

The FCC's Comcast net neutrality decision – convergence with Europe?

Producers and distributors: can regulation of retail help for better regulation of the Internet?
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History of Net Neutrality in the U.S.

- March 2003: Madison River Consent Decree
 - ISP blocks VOIP, FCC intervenes
- August 5, 2005: FCC Broadband Policy Statement
 - Four consumer “rights”:
 - to access the lawful Internet content of their choice
 - to run applications and use services of their choice, subject to the needs of law enforcement
 - to connect their choice of legal devices that do not harm the network
 - to competition among network providers, application and service providers, and content providers
 - Principles “are subject to reasonable network management”
 - Principles omit “non-discrimination”
 - Companion order issued on the same date reclassified broadband Internet access transmission as a “non-common carrier” service
- 2005-2006: mergers AT&T/SBC, AT&T/BellSouth, Verizon/MCI
 - Merger condition: comply with FCC principles for two years
- 2007-2008: service rules for “C Block” 700 MHz spectrum
 - Winning bidder must comply with open platform rules that essentially track the Broadband Policy Statement
- August 1, 2008: FCC *Comcast* Order
- January 29, 2009: Adoption by U.S. House of Representatives of American Recovery and Reinvestment Act 2009 (pending in U.S. Senate)

The facts of the Comcast case

- Comcast sent “reset” packets to interrupt BitTorrent applications
- Users complained, but Comcast denied it was doing anything
- Comcast continued to deny even after FCC began investigation
- Comcast finally admitted practice, but claimed it was to manage traffic congestion
 - Untrue, because blocking occurred regardless of the time of day or night, and regardless of level of congestion

FCC's decision

- 3 to 2 decision: Republican Chairman Martin sided with two Democrats, the other two Republicans voted against
- FCC holds that Comcast's practice is illegal because it does not constitute "reasonable network management"
- FCC uses postal analogy:
 - "...in laymen's terms, Comcast opens its customers' mail because it wants to deliver mail not based on the address or type of stamp on the envelope but on the type of letter contained therein."
 - "Would it be OK if the post office opened your mail, decided they didn't want to bother delivering it, and hid that fact by sending it back to you stamped 'address unknown – return to sender?'"
- FCC cites failure to inform customers as potential consumer fraud
- FCC cites anticompetitive vertical leveraging: reason for blocking was to push consumers to purchase Comcast's own VOD service

Questions raised

- When if ever can network operators discriminate based on content?
- Can network operators block illegal content?
- Is this decision based on “symmetric” or “asymmetric” (SMP) regulatory rationale?
- Would full and fair disclosure to consumers cure the problem?
- Does the Comcast ruling extend to wholesale relationships between carriers (e.g., peering and QoS questions)
- Does the Comcast ruling extend to mobile operators?

When if ever can network operators discriminate based on content?

- FCC reiterates that reasonable network management is permitted, but states that ISPs have the burden of proving that “its practice should further a critically important interest and be narrowly tailored to serve that interest.”
 - Proportionality test familiar to Europeans!
- Example: FCC Chairman said that operators can legitimately prioritize VoIP calls
- Network operators bear the burden of proof to show that a challenged network management technique is reasonable
 - But possible change: recent consensus statement by Broadband Coalition BB4US.NET (includes industry and consumer representatives) seems to indicate that network operators have the “right” to reasonable network management – i.e., party challenging a practice bears the burden of proof

Can network operators block illegal content?

- Yes: 2005 FCC net neutrality principles only apply to “lawful” content
- In his separate statement in the Comcast matter, FCC Chairman said that the Comcast ruling and FCC principles do not protect:
 - “illegal content, such as child pornography or content that does not have the appropriate copyright.”
- Although the FCC does not say so explicitly, ISP filtering of illegal content would presumably be permitted, provided the filtering mechanism is “narrowly tailored” to achieve the objective of blocking illegal content (and only illegal content)
 - King James’ Bible blocked in Comcast case
- Consumer disclosure, consent may be required.
- Subject highly controversial in U.S and the E.U.
 - Plan Besson – ISPs to experiment filtering
 - Digital Britain – ISPs given ultimatum to find consensus otherwise government will intervene

Is this decision based on “symmetric” or “asymmetric” (SMP) regulatory rationale?

- FCC alludes to vertical leveraging problem (pushing consumers to purchase Comcast’s own VOD services)
- But FCC Chairman also stated that the ruling does “not address pricing, unbundling, or other economic regulation.” He characterizes ruling as “non-economic regulation”
 - In EU parlance, “symmetric” and not SMP regulation
- Consumer protection is therefore key consideration rather than abuse of market power
- FCC’s “symmetric”/“non-economic” rationale is necessary because FCC lifted most economic/SMP regulation on broadband services. Holding would be inconsistent otherwise.
- What place (if any) for “common carriage” regulation?

Disclosure to consumers?

Does Comcast affect wholesale relationships?

- Would full and fair disclosure to consumers cure the problem?
 - Apparently not. FCC's order was motivated in large part by Comcast's deceptive behavior vis à vis consumers BUT:
 - The practice itself is improper because it does not meet the "reasonable network management" test ("critically important interest"..."narrowly tailored")
- Does the Comcast ruling extend to wholesale relationships between carriers (eg. peering and QoS questions)
 - Not directly, but issue is open to debate

Does the Comcast ruling extend to mobile operators?

- Unclear, but critically important question
- Mobile networks have traditionally exerted more control on devices and applications, and have been subject to fewer regulatory obligations:
 - More limited capacity linked to spectrum
 - Less clear delineation between the network and the terminal (the terminal is part of the network)
 - Walled garden model tolerated
- U.S. debate has in large part spared mobile operators, subject to a small but vocal minority lobbying for “wireless net neutrality” principles
- Wireless “holiday” may end as mobile broadband develops
- New proposed legislation contains a provision on “wireless open access”
 - FCC would have to define what it means

Why convergence with Europe?

- Increased reliance on symmetric regulation
 - But doesn't the expansion of symmetric regulation betray original vision of 2002 EU Directives, which predicted gradual disappearance of sector-specific regulation?
- Increased disclosure obligations to consumers when there are restrictions to access
- Consumers' right to access and distribute any lawful content and use any lawful applications and/or services of their choice
- Proportionality principle

New Developments

- New American Recovery and Reinvestment Act 2009 (subject to Congressional debate; not yet enacted) contains billions of dollars to subsidize broadband investment, but recipients of funds must comply with:
 - “Open access” rules to be developed by the FCC for wireline operators
 - “Wireless open access” rules to be developed by the FCC for wireless operators
 - FCC net neutrality principles of 2005
- Unclear what the differences will be (if any) between “open access” rules and the FCC net neutrality principles.

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Thank you



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