

The Internet, and Rationales for Free Expression

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Abstract

The changes to society brought by the Internet have prompted a challenge to orthodoxy in a number of areas of law, Intellectual Property being a notable example. Human rights, especially those related to information, knowledge and ideas, have been drawn into this re-evaluation, with various issues being encountered in practice demanding solutions that accord with respect for rights and freedoms, and with the functioning of this new technology. Nevertheless, the theoretical aspect of human rights in the Internet context has not been so much addressed. The Internet has implications for how rights are conceived, especially the freedoms of speech and expression. This study is an examination of whether the existing rationales for free speech and expression still apply in the context of cyberspace. These rationales, coming mainly from court decisions (in particular, the US Supreme Court) as well as the academic literature (notably Cass Sunstein's work), will be examined, alongside observations about the state of play in the Internet, with Yochai Benkler's elaboration of the development of “commons-based peer production” initiatives being of particular relevance. If indeed the Internet is significantly different from previous communication technologies, then this may require a different approach to how the Internet is regulated, including in order to promote and maintain free speech and expression.

Introduction

The Internet has heralded a revolution in the ways in which people communicate: the low cost, coupled with near-instantaneous speed, has opened up the ability to communicate globally to a far greater number of people than in the mass media world. In many areas of law, this has prompted re-evaluation of received wisdom, with Intellectual Property and privacy being pertinent examples. Furthermore, the transnational nature of the Internet has been problematic for nation-states' attempts to enforce their laws in this arena. Human rights have been frequently engaged in these discussions, usually in the sense of their practical application. Some authors, particularly from the US, have analysed the more theoretical element of human rights in the Internet context, especially free expression, yet this happened prior to the development of Web 2.0. This paper builds on this by examining free expression and its rationales, and their relevance to current Internet reality. Firstly, the existing rationales for free expression will be considered; then free expression on the Internet in its early days as a publicly-available medium will be analysed; the developments in the Internet as it has matured will be considered, and their implications for free expression will be considered; with a determination of the state of play as regards the Internet and free expression made at the end.

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Existing rationales for the right to free of expression

In his seminal work on free expression², Eric Barendt identifies four main rationales for this right: free expression as an instrumental means to discovering the truth; free expression as an aspect of self-fulfilment; free expression as a means of enabling citizen participation in a democracy; and free expression, due to a suspicion of government regulation.

The first of these arguments, the importance of discovering the truth, has been influential especially in American jurisprudence, where one version of it, the marketplace of ideas, has been seen as the rationale behind the protection of free speech and expression in the First Amendment to the Constitution³.

This concept of the “marketplace of ideas” in modern times is often attributed to the dissenting opinion of Justice Oliver Wendell Holmes in the 1919 US Supreme Court case, *Abrams v United States*⁴, which concerned freedom of speech during World War 1, in which he stated:

“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”

Holmes did not explicitly use the term “marketplace of ideas”, but his description of a rationale for freedom of speech and expression is based upon an analogy to a free market for goods or services: that there ought to be a free space in which ideas can circulate and compete with each other for the “best” or “truest” idea to be able to prevail. The benefits brought by such a marketplace of ideas are thought to be similar to the benefits bestowed by a competitive free market for a good or service (i.e. in this way, the best good or service also ought to prevail). A Chicago School free market is associated with the marketplace of ideas, including a preference for as little government intervention as possible, due to a historical uneasiness about State action in this area, echoing Barendt's fourth rationale for free speech, a suspicion of government. On the one hand, this prevents government interference with speech e.g. censorship, but, on the other, this also entails a distrust for more positive government action e.g. the promotion of under-represented points of view.

