comcast* called into question the Commission’s authority to regulate access to the Internet. When petitioners filed a complaint with the Commission concerning Comcast’s network management practices – consisting mainly of port throttling – the Commission ordered Comcast to cease its network management practices, basing its jurisdiction on an area of in U.S. telecommunications law known as “ancillary authority”:

“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”¹⁶

The term, although not expressly contained in the text of official U.S. law, is derived from a combination of several major U.S. Supreme Court cases. The Commission’s “ancillary authority” is far reaching and provides the Commission authority to regulate in the field of telecommunications even outside of one of the enumerated forms of jurisdiction laid down by U.S. Congress. Interestingly, the Commission is the only federal agency with such far-reaching authority. However, the Commission’s ancillary jurisdiction is not without limits.

The D.C. Circuit Court, a federal appellate court just below the U.S. Supreme Court, has held that in order for the Commission to regulate under its “ancillary jurisdiction”, it must have a statutorily mandated obligation.¹⁷ Such an obligation is likely contained in, but not limited to, the laws of the areas in which the Commission does have express jurisdiction (i.e. broadcast, cable, satellite).¹⁸ A relevant and applicable statutorily mandated obligation triggers the Commission’s ancillary authority and would likely allow the Commission to regulate matters of telecommunications outside of their express jurisdiction. In *Comcast*, the Commission sought to justify the jurisdictional grounds used against Comcast by citing a statutorily mandated obligation contained in an official statement of policy. However, statements of policy by administrative agencies do not suffice to trigger the Commission’s ancillary authority. The court in *Comcast* held that the Commission’s order lacked jurisdiction and, as a result, Comcast was allowed to continue managing its network. In conclusion, Comcast called into question the Commission’s “ancillary authority” as applied to broadband Internet access, and its continuing force in general, if any.¹⁹

2. Notice of Proposed Rulemaking - Commission’s Policy in the Era of Broadband.

Faced with future uncertainty in how, if at all, the Commission can regulate broadband access to the Internet, the Commission held a public meeting on 17 June 2010 in which it set forth its goals for the future of broadband in the U.S. and, further, discussed three options that would *give* it legal jurisdiction to regulate broadband access to the Internet and preserve the open Internet.²⁰

16) Communications Act of 1934, as amended, *supra* note 9, 47 U.S.C. § 154 (i).

17) *American Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). See also *Comcast*, *supra* note 2.

18) In the U.S., the term “broadcast” does not include cable or satellite services. Rather, it consists of television and radio broadcast services transmitted via radio frequency. Broadcast does not include wireless services covering, for example, mobile/cellular services.

19) Prior to *Comcast*, the Commission successfully used its ancillary authority to regulate cable television until Congress passed the Cable Communications Act of 1984 giving the Commission jurisdiction over cable services independent of its ancillary authority.

20) See *Framework of Broadband Internet Service*, GN Docket No. 10-127, 15-24 (Jul. 13, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-1296A1.pdf (The Commission’s goals for the future of broadband in the U.S. include: (1) achievement of national broadband coverage; (2) privacy; (3) national security; (4) safety of life and property; (4) addressing harmful practices by ISPs.)

Option No. 1 – also known as the “Title 1” option because of where the text of the jurisdiction can be found in official U.S. law – maintains the current legal framework. In other words, the Commission would maintain broadband Internet service as an “information service”, and rely on its ancillary authority by tethering its broadband policies to telephone, broadcast, or cable services. Maintaining broadband Internet access service as an “information service” as opposed to a “telecommunications service” determines the amount and type of legal obligations that apply to carriers of such services. Option No. 2 – also known as the “Title II” option – would recognize broadband Internet service as a “telecommunications service”. Accordingly, all Title II “telecommunications service” provisions would apply. Option No. 3 – also known as Chairman Genachowski’s “Third Way” – is similar to Option No. 2 in that the Commission would recognize broadband Internet access service as a “telecommunications service”. However, the Commission would forbear from imposing all Title II obligations.²¹ The Commission would then, apparently, lock-in the forbearance.²²

The idea of publicly discussing options to find jurisdiction when it is highly questionable opens the door for much public criticism. Conventionally, jurisdictional issues arise out of whether the given set of facts fits within set parameters geared for particular scenarios. Here, the Commission sought to place broadband Internet access within a set of parameters geared for technologies existing prior to broadband for which the current law is not meant to apply – a tough task carrying a high risk of anomalous results.

