3-12-2012

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Posted on March 13, 2012, by admin

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The debate about network neutrality—the idea that packets of information traversing the pipes that connect us to the Internet should be treated equally and on a best-efforts basis—is not going away. It continues to rear its ugly head as the government and the industry engage in an intense battle over whether the Internet should continue in its path to centralization, or whether the government has the power and the wherewithal to stop it.

The FCC Open Internet regulation left some issues wide open, including what to do about wireless Internet providers (the industry is relatively nascent, so the FCC took a hands-off approach for now). Already, the FCC is being challenged in court, and the industry is taking advantage of the relaxed rules.

Verizon and MetroPCS Challenge the Open Internet Regulation

These days, when the FCC takes one(-half) step forward, the industry attempts to push it back. Typically, industry argues the FCC lacks the authority to regulate. Because the FCC's authority is ancillary regarding cable/wireless providers, this claim is made with impunity. The Open Internet regulation is no exception.

Verizon originated this suit in early 2011, but the D.C. Circuit Court of Appeals dismissed it for ripeness reasons—the rules had not yet been published in the Federal Register. Thus, come the day the rules were published, September 22, 2011, the suit was re-filed. Recently, the industry won a procedural victory when the court denied the FCC's request to hold the proceeding in abeyance while the FCC reviewed a petition for reconsideration regarding the scope of "specialized services"—a type of service that shares broadband capacity but is not necessarily access to the Internet (ISP-provided VoIP services, for instance). Thus, the case will proceed as planned without accounting for the rule clarification.

Industry analysts expect that the FCC will lose, given the D.C. Appeals Court precedent from 2005 that "ancillary" jurisdiction does not give the FCC the power to require cable/wireless companies to treat packets similarly (Comcast v. FCC, 600 F.3d 642 (2010)). While the FCC claimed different authority for the Open Internet regulation (a hodge-podge, piecemeal list of various statutes aimed at gaining some insight into Congressional intent), some scholars say reclassification of the transmission lines of high-speed Internet access to Title II (common carrier status, requiring nondiscrimination of users and uses) would have been both legal and

prudent. If the court rules the current justifications are not sufficient, there may be no choice but to reclassify or deregulate. The latter is an unjustifiable choice, in my opinion.

AT&T Testing the Waters of the New Regulation

AT&T has been busy recently: it denied its shareholders the opportunity to vote on a net neutrality proposal, which the SEC overturned; and it is planning to launch a new service where it will charge content providers for access to consumers and consumers for access to content.

The Open Internet regulation does not require wireless companies to comply with the "no unreasonable discrimination" regulation, so AT&T is technically free to mess with traffic (short of blocking it) without violating the regulation. But shareholders, specifically Mike D. from the Beastie Boys, do not think that is right. He, and other investors, proposed requiring AT&T to remain open (subject to shareholder vote). AT&T denied the proposal, stating this was a day-to-day business decision outside the shareholder's oversight. The SEC disagreed and allowed the vote because of the national importance of network neutrality. This decision makes sense because thisisa national, hot-button policy issue, and shareholders should be allowed to weigh in. Plus, AT&T is beholden to its shareholders, and if they think AT&T should remain neutral and forego benefits of increase control, the company should acquiesce.

AT&T's most deplorable act, in my opinion, is to charge content providers for access to consumers such that consumers with capped data plans will not accrue data usage when visiting those sites. With this new plan, AT&T receives revenues from the subscriber side *and* from the content provider side, *for the same exact service*. Some have called this double dipping, others say this proves it is just all about the money. Combine this with AT&T's recently imposed data caps on cell phone plans, and this is a significant boon to the company to the detriment of the public. This inherently favors larger content providers, disfavors, in the end, the people who actually *access* the content, and AT&T gets a windfall. This plan would only serve to further fracture the Internet—powerhouses like Google and Amazon can afford to do this, small shops definitely cannot. Either way, this smells fishy.

Conclusion

The balance of power between the public (read: government agencies) and the industry has shifted, and the industry has spoken: neutrality of networks is no longer a favorable business model. Back when email and web surfing were the primary uses of the Internet, neutrality worked. Today, we watch video, stream music, play video games, and Internet access companies have an incentive to call those people "bandwidth hogs" that detract from other user's ability to enjoy the service. However, some say the bandwidth hog argument is "a convenient bogeyman." I am inclined to agree, at least out of skepticism for the industry's

own proclamation that a small number of users hog all the bandwidth, and thus it should be allowed to double-dip.