However, Cass Sunstein has disputed the “marketplace of ideas” description of free speech and expression. In “Democracy and the Problem of Free Speech”⁵, Sunstein claims that this is a misleading way to conceive of First Amendment protection. Instead, free speech and expression should be seen as one way of achieving a deliberative democracy as envisaged by Founding Father James Madison (and so fitting into Barendt's third rationale for free expression, as enabling citizen participation in a democracy). The existing “markets” for free speech, such as broadcasting and print media, are to be seen in many ways as Madisonian “failures” as there is insufficient

2 “Freedom of Speech” 2nd ed, Oxford University Press 2005

3 The full text of the First Amendment is available at: <http://caselaw.lp.findlaw.com/data/Constitution/amendment01/>

4 250 US 616; the full text of the judgement is available at:
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=250&invol=616>

5 The Free Press, 1993

substantive discussion of issues, and there is not exposure to a sufficient diversity of views. Sunstein advocates the possibility of some government regulation of free speech as promoting, in some circumstances, free speech in this conception from Madison. An un-/deregulated “marketplace” seems to be imperfect in practice, according to Sunstein, due to the fact that consumption decisions in such a marketplace are defined by private willingness to pay, which is “an extremely crude proxy for utility or welfare”, and, in the American experience, has not given rise to the Madisonian deliberative democracy. In addition, it seems that other liberal democracies, particularly European countries, do not take a “marketplace of ideas” approach to free speech, and instead allow certain government regulation of it.

Indeed, in Europe, whose jurisdictions have not adopted as expansive a conception of free expression as in the US, the right is seen as centring on the individual human person (as opposed to legal person i.e. company), and being based on the ideas of autonomy and human dignity⁶. This justifies such government regulation of expression, especially that emanating from companies or corporations, and hate speech (whose justification comes as well from the experience of Fascist regimes in the 20th century). Such a conception seems closer to Barendt's second rationale for free expression, as an aspect of self-fulfilment.

The early Internet and free expression

At the inception of the publicly-available Internet in the 1990s, it seemed to be a transnational and anarchic phenomenon which would herald a new era of freedom, especially from State actors. The new, free Internet was exhibiting conditions close to perfect competition (as between email providers, web browsers, internet service providers etc), all of this inspiring various “cyber-libertarian” manifestos, such as John Perry Barlow's “*A Declaration of the Independence of Cyberspace*”⁷, which denied the sovereignty of nation-states over the Internet, and asserted the ability of the internet community to self-govern, as well as defining the Internet as the place where “whatever the human mind may create can be reproduced and distributed, infinitely at no cost” claiming the internet's capacity to collect and disseminate to a mass global audience any and all ideas. The more pragmatic article “*Cyberspace and the American Dream: A Magna Carta for the Knowledge Age*”⁸ by Esther Dyson, George Gilder, George Keyworth and Alvin Toffler at the Progress and Freedom Foundation⁹ nevertheless proclaimed the death of “bureaucratic” (i.e. governmental) power and the “demassifying” or “freeing” of institutions and culture (given financial costs were being driven towards zero in cyberspace).

The implications of the Internet for the rationale for free expression were commented on by Eugene Volokh¹⁰, who noted the differences between the ways in which the “speech market” formerly operated in the mass media context, and how it now operated given the Internet, and asserted that these new technologies would enable all ideas, regardless of the wealth of their proponents, to participate in this marketplace. The major changes entailing this assertion were the much lower cost of disseminating information on the Internet as compared to printing, and the much larger

6 See Zeno-Zencovich “La Liberta d'espressione Media, mercato, potere nella società dell'informazione” Il Mulino, Bologna 2004

7 The full text is available at: http://w2.eff.org/Censorship/Internet_censorship_bills/barlow_0296.declaration

8 The full text is available at: <http://www.pff.org/issues-pubs/futureinsights/fi1.2magnacarta.html>

9 The PFF's official website can be found at: <http://www.pff.org/>

10 “Cheap Speech and What It Will Do” Yale LJ 104 7 (1995) 1805-1850

(potential) audience for information on the Internet, which was formerly reserved for one-way broadcast media. In addition, this would weaken any justification for government regulation of speech (such as the fact various points of view are not disseminated via mass media due to their proponents for whatever reason not having access to these forms of communication), and so accord with some cyber-libertarian ideals of freedom from government.

However, Sunstein, in an “Afterword” to “Democracy and the Problem of Free Speech” (originally written in the early 1990s), discussed the claim that in cyberspace the free market model and the Madisonian model of free expression were becoming the same thing, as new technologies, and their vastly increased capacity as compared to “old” media, meant that Madisonian goals were best satisfied in a system of free markets. Sunstein himself seemed sceptical about the truth of this, warning against “government by referendum” coming as a consequence of electronic media, and reiterated that the same person may well want different things in their capacities of democratic citizen, and market consumer. Sunstein thought that there would remain a need for government intervention to the end of deliberative democracy, although he did not address the issue of how the governments of nation-states would achieve this on this seemingly transnational and unregulable medium.