IV. Post-December 21, 2010 – Preservation of the Open Internet Order and Issues

The Commission’s search for its own legal authority may have caused it to shift thoughts in how to best proceed. Post-*Comcast*, the Commission in its *Preserving the Open Internet* order (“*Order*”) made clear that the purpose of the *Order* is to regulate broadband Internet access.²³ The Commission refrained from abandoning Title I ancillary jurisdiction, tethering it to various sections of the Act.²⁴ The *Order* sets out two different standards – one for providers of fixed broadband services and another for providers of mobile broadband services. Providers of fixed broadband Internet services are prohibited from blocking “lawful content, applications, services or non-harmful devices, subject to reasonable network management.”²⁵ Further, fixed providers may not “unreasonably discriminate in transmitting lawful network traffic over a consumer’s broadband Internet access service.”²⁶

The Commission gave providers of mobile broadband Internet access more flexibility than fixed broadband Internet providers. Mobile providers are prohibited from blocking consumer access to “lawful *websites*, subject to reasonable network management.”²⁷ Also, mobile providers are prohibited from “block[ing] *applications* that compete with the provider’s voice or video telephony services, subject to reasonable network management.”²⁸ Interestingly, the Commission says nothing about wireless carriers slowing or degrading traffic to targeted websites or applications.²⁹

21) Communications Act of 1934, as amended, *supra* note 9, 47 U.S.C. §160.

22) This, however, is unlikely because U.S. Congress can override with legislation saying otherwise.

23) *Preserving the Open Internet*, *supra* note 4, at 88, “The purpose of this...is to preserve the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission”.

24) Notably, one of the areas of the Act to which the Commission tethered its jurisdiction includes Title II. The Commission expressed that VoIP services act as substitute for standard telephony, which is currently regulated as a telecommunications service. Although the D.C. Circuit court threw out this argument in *Comcast*, the Court did so merely on procedural grounds because the jurisdictional argument was not brought up in the original complaint.

25) *Preserving the Open Internet*, *supra* note 4, at 88.

26) “Reasonable network management shall not constitute unreasonable discrimination.” *Id.* at 88. “Reasonable network management” is defined as a network management practice that is “appropriate and tailored to achieving a legitimate network management purpose.” *Id.* at 89.

27) *Id.* at 88 (emphasis added).

28) *Id.*

29) See FCC’s Net Neutrality Rules: The Basics, NetworkWorld, <http://www.networkworld.com/news/2010/122210-fcc-net-neutrality.html>

The Commission subjects the net neutrality rules to certain exceptions: emergency communications, public safety, or national security.³⁰ These exceptions, however, are accompanied an increased risk that broadband ISPs seeking to circumvent the rules will aim to frame their respective network practices as necessary to address the needs of emergency communications, law enforcement, safety, or national security, “consistent with or as permitted by applicable law.”³¹ Interestingly, the rules expressly provide that the exceptions do not prohibit a broadband ISP to address copyright infringement or other unlawful activity. Now that broadband ISPs are expressly permitted to use reasonable efforts to address copyright infringement or other unlawful activity; the question remains as to whether this is an affirmative obligation. An issue may arise concerning whether holders of intellectual property rights can obtain relief from broadband ISPs should they fail to use reasonable efforts.³²

The most important piece of these rules lies within the definitions of *fixed broadband Internet access service* and *mobile broadband Internet access service*, noting that the latter definition uses the word “mobile”, and not “wireless”. It would seem to make sense for the Commission to consider satellite providers of broadband Internet access as fixed providers. However, the question then becomes whether the definition of “reasonable” in “reasonable network management” changes amongst fixed providers. It must in at least some circumstances. For instance, if a satellite fixed broadband ISP manages its network in order to most efficiently utilize its limited spectrum and bandwidth, and this management practice becomes subject to court review, a court would likely afford a satellite provider more flexibility than a non-satellite provider because satellite providers, like mobile providers face similar technical feasibility problems concerning bandwidth limits on spectrum.

