Net Neutrality: The Great Debate

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Abstract

FCC Chairman Tom Wheeler, speaking at the International Consumer Electronics Show in January, called for an open Internet which would make sure that ISPs had economic incentives to build better networks while still protecting consumers and innovators. His specific recommendations were shared with the other members of the FCC in February. One of the big issues is the appropriate role of the FCC based on Title II of the Telecommunications Act. Two important court cases (Comcast vrs. FCC, Verizon vrs. FCC) have limited the role of the FCC, leading it to develop a new policy after soliciting roughly 4 million comments last fall.

This paper will present a brief historic background, the issues involved in the court cases, the more general issues raised by the public, the current status of the FCC rules, and any new challenges by telecom companies.

Introduction

Should service providers be able to charge companies for better access to their networks when those companies use large amounts of available bandwidth? On the other hand, should such companies have to pay for the network if the network doesn't pay for the content? Should everyone have the same fast, free, and open experience using the Internet? Should there be incentives for broadband operators to invest in their networks? Should service providers be allowed to block or slow down some content? Is there a common understanding of what net neutrality means?

Not too long ago it would have been hard to imagine such questions. A brief look back might help focus the current debate. When we consider the early beginnings of the Internet (ARPAnet – 1968, CSNET – 1981, NSFNET – 1986) it is unlikely that those working on connecting supercomputer centers and research universities would imagine the questions being asked today. In 1985 there was no World Wide Web, no freely available web browser, and only about 2000 Internet connected computers. In 1989 Tim Burners-Lee created HTML, and the World Wide Web was launched in 1991 by Berners-Lee and colleagues at CERN. In 1991 the government lifted the restriction on the use of the Internet for commercial use. Perhaps then it was only a matter of time before the current controversy over net neutrality surfaced.

In some sense the Federal Communications Commission has had an almost impossible task – trying to determine appropriate rules consistent with its role while the technology changes rapidly and Congress

passes legislation which also becomes outdated. Going back to 2005, The FCC issued a rule entitled "Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities." [1]

The Communication Acts (1934 and 1996) did not directly address how broadband Internet access should be classified or regulated. Although some rules were in place at the time, in 2002 the FCC issued what is called a "Notice or Proposed Rulemaking" seeking comments on an appropriate regulatory framework. At this point the FCC was concerned with services that used existing or future wireline facilities of the telephone network to provide subscribers with Internet access. The important difference in thinking between the 2005 rule and previous rules was the recognition that Internet service now intertwines information processing capabilities with data transmission, i.e. the two should not be separated. The document often made comparisons with cable modem service (a sign of the times in 2005). The rule pointed out that what matters is the finished product made available through a service rather than the facilities used to produce it. The 1996 Communications Act introduced the terms "information service" and "telecommunications service." The 2005 document pointed out that the previous rules were developed before separate and different broadband technologies began to emerge and compete for the same customers. The technology used to build networks and the purposes for which they were built was fundamentally changing in 2005. It was not so easy to separate one network from another, and cable, mobile wireless providers, and satellite provides were entering the market. The FCC, mindful that its most critical function was to adapt regulation to changing technology, determined that it was time for a change. Those submitting comments had argued for a focus on the core nondiscriminatory access obligation. The 2005 rule essentially established that wireline broadband Internet access service was an information service and that the transmission component should not be separated out. After a transition period ISPs were permitted to offer Internet access series on a common carrier basis, and the broadband transmissions component was not to be considered a telecommunication service as defined by the Communications Act. The framework was designed to encourage ubiquitous availability of broadband to all Americans.

Both the ubiquitous use of the Internet and the technology involved continued to evolve after the 2005 framework. The FCC felt that the openness of the Internet faced real threats, and that some blocking or degrading content and applications without informing end users was taking place. Hence four years later the FCC launched a public process to determine whether (and what) actions might be needed both to preserve the characteristics of the Internet at that time and to foster continued investment in the necessary physical networks. Roughly 100,000 written comments were received. Those commenting disagreed about whether there was a need to take action, although all agreed that an open Internet was an important platform. Those who wanted no action were concerned about the costs that might occur if new rules were imposed.

The FCC issued its Open Internet Order in December, 2010.[2] Two of the five commissioners supported the document; a third approved in part. The other two commissioners dissented and issued separate statements. There were four basic rules in this order.

Transparency. Fixed and mobile broadband providers must disclose their network management practices and the terms and conditions of their broadband services. They are also required to disclose

their performance characteristics. End users should be able to make informed choices regarding broadband services.

No blocking. Fixed broadband providers may not block lawful content, applications, or services. This requirement is subject to reasonable network management. Mobile broadband providers also may not block lawful websites or applications which compete with their voice or video telephony services.

No unreasonable discrimination. Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic. Again, reasonable network management is allowed.

Reasonable network management. The network management is reasonable if it is appropriate and tailored to achieving a legitimate purpose. This takes into account the network architecture and the technology of the broadband Internet access service. In this area the FCC attempted to balance clarity with flexibility.