Nevertheless, the Internet as the true marketplace of ideas for free expression was endorsed in the 1997 US Supreme Court decision *Reno v ACLU*¹¹, which concerned whether the anti-indecency provisions of the Communications Decency Act (“CDA”) were compatible with the freedom of speech provisions of the First Amendment. Justice Stevens, delivering the opinion of the Court, stated that “*the internet is 'a unique and wholly new medium of worldwide human communication'*”, and repeated the District Court's finding that “*it is 'no exaggeration to conclude that the content on the Internet is as diverse as human thought'.*”

The conception of the marketplace of ideas as the rationale for allowing free speech, and the Internet embodying this idea, was also found in Stevens' discourse:

“The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention [the government claimed that indecent and offensive material on the Internet was driving many people away from the medium because of the risk of them or their children being exposed to it]. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”

This assessment by the Court seems to run counter to Sunstein's Afterword, and accords with Volokh's analysis: the Court acknowledges the Internet as the marketplace of ideas, and proclaims its inherent difference from previous mediums, concluding that with regards to free speech, the presumption is against government regulation of speech. Part of Sunstein's critique of the marketplace of ideas conception of free expression concerned the ease with which people's attention could be bought in the mass media world, due in part to scarcity of means of broadcasting; the above decision suggests that this is not the case with the Internet, at least at this point in time. Sunstein's suggestion of a possible role for the government in promoting free speech also may be redundant in the Internet context, due to the fact it seems unnecessary in principle, and the

11 521 US 844; the full text of the judgement is available at:
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=96-511>

difficulties with actual government control over the Internet. Thus, the marketplace of ideas rationale for free expression seems to have triumphed on the Internet.

Participation, collaboration and freedom?

Yet, as the Internet matured, these aforementioned utopian visions seemed to be indicative of a failed idealism from the 1990s. As Jack Goldsmith and Tim Wu have documented¹², governments of both liberal democracies and authoritarian regimes, instead of fading out of cyberspace, have in fact managed to assert political and legal control over the medium, a far cry from the self-governing community of Perry Barlow's *Declaration*. Furthermore, Lawrence Solum notes that, while during the 1990s governments and markets had not fully acknowledged the importance of the Internet, “[g]overnments and large multinational firms now have pervasive presences in cyberspace”¹³. Indeed, Lawrence Lessig has declared the “change from a cyberspace of anarchy to a cyberspace of control”¹⁴, with this control being exercised through the means of code, leading to his proclamation that “code is law”¹⁵ (given that code for him is the primary form of regulating behaviour on the Internet¹⁶). Lessig observes that the “first generation” of Internet architecture was built by a noncommercial sector of programmers and universities, whereas the “second generation” was built by commerce, responding to the demands of users¹⁷. He strongly advocates government regulation of the Internet, “to ensure that those public values that are not in commerce's interest are also built into the architecture”¹⁸. This transition in the operation of the Internet has indeed seen the emergence of powerful Internet players, such as Google, Amazon and eBay. The conditions of perfect competition as between internet players at the mass inception of the internet seems no longer to exist, and the relevance of government regulation of the medium seems much greater.

However, the transition to Web 2.0 from 2004 onwards, with the advent of web-based applications allowing information sharing, interoperability, user-centred design and collaboration, has created a parallel phenomenon in the form of mass user collaboration on the Internet, especially content generated by users, which has opened up to a wider category of people the possibility of creating, participating and disseminating their creations to a vast global audience. Examples of this include social networking sites such as Facebook, open source software such as the Firefox browser, and collaborative projects such as Wikipedia. This phenomenon has been documented by Yochai Benkler¹⁹ who coins the term “commons-based peer production” to describe it, and he makes the claim that, as a result of such efforts, there has been a new stage in the information economy, which he terms the “networked information economy” in which decentralised, individual efforts play a more significant role than they did in the “industrial” information economy, and where “non-market” production is more important than before.

