

The FCC Hasn't Really Shifted on Open Internet; Net Neutrality Was Never the Law



*Following the FCC's decision to liberalize net neutrality rules in the US, **Ellen Goodman** from the Rutgers University School of Law explains that the impact of the decision hinges on the definition of "commercially reasonable" and argues that the US is on the opposite path from Europe in terms of internet regulation.*

In the last month, Europe and the U.S. seem to have diverged markedly in their approaches to net neutrality, although they may not be so discrepant in practical application. **Inge Graef** explains how the **European Parliament strengthened the European Commission's proposed net neutrality legislation**. It did this by tightening the definition of "specialized services" for which ISPs can charge content providers premium rates. The new definition seeks to exclude ordinary Internet access, thereby preventing ISPs from striking special Internet access deals with content providers. But this definition wouldn't prevent ISPs from moving popular services to "logically distinct capacity," whatever that means. And it doesn't seem to cover peering arrangements.

In the U.S., the FCC has announced that it is prepared to go in the other direction, liberalizing net neutrality rules to permit ISPs to enter into "commercially reasonable" tiered pricing deals with content providers. In both Europe and the U.S., the real impact of these apparently divergent approaches will turn on regulatory interpretation and enforcement.

Reaction to the **FCC's announcement** yesterday that it was circulating new open Internet rules **blazed**, with many claiming that the FCC had dramatically shifted course and was set to kill net neutrality. The truth is that the FCC never endorsed the strongest versions of net neutrality and has hardly budged. The agency's tentative plans don't increase the distance between the idealized egalitarian net and the reality of a pay-to-play distribution system — they just expose the reality that the distance has been growing.

To the extent that we've had a neutral network, with ISPs transmitting all content on equal terms, it has not been legally required. Look at the **Comcast-Netflix deal** for preferential interconnection. This "peering" arrangement whereby Netflix pays more to ensure fast delivery of its content was never even covered by open Internet rules, much less forbidden.

Net neutrality proponents accuse the FCC of walking away from its **2010 Open Internet rules** that the D.C. Circuit partially vacated in **Verizon v. FCC** earlier this year. In fact, these rules equivocated on the practices that the FCC now wants to permit: "commercially reasonable" payments from content providers to ISPs for preferential delivery. The **Open Internet Order** said this practice of *paid prioritization* "would raise significant cause for concern," but it ultimately reserved judgment. Of course the nondiscrimination rules did not reach mobile and we have seen a number of paid prioritization deals in the mobile space, such as **AT&T's sponsored data program** and the privileging of Google and Facebook on some mobile plans.

Without reclassification of internet transmission as a Title II telecommunications service, the FCC was never going to forbid deals that improved content delivery (and even under Title II, tiered pricing is not always "unreasonable discrimination.") Where "best efforts" delivery is not good enough (often because the network is under-built), it's hard to imagine a regulator standing in the way of a better consumer experience. The consumer benefits of course are often illusory and short-term. Consumers may end up paying more and having access to less diverse and innovative content. Apart from economic harms, there is harm to the potential *future* consumer

experience foreclosed because some players never get the chance to play. The harm is to diversity – a concept that has long bedeviled U.S. media law. But this tradeoff between greater distant harms and smaller immediate benefits is not new. Nor is the direction the FCC announced this week.

The game will turn, as we always knew it would, on the meaning of “commercially reasonable” pricing practices. About this, I’ll have more to say in another post. We know from [Section 616 of the 1992 Cable Act](#) that proving unreasonably discriminatory carriage of cable channels is extremely hard, expensive, and protracted. If there is to be any bite in rules preventing unreasonable discrimination on broadband networks, it will be crucially important to develop a different, faster procedure that shifts the burden to the network operator. The other thing that net neutrality advocates have to focus on, as I’ve said [here](#) and [here](#), are various components of *public broadband*.

We know what highly commercialized content distribution systems look like. Progressives have pushed back to build noncommercial alternatives. This has to be part of the response to networks that are ever more tied to a relentlessly commercial logic.

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