One issue is whether the Commission has the authority to regulate *access to* the Internet, which, by implication, results in the Commission indirectly *regulating*, though not necessarily *reducing*, Internet content.³³ If the Commission’s assertion of authority is proper, has the Commission proceeded appropriately? If the Commission does not have the authority, who can stop the actions of the current Commission or subsequent Commissions and, more importantly, by what means?

Another issue surrounds “specialized services”. These services are defined as “services that share capacity with broadband Internet access over the providers’ last mile facilities.”³⁴ The Commission has made clear in its *Order* that it is taking a hands-off approach concerning these services. The issue arises “when ‘specialized services’ become so intertwined with the regular Internet that the two become indistinguishable.”³⁵ For example, an ISP that, in addition to providing Internet, provides television services. This provider chooses to offer to its consumers a web-based service such as Hulu through its television service. Here, two legal standards would exist because of a mere difference in platform even though the content, arguably, remains unchanged. In essence, an ISP would be able to give preferential treatment to a certain website. Any future insight into how issues related to specialized services will arise and be handled by the courts is speculative at best.

30) *Preserving the Open Internet*, *supra* note 4, at 89.

31) *Id.* The qualifying phrase is vague and lacks additional insight from the remaining rules.

32) See *Viacom v. YouTube*, Alexander Malyshev, IRIS Merlin Database, European Audiovisual Observatory (2010), <http://merlin.obs.coe.int/iris/2010/8/article46.en.html> (discussing a recent landmark copyright case holding that copyright holders may not obtain relief from the online content provider YouTube for engaging Internet users in copyright infringement.); see also *Viacom International, Inc. v. YouTube, Inc.*, Joseph Gregory, FortheRechord (2010), <http://www.fortherechord.com/articlesnotes>

33) Issues concerning whether the Commission has authority and jurisdiction aside, regulation of Internet access almost necessarily has the effect of regulating Internet content. For example, if ISPs are allowed to enact reasonable network management practices, such practices could and would likely have the effect of limiting bandwidth-intensive media. As a result, consumers may lose access to certain lawful Internet content (i.e. streaming video feeds).

34) See Get Informed about the Open Internet, OpenInternet.gov, <http://www.openinternet.gov/get-informed.html>

35) *Google-Verizon Net-Neutrality Plan Raises More Questions than it Answers*, Find Technology News, <https://findtechnologynews.com/google-verizon-net-neutrality-plan-raises-more-questions-than-it-answers/>

V. The Current Situation – Who Can Stop the FCC, and Should They?

The current Commission has taken significant strides to enact “net neutrality” rules for the purpose of preserving the open Internet. After issuing the *Framework of Broadband Internet Service* Notice of Proposed Rulemaking, containing three legal options in order to best proceed – including the infamous “third way” – the Commission found it most appropriate to ground the net neutrality rules on its Title 1 ancillary authority even though the court in *Comcast* found unconvincing the Commission’s use of this authority.

The Commission’s goal has been to enact “net neutrality” legislation in order to preserve the open Internet. Critics, however, suggest that because of the role administrative agencies (i.e. the Commission) play in the U.S. legal infrastructure, any rules either could be overturned by a subsequent Commission or, more importantly, could open the door for future Commission regimes to take more proactive steps in regulating content on the Internet in a way that reduces consumer access to content. The Commission, however, has expressed that this is not its purpose in issuing its *Order*.³⁶ Further, some critics in favor of net neutrality legislation suggest that any legislation should come directly from U.S. Congress because such legislation cannot be overturned as easily.

The question then boils down to whether the Commission should be stopped and, if so, how. Although the Commission’s rules present themselves to be pro-consumer, failure by Congress or the Courts to step in may pave the way for future Commissions to rely on the jurisdiction used in the net neutrality rules as precedent in enacting less consumer friendly rules. Congress has introduced various bills both for and against net neutrality, but such bills have failed to become law. The future of Internet in the U.S. may very well lie within the hands of the courts if Congress does not act in due time.

36) See *Preserving the Open Internet*, *supra* note 5, at 88.



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE

Information services for the audiovisual sector

It is the task of the European Audiovisual Observatory to improve transparency in the audiovisual sector in Europe. It does this by collecting, processing and publishing up-to-date information about the various industries concerned.