12 See “Who Control the Internet? Illusions of a Borderless World”

13 P58, “Models of internet governance”, in “Internet Governance: Infrastructure and Institutions”, L. A. Bygrave, J. Bing, and T. Michaelsen, eds., Oxford University Press, 2009. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136825. Solum also acknowledges that accounts of the Internet in the 1990s as being outwith the control of national governments was “credible” at that point in time.

14 “Code v2”, p5 the full text of the book is available online here: <http://codev2.cc/>

15 Ibid p5

16 Ibid p24

17 Ibid p38

18 Ibid p77

19 “The Wealth of Networks” [publisher, year] The full text of the book is available online at: http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf

Benkler terms the commons-based peer production as being “non-market” and “non-proprietary”, and argues that the emergence of this sphere of activity as a substantial component at the core of the economy suggests a genuine limit on the extent of the market. Benkler recognises that market and non-market, and proprietary and non-proprietary co-exist in reality, and that one significant benefit of these alternative platforms is that they decrease the extent to which individuals can be manipulated by the owners of the facilities on which they depend for communication. Thus, the non-market and non-proprietary enhance individual's freedom and autonomy.

Conceptually, from the above there are two issues for the idea of the Internet as the marketplace of ideas. The first is that of dominance in the Internet as exhibited by the major Web 2.0 companies – due *inter alia* to network effects²⁰, the “marketplace” may in fact have a tendency towards oligopoly, rendering the Internet much less “free” than it may have been in the 1990s. The second issue is that of the emergence of non-proprietary, non-market organisation on the Internet: if the marketplace of ideas is to be taken to compare to “markets” as developed in economic theory (something along the lines of indirect exchange of goods and services using a form of currency facilitating transactions by using a price determined by a supply and demand curve), then substantial non-market exchange in the Internet through commons-based peer production would dispute the conception of the Internet as the marketplace of ideas, and this providing the rationale for free expression in this context.

If, however, the marketplace of ideas is not taken as a representation of an actual market, but more as a space in which ideas can be exchanged, discussed and promulgated without undue dominance, restraints or interference from authority. Perhaps “autonomous space” is a better term than “marketplace of ideas”. Regardless of the actual term used, if commons-based peer production initiatives do “compete” with “market” participants, and indeed represents a counter-current to increasing consolidation on the Internet of “market” and “proprietary” players, enhancing the freedom and autonomy and individuals and users, then its existence is beneficial to the development and flourishing of society. Yet, if they represent real social and economic changes from the pre-Internet scenario, there will be practical consequences for *inter alia* current legal regimes, especially those used to regulate media, information and knowledge. Included in these consequences is a re-conceptualisation of the rationale for free expression: an analogy to the marketplace of *lassiez-faire* economics may no longer hold.

The market strikes back

However, the world Benkler describes, of individuals freed from the constraints of the industrial information society, and flourishing in their autonomy, is something of a second-generation Internet utopian dream, as opposed to concrete Internet reality. The capacity to create and disseminate which all individuals with a computer and Internet connection possess is not synonymous with the actual use of that capacity. Furthermore, it does not mean that individuals and mass media giants are on a level playing field: resources still matter in the Web 2.0 world²¹. Indeed, Swire characterises Web 2.0 more as “many-to-many e-commerce” than “voluntary and non-market” activity, and points out

20 For more on this subject, see Oz Shy, “The Economics of Network Industries”, 2001 Cambridge University Press

21 [See Ward, Stephen "Introduction - Parties and Election Campaigning Online: A New Era" in Stephen Ward, Diana Owen, Richard Davis, and David Taras \(eds.\) Making a Difference, 2008 Lexington Books p5](#)

that open source projects are often funded by major corporations²², thus making this supposedly egalitarian endeavour another platform for corporate influence. In the area of news, despite the rise of blogs and “participatory journalism”, Gans has observed that old media still remains “dominant” on the Internet²³. In the realm of politics, Hindman, Tsioutsoulis and Johnson have noted the “dominance” of mainstream political actors on the Internet, due to the tendency of search engines to give greater visibility to them, as opposed to actors on the political fringes, thus challenging egalitarian assumptions about the Web²⁴. They coin the term “googlearchy” to describe this increased visibility largely due to the amount of links such a website receives, given this is how the Google search engine ranks results. The implication is that citizens may continue to get political information from a few sources, rather than the previously envisaged pluralistic multiplicity.