The stated goal of these new regulations was to empower and protect consumers and innovators while encouraging continued innovations and private investment in the network. The document suggested many possible dangers to Internet openness, and cited some cases, including a case involving Comcast (details to follow).

In 2008 the FCC imposed a sanction against Comcast for violating the agency's open Internet guidelines. The FCC found that Comcast had improperly slowed traffic to the BitTorrent file-sharing site, a popular file-sharing site. The FCC urged Comcast to halt the practice but imposed no fine. At the time Comcast was trying to get agency approval of its proposed $30 billion merger with NBC Universal. Comcast was anxious to clear its name and appealed the sanction. Comcast argued that it needed to be able to limit some activities, such as downloading massive movie files. In a unanimous decision in April, 2010, the U.S. Court of Appeals for the D.C. Circuit agreed with Comcast. The Court said that the FCC relied on laws that give it some jurisdiction over broadband services but not enough to make this action permissible. The Court felt that the FCC did not have the authority over Comcast's network management practices. The Court granted Comcast's petition for review and vacated the challenged order. The merger with NBC Universal went through. [3]

On September 30, 2011, Verizon filed a petition the the U.S.Court of Appeals for the D.C. Circuit challenging the transparency, no blocking and no unreasonable discrimination rules of the Open Internet Order. [4] Verizon cited five grounds for its petition:

1. FCC lacked the statutory authority to issue such rules.
2. The rules were unlawfully arbitrary and capricious.
3. The rules violated those sections of the Communications Act which prohibited the FCC from regulating broadband providers as "common carriers."
4. Verizon's First Amendment rights were being violated.
5. Verizon's Fifth Amendment rights were being violated since the rules constituted an uncompensated taking.

The Court's decision was handed down on January 14, 2014. The Court upheld the transparency rule but not the antiblocking and antidiscrimination rules. The Court agreed that the FCC has the statutory authority to enact rules but that it had regulated broadband providers as "common carriers" despite declining to classify them as such, in violation of the Communications Act. Note that the recognition that the FCC did have statutory authority left the FCC room to come back with new rules that might pass the judicial test. The Court rejected Verizon's claim that the rules were arbitrary and capricious. Verizon had not argued that the transparency rule violated the First or Fifth Amendments. Note that the Court was not assessing the wisdom of the Open Internet Order regulations, but simply determining if the regulations fell within the statutory grant of authority. This seemed to leave the FCC with room to adopt new Open Internet rules.

Not unlike the situation prior to the 2005 framework and the 2010 Open Internet Order, once again the FCC called for public comments on proposed net neutrality rules in 2015, with a September 15, 2014 deadline. Over 4 million comments were received. It should be noted that a number of the more recent comments used a form letter from a net neutrality group. On the other side, more than 800,000 signatures were on a petition calling on the FCC to not classify broadband as a public utility. [5] During the period from mid-September to February, 2015, when FCC Chairman Tom Wheeler would put forth a proposal to be voted on later in February, discussion on the Internet was filled with all kinds of speculation. Tom Wheeler gave some indication of his thinking when speaking in January, 2015 at International Consumer Electronics Association in Las Vegas. He called for an open Internet that protects both innovators and consumers. He also wanted to be sure that ISPs had economic incentives to continue building better networks. [6]

The big day came on February 26, 2015 when the FCC, in a vote of 3-2, classified broadband Internet service as a public utility. The Open Internet Order begins by citing the importance of the open Internet and its benefits. [7] The document claims that in the four years since the FCC adopted open Internet rules significant investment and innovation has taken place in the broadband marketplace. The rules adopted in this new order are carefully-tailored and grounded in both the Telecommunications Act and Title II of the Communications Act, according to the document. Three specific practices are banned, with the ban applying to both fixed and mobile broadband Internet access service.

1. No Blocking. Lawful content, applications, and services cannot be blocked, subject to reasonable network management.
2. No Throttling. A provider of broadband Internet access service cannot impair or degrade lawful Internet traffic on the basis of its content, application, or service.
3. No Paid Prioritization.

Other provisions include the rule that there is to be no unreasonable interference or disadvantage to consumers or edge providers, i.e. providers cannot act as gatekeepers who block access or target competitors. As in the 2010 document, reasonable network management is not a violation of these rules. The Court upheld the 2010 transparency rule, so that remains in effect. Note that the huge difference between these rules and the 2010 rules is the statutory basis.

The two FCC commissioners who voted against the Open Internet Order issued separate statements. It is no surprise that court challenges have already begun. On March 23, 2015 U.S.Telecom (a trade group including AT &T and Verizon) sued the FCC in the same U.S. Court of Appeals. The suit claims the rules are arbitrary and an abuse of FCC's discretion.[8] The focus of the appeal is on the

decision of the FCC to reclassify broadband Internet access service as a public utility. Alamo Broadband, a small provider in Texas, has also sued the FCC. This suit was filed in New Orleans federal court. Once again, it will surely take some time for these challenges to move through the courts. In the meantime, technology will continue to evolve making it hard to predict what the environment might look like in a few years.

References

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