The Observatory has adopted a pragmatic definition of the audiovisual sector in which it works. Its principal areas of interest are film, television, video/DVD, new audiovisual media services and public policy on film and television. In these five areas, the Observatory provides information in the legal field as well as information about the markets and financing. As far as its geographical scope is concerned, the Observatory monitors, records and analyses developments in its member states. In addition, data on non-European countries is also made available when judged appropriate. The various stages involved in providing information include the systematic collection and processing of data as well as its final distribution to our users in the form of print publications, information on-line, databases and directories, and our contributions to conferences and workshops. The Observatory's work draws extensively on international and national information sources and their contributions of relevant information. The Observatory Information Network was established for this purpose. It is composed of partner organisations and institutions, professional information suppliers and selected correspondents. The Observatory's primary target groups are professionals working within the audiovisual sector: producers, distributors, exhibitors, broadcasters and other media service providers, international organisations in this field, decision-makers within the various public bodies responsible for the media, national and European legislators, journalists, researchers, lawyers, investors and consultants.

The European Audiovisual Observatory was established in December 1992 and is part of the Council of Europe thanks to its status as a "partial and enlarged agreement". Its offices are in Strasbourg, France. The Observatory's membership currently comprises 37 European States and the European Union, which is represented by the European Commission. Each member appoints one representative to its board, the Executive Council. An Executive Director heads the international Observatory team.

The Observatory's products and services are divided into four groups:

- Publications
- Information on-line
- Databases and directories
- Conferences and workshops

European Audiovisual Observatory

76 Allée de la Robertsau – F-67000 Strasbourg – France
Tel: +33 (0) 3 90 21 60 00 – Fax: +33 (0) 3 90 21 60 19
www.obs.coe.int – E-mail: obs@obs.coe.int



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE



Legal Information Services from the European Audiovisual Observatory

Order:

- online at <http://www.obs.coe.int/about/order>
- by email: orders-obs@coe.int
- by fax: +33 (0) 3 90 21 60 19

IRIS Newsletter

*Legal Observations
of the European Audiovisual
Observatory*

Online, free of charge!

The IRIS Newsletter is a topical and reliable monthly information service covering all legal developments in Europe relating to the audiovisual sector. IRIS covers all areas of law relevant to the audiovisual sector. The main emphasis of the IRIS articles is on legal developments in the fifty or so countries that make up greater Europe. IRIS reports on media legislation in the broadest sense, as well as major developments in case law, important administrative decisions, and policy decisions which will potentially affect legislation in this field.

A free subscription and the complete IRIS newsletter are available from the IRIS website:
<http://merlin.obs.coe.int/newsletter.php>

IRIS plus

*A legal hot topic examined
from different angles*

Legal, technological or economic developments in the audiovisual sector generate immediate priority information needs for professionals. IRIS *plus* identifies these issues and provides the relevant legal background. It features a combination of a lead article, related reporting and a *Zoom* section, comprising overview tables, market data or practical information. This brand new format provides you with the knowledge to follow and join in the latest and most relevant discussions concerning the audiovisual sector.

For more information: <http://www.obs.coe.int/irisplus>

IRIS Merlin

*Database on legal information
relevant to the audiovisual
sector in Europe*

The IRIS Merlin database enables you to access nearly 6,000 articles reporting on legal events of relevance to the audiovisual industry. These articles describe relevant laws, decisions of various courts and administrative authorities, and policy documents from over 50 countries. They also report on legal instruments, decisions and policy documents of major European and international institutions.

Free access at: <http://merlin.obs.coe.int>

IRIS Special

*Comprehensive factual
information coupled
with in-depth analysis*

The themes chosen for our IRIS *Special* publications are all topical issues in media law, which we explore from a legal perspective. IRIS *Special* publications offer detailed surveys of relevant national legislation facilitating the comparison of the legal frameworks in different countries, they identify and analyse highly relevant issues and outline the European or international legal context that influences national legislation. IRIS *Special* publications explore their legal themes in an extremely accessible way. You don't have to be a lawyer to read them! Every edition combines a high level of practical relevance with academic rigour.

For a list of all IRIS *Specials*, see: http://www.obs.coe.int/oea_publ/iris_special/index.html



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

IRIS plus 2011-5
Why Discuss Network Neutrality?

24,50 € - ISBN 978-92-871-7246-4