If the Internet is indeed capable of being dominated, as the authors above suggest, then this has implications for free expression on the Internet: the marketplace of ideas rationale for free expression, as embodied by the Internet, does not hold. Even if individuals have the capacity to create and disseminate to a global audience, this does not mean they will actually do this. All creators of information are not equal: some are richer, or better known than others, and this partly determines the extent of their exposure on the Internet. Above all, the lack of government regulation/intervention that the marketplace of ideas model entails is not appropriate in the context of a medium that can be manipulated by powerful economic or other forces. The maturation of the Internet, and the rise of corporate power, may see it being considered as less “different” to previous media and communications technologies.

The new dominance, and net neutrality

An example of the potential of the Internet to be dominated and the effects this has on free expression can be found in the net neutrality debate. This discussion has mostly played out in the USA, although the European Union has also taken some interest in this issue. Net neutrality is a principle proposed for user access to the Internet, which would prevent Internet Service Providers (“ISPs”) from discriminating between different kinds of Internet traffic, regardless of the amount of bandwidth the traffic takes up, and the restriction of content, sites or platforms (at least those which are legal).

Net neutrality explained

The Internet was set up using “end-to-end connectivity” as part of its design, allowing nodes of the network to send packets to all other nodes of the network, without requiring intermediate network elements to maintain status information about the transmission. This is implemented in the TCP/IP protocols. What this means is that the Internet was created as a “dumb” network, with “intelligent” devices (such as personal computers) at the end or “last mile” of the network. The dumb network does not interfere with an application's operation, nor is it sensitive to the needs of an application, and in this way it treats all information sent over it as equal.

It is the last mile of the network which is relevant for net neutrality. This is the final part of the

22 “Consumers as Producers”. Available at SSRN: <http://ssrn.com/abstract=1137486>

23 “Democracy and the News” Oxford University Press, 2003

24 ““Googlearchy”: How a Few Heavily-Linked Sites Dominate Politics on the Web” 2003. Available at <http://www.cs.princeton.edu/~kt/mpsa03.pdf>

network which connects a customer with a communications provider – in the case of high-speed Internet, an individual and her broadband provider. The concern from proponents of net neutrality is that broadband ISPs will use this last mile to block Internet applications and content, especially those of competitors, using “deep packet inspection” technology to look into the content of blocks of data, and act based on that, as opposed to considering solely the destination of the data.

Net neutrality and free expression

The debate about net neutrality is not purely theoretical: there have already been instances of ISPs differentiating between different types of Internet content²⁵. Indeed, in Canada, non-net neutral behaviour has had overt free expression implications, namely the case of communications provider Telus blocking its subscribers' access to a website run by Telecommunications Workers Union members in July 2005²⁶.

Indeed, an enacted net neutrality principle has been viewed as necessary to secure and maintain conditions for free expression on the Internet. Wu advocates such a principle “to forbid broadband operators, absent a showing of harm, from restricting what users do with their Internet connection”²⁷.

Lessig and McChesney identify various free expression issues pertaining to net neutrality. They see access-tiering²⁸ as a particular concern in the absence of net neutrality rules, asserting that “firms would be able to sell access to the express lane to deep-pocketed corporations and relegate everyone else to the digital equivalent of the winding dirt road”²⁹, warning that in this case the Internet will “start to look like cable TV – a handful of massive companies would control access and distribution of content, deciding what you get to see and how much it costs”³⁰. Given the Internet's previous record on facilitating free expression of individuals, which was restricted to a much greater extent in the traditional one-way broadcasting world, it would be a great loss if the Internet was to mimic this model, with its associated disadvantages for free expression. Furthermore, if users were charged more to access non-favoured content, then this could exacerbate existing “digital divides” in society³¹.

In the European context, Chirico, Van der Haar and Larouche have acknowledged end-users' and content providers' “fundamental right to receive and impart information, enshrined *inter alia* in Art

25 A prominent example is the US cable operator Comcast blocking peer-to-peer data transfers for its users, resulting in the Federal Communications Commission ordering Comcast to cease doing so.

