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Net neutrality: a battle that has intensified in the US

The principle of network neutrality, whereby there are no restrictions placed on any type of internet content, method of communication or application, appears to be a controversial issue in many jurisdictions, not least in the US where it has turned into a political debate. While some other countries have actually implemented laws promoting net neutrality - as have Chile and the Netherlands, for example - the US is still very much deciding the best way forward to manage online traffic. Bennet Kelley, Founder of the Internet Law Center, examines how net neutrality has not only become an economic and ideological debate in the US, but has turned into a political battle.

The net neutrality debate was triggered by a 2005 Supreme Court decision that the provision of internet access via cable modem was an 'information service' under Title I of the Federal Communications Act and not a 'telecommunication service' subject to mandatory regulation as a common carrier under Title II (which the Federal Communications Commission (FCC) subsequently applied to internet access via telephone)¹. The issue quickly jumped from the pages of law journals to editorial pages that same year after then-AT&T Chairman Whiteacre, bluntly stated his opposition to the likes of Google, MSN and Vonage 'using my pipes [for] free'.

The issue, which was once dismissed by opponents as a nebulous slogan without any meaning, is now likened to an 'iron curtain' of the internet and is before the District of Columbia Circuit Court of Appeals for the third time in three years as the

FCC is being sued by both net neutrality opponents and proponents over its 2010 Open Internet Order.

The road to Comcast

At the same time that the FCC extended the Brand X decision to internet access via telephone, it adopted an 'Internet Policy Statement' that articulated four principles to 'encourage broadband deployment and preserve and promote the open and interconnected nature of [the] public Internet'. The principles essentially stated that consumers were entitled to access the content of their choice via applications and hardware of their choice and that they were entitled to competition among network, content, application and service providers, subject to reasonable network management².

Opponents of net neutrality argued that the alleged harms it sought to prevent were speculative, a view expressed by the Federal Trade Commission in a 2007 report which found that regulation would be premature from their perspective, as '[p]olicy makers should be wary of enacting regulation solely to prevent prospective harm to consumer welfare'³. This argument lost some of its currency in 2008 when Cox and Comcast were found to have blocked user access to P2P sites. FCC Chairman Kevin Martin, a Republican who had opposed net neutrality conditions imposed as part of the AT&T-Bell South merger, ultimately invoked the Internet Policy Statement against Comcast who contended the statement had no binding effect. While Martin and the two-Democratic Commissioners cited Comcast for 'invasive and outright discriminatory' practices that 'significantly impeded consumers' ability to access the content and

use the applications of their choice,' as a sanction the FCC merely demanded that Comcast cease the practice which it had already done⁴.

The Genachowski way

In 2009, the newly elected Democratic President Obama named his former law school classmate and past FCC General Counsel, Julius Genachowski, as Chairman of the FCC where he became the quarterback for the President's agenda to expand broadband penetration, reverse the United States' declining rankings in broadband penetration and speed and promote net neutrality. In October 2009, the Genachowski-led FCC issued a notice of proposed rulemaking to formalize the 2005 policy statement⁵, but this process was upended in April 2010 when the D.C. Circuit overturned the 2008 Comcast order. The D.C. Circuit found that although the FCC is given latitude to exercise authority ancillary to that granted by Congress, it had failed to tie its actions in Comcast to any 'statutory mandated responsibility'⁶.

Chairman Genachowski tried to navigate this new legal terrain by floating his 'third way' solution which involved recognizing 'the transmission component of broadband access service-and only this component' as a telecommunication service subject to regulation under Title II of the Communications Act, while also renouncing the application of provisions from the Act 'that are unnecessary and inappropriate for broadband access service'⁷.

In November, Genachowski was confronted with a dramatic change in the political terrain as well as not only did the Republicans regain control of the House of Representatives in the 2010 mid-term elections but all 95 House

Democrats who signed a pledge to support net neutrality lost.

Undaunted, Genachowski pushed forward and in a December 2010 order adopted by the Commission on a party line vote. Genachowski abandoned the 'third way' approach and instead explained that 'Congress did not limit its instructions to the Commission to one section of the communications laws. Rather, it expressed its instructions in multiple sections which, viewed as a whole, provide broad authority to promote competition, investment, transparency, and an open Internet'.

The Open Internet Order set three requirements:

- (1) transparency for both wireline and wireless services, requiring disclosure of its network management practices;
- (2) wireline providers are prohibited from blocking any lawful content, apps, services or devices; wireless providers, from blocking websites and competing telephony services, and
- (3) wireline (but not wireless) providers are prohibited from unreasonably discriminating against any traffic.