26 CBC News “Telus cuts subscriber access to pro-union website” 24 July 2005. Available at: <http://www.cbc.ca/canada/story/2005/07/24/telus-sites050724.html>

27 “Network Neutrality, Broadband Discrimination”. *Journal of Telecommunications and High Technology Law*, Vol. 2, p. 141, 2003; p167-168. Available at SSRN: <http://ssrn.com/abstract=388863>

28 Access-tiering is the practice of providing different levels of access to Internet content depending on the price paid by the consumer to receive the information and/or content-provider to disseminate the information.

29 Washington Post “No Tolls on the Internet” 8 June 2008. Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060702108.html>

30 Ibid

31 For more on contemporary debate on digital divides, see: [Calderaro, A \(2009\). “Framing the Digital Divide: bridging the gap between users and makers of the Internet”. Presented at the 59th International Communication Association \(ICA\) Conference, Chicago, USA; and Couldry, Nick, 2007. "Communicative Entitlements and Democracy: The Future of the Digital Divide Debate", in *The Oxford Handbook of Information and Communication Technology*, Robin Mansell, Chrisanthi Avgerou, Danny Quah, and Roger Silverstone \(eds\). Oxford: Oxford University Press, p 383-401.](#)

10 ECHR³², with the implication being that this could come into conflict with non-net neutral conduct from ISPs. However, Art 10 of the ECHR is an obligation weighing only on States as opposed to private entities, so would not entail free expression winning out in this scenario. The Access Directive³³, especially Art 5 which empowers national regulatory authorities “to encourage and, where appropriate, ensure ... adequate access and interconnection, and interoperability of services” taking into account what would benefit end-users, may go some way to alleviating free expression (as well as anticompetitive) concerns, however it does not equate to a guarantee for free expression, especially at the content level.

Moran Yemini has explored the relationship between net neutrality and free expression at length, focussing on the American First Amendment position³⁴. He critiques the “traditional bilateral conception” of the First Amendment as the scenario of a conflict between a speaker and the (US) Government, and claims that this makes it inadequate for dealing with the “multiple-speaker environment” found on the Internet³⁵. He asserts that net neutrality protects the free expression rights of content providers as well as individual Internet users (which, as Chirico, Van der Haar and Larouche observe, are sometimes one in the same, due to the rise of peer-to-peer distribution of content³⁶). Yemini acknowledges that the Internet is still “unique among mass media outlets” as it is the “most decentralised and democratic medium”³⁷, but the implication is that it is not perfectly so, since the entity which controls the physical layer of the Internet “becomes the gatekeeper for all the other layers”, unless the law intervenes³⁸, with the problem of “bottlenecks”, discussed in the context of cable communications in the *Turner v FCC* case³⁹, emerging with regards to broadband networks. He characterises broadband ISPs as “conduits and editors”, and his reading of the *Turner* decision is that it is based on an “affirmative understanding” of the First Amendment, which accepts the idea that government action to enhance free expression is permissible under the First Amendment⁴⁰. This last contention is controversial in American constitutional jurisprudence and discussion, since legal persons i.e. companies are also thought of as being entitled to free expression⁴¹, and the aforementioned traditional bias against government regulation of speech⁴².

Nevertheless, Yemini implies that certain “governmental characteristics” can be found in some private entities or their activities, such as monopoly status, the exercise of quasi-public functions and their subjection to licensing or government regulation⁴³. If broadband ISPs exhibit these characteristics, then there may be similar justifications for subjecting them to First Amendment

32 Chirico, Filomena, Van der Haar, Ilse M. and Larouche, Pierre, “Network Neutrality in the EU” (September 2007). TILEC Discussion Paper No. 2007-030; p40. Available at SSRN: <http://ssrn.com/abstract=1018326>

33 Access and interconnection Directive 2002/19/EC

34 “Mandated Network Neutrality and the First Amendment: Lessons from *Turner* and a New Approach”. Virginia Journal of Law and Technology, 2008. Available at SSRN: <http://ssrn.com/abstract=984271>

35 Ibid p40

36 Chirico, Van der Haar and Larouche, ibid p10. However, they assume traditional content providers will remain “larger players”.

37 Yemini, ibid p17

38 Yemini, ibid p18

39 512 US 622 (1994). The full text of the decision is available at:

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=512&page=622>

40 Which accords with Cass Sunstein's conception of the First Amendment, ibid

41 As reflected in the recent controversial US Supreme Court decision *Citizens United v Federal Election Commission* 588 U.S. _ (2010), where it was held that corporate funding of independent political broadcasts in candidate elections cannot be limited under the First Amendment.

42 This can be seen in the reasoning in *Reno v ACLU* above.

43 Yemini, ibid p43

duties as for the government. As discussed above, in the US there is effectively a broadband duopoly, and such providers may be considered to exercise quasi-public functions such as the creation and maintenance of an online “public sphere”.

According to Yemini, an individualistic notion of free expression, i.e. that it is principally a right pertaining to individuals, seems to have been “downplayed by many First Amendment theories in their pursuit of greater social goals”⁴⁴. However, this is the conception of the right to free expression protected by the First Amendment that Yemini advocates. This is relevant for him to the net neutrality debate, for if a “multilateral approach” to the First Amendment is taken, then “content providers' and users' interests would not be assessed merely within a general assessment of the governmental interest in the dissemination of information from a multiplicity of sources (or any other government interest), but would enjoy separate, individual and independent status which would stem directly from First Amendment”⁴⁵. Yemini believes that this would give a more solid basis to net neutrality, since net neutrality law and regulation would be justified primarily by the need to ensure the realisation of content and application providers' and users' individual rights to free expression⁴⁶.

Indeed, this would accord more with the traditional European understanding of free expression, centring on the human individual⁴⁷, as seen above. This has been elaborated by *inter alia* Italian jurist Vincenzo Zeno-Zencovich, who proclaimed the Internet as allowing the reclaiming of free expression as an individual liberty, properly pertaining to individual human beings⁴⁸.

Thus, free expression on the Internet seems to be closest to the rationale for free expression as a means of self-fulfilment, placing the individual and her expression at the centre of the idea. However, maintaining the Internet as a free space for ideas, for the benefit of individual expression, would seem to require vigilance as to current developments on the neutrality of Internet traffic, and a cognisance of emergence of axes of power in the medium.

Conclusion

The early Internet engendered large autonomy gains for individuals, and enabled them to create, participate and publish their works on a scale unimaginable in the previous mass media world, permitting a manifestation of individual free expression which was not possible with previous communications technology. In addition, the rise of commons-based peer production as a significant non-proprietary, non-market alternative to increased consolidation in the proprietary, market-based Internet disputed the use of the word “market” to describe the free expression of ideas in this space, and thus also the marketplace of ideas rationale for free expression. The Internet as the free space for ideas, and the empowerment of individuals to participate in this space, places human beings at

44 Ibid p48

45 Ibid p51

46 Ibid p51

47 However, Yemini makes no distinction between human persons and legal persons in his analysis of free expression as an individual right.

48 Ibid. Although Zeno-Zencovich sees this freedom as thriving on the lack of legal regulation of speech (in contrast to previous communications technology, where free expression was enhanced by government regulation). However, Zeno-Zencovich wrote this before net neutrality penetrated the European spheres for debate, so it is uncertain whether he would still regard the lack of regulation as desirable.

the centre, and would appear to be closest to some conception of free expression in this space as a means for self-fulfilment.

However, the emergence of major Internet players in the Web 2.0 world has threatened the Internet as a free space for ideas due to the axes of power which have now been established. One important manifestation of this danger can be seen in the net neutrality debate. It would seem that the absence of any rules mandating this principle may change the state of play on the Internet, and threaten the increased freedom and autonomy it has brought individuals. Government regulation may well be required to ensure that these private forces do not encroach unreasonably on this liberty.

Thus, the rationale for free expression being the marketplace of ideas, which may have been an accurate description in the 1990s, is no longer so, given the questioning of the unlimited availability of bandwidth (implicit in the net neutrality debate) along with the fact that resources i.e. money still matter on the Internet (even if not to the same extent as in the offline world). Free expression now seems to be best understood as an individual right, to enable it to operate in the context of a multilateral Internet, and to ensure that it is adequately protected and promoted in this arena.