Democratic Commissioners Michael Capps and Mignon Clyburn, while voting for the rule, disagreed with its failure to fully apply to mobile and not expressly address pay for priority practices.

The Order drew a sharp rebuke from the two Republican Commissioners - Meredith Baker and Robert McDowell, with each stating the Commission was acting without evidence to address a problem that did not exist and which they did not have the authority to address.

Commissioner Baker criticized the majority's basis of authority as an 'everything-but-the-kitchen-sink defense [with] 24 different claimed statutory bases'. She concluded that

Despite the fact that Genachowski was codifying principles established during the Bush administration, the Open Internet Order enraged Congressional Republicans, with Rep. Marsha Blackburn calling [it] a 'vampiric leap' that is building an 'Internet Iron Curtain that will restrict more of our freedom'

'[i]n the final analysis, the Commission intervenes to regulate the Internet because it wants to, not because it needs to'. McDowell charged that asserted that the Commission was 'circumventing the will of a large, bipartisan majority of Congress' by engaging in 'regulatory vigilantism' and charting a 'collision course' with Congress.

Opposition to Open Internet Order

Verizon and MetroPCS immediately appealed the Open Internet Order to the D.C. Circuit, but these appeals were quickly dismissed as premature since the rule had yet to be published in the Federal Register⁸. On 23 September 2011, the final rule was published in the Federal Register and, since then, seven cases have been filed in multiple circuits which either contend that the Open Internet Order exceeds the FCC's statutory authority or that the adoption of different rules for broadband access via fixed platforms versus mobile platforms violates the Communications Act and 'is arbitrary and capricious, an abuse of discretion, or otherwise contrary to law'⁹. The cases have been assigned to the D.C. Circuit via a random lottery which is viewed as a victory for opponents given its prior Comcast ruling. Despite the fact that Genachowski was codifying principles established during the Bush administration, the Open Internet Order enraged Congressional Republicans, with Rep. Marsha Blackburn calling the Order a 'vampiric leap' that is building an 'Internet Iron Curtain that will restrict more of our freedom'¹⁰. While Republicans are unlikely to succeed in overturning the Open Internet Order, the Commission can expect to face battles over funding for implementing the rule.

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1. National Cable & Telecommunications Association et al. v Brand X Internet Services, 545 U.S. 967 (2005), Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 70 Fed. Reg. 60222 (17 October 2005).

2. In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C.R. 14,986, 14,988, 4 (2005). The policy statement made clear that the FCC was 'not adopting rules' but rather would incorporate this policy into 'its ongoing policymaking activities'. Ironically, these principles were incorporated into the approval of the AT&T-SBC merger (as well as the Verizon-MCI merger).

3. Broadband Connectivity Competition Policy Staff Report, Federal Trade Commission (June 2007) at 160, see www.ftc.gov/reports/broadband/v07000Oreport.pdf. In a concurring statement, FTC Commissioner (and now Chairman) Jon Liebowitz noted that the reports 'concerns about the consequence of ill-advised action', but added that 'it seems to me equally clear that this Report shows that doing nothing may have its costs as well.'

4. In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast, No. EB-08-IH-1518 (1 August 2008) at 42, 51.

5. Preserving the Open Internet, Broadband Industry Practice, 74 Fed. Reg. 62638 (proposed 22 October 2009) (to be codified at 47 C.F.R. pt. 8).

6. Comcast v FCC, 600 F.3d 642 (D.C. Cir. 2010).

7. In the Matter of Preserving the Open Internet Broadband Industry Practices Preserving the Open Internet, Broadband Industry Practice, 76 Fed. Reg. 59192, 59214 (adopted 21 December 2010) (to be codified at 47 C.F.R. pt. 8).

8. Verizon v FCC, No. 11-1014 (D.C. Cir. 4 April 2011) (*per curiam*).

9. Free Press v FCC, No. 11-2123 (1st Cir.); People's Production House v FCC, No. 11-3905 (2nd Cir.); Media Mobilizing Project v FCC, No. 11-3627 (3rd Cir.); Mountain Area Information Network v Federal Communications Commission, No. 11-2036 (4th Cir.); Access Humboldt v FCC, No. 11-72849 (9th Cir.); Verizon v FCC, Case Nos. 11-1355 and 11-1356 (D.C. Cir.).

10. Nate Anderson, 'From Vampires to Communisms: Net Neutrality an "Internet Iron Curtain"', at <http://arstechnica.com/tech-policy/news/2011/09/from-vampires-to-communism-net-neutrality-an-internet-iron-curtain.ars>