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Does the Net Neutrality Really Preserve the Open Internet?: A Critique From the Implications of Broadband Policy

Chih-Liang Yeh*

I. Introduction

Network neutrality (or net neutrality) has been called many things, from "a solution in search of a problem," by lobbying group Freedom Works, to "vital for the functioning of democracy," by the Consumer Federation of America. Some argue that net neutrality is a principle that "Internet users should be in control of what content they view and what application they use on the Internet."[1] However, a clear and concise definition of net neutrality is difficult to make. Nevertheless, we can find certain foundation in section 202 of the Communications Act of 1934:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[2]

Congress has considered several statutory proposals to implement net neutrality concepts;[3] meanwhile, President Obama backed net neutrality as part of his campaign platform. It seems no exact end during the long-debate period for almost ten years. After Democrats losing seats in the House of Representatives in November 2010, President Barack Obama made clear that where his party could no longer legislate, it will regulate.[4] Just a few weeks later, his words became action

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1 Posting by Steve Sprague to TECHNORATI, *Is Google Too Powerful?* March 3, 2011, http://technorati.com/technology/article/is-google-too-powerful/ (last visited May 2, 2011).

2 Communications Act of 1934, 47 U.S.C. § 202(a)(2006).

3 *See e.g.*, H.R. 5273 (The Network Neutrality Act of 2006); S. 215 (Internet Freedom Preservation Act); H.R. 3458 (Internet Freedom Preservation Act).

4 Posting by Mike Brownfield to THE FOUNDRY: CONSERVATIVE POLICY NEWS, *Morning Bell: Big Government vs. the Internet*, http://blog.heritage.org/2011/04/04/morning-bell-big-government-vs-the-internet/ (Apr. 4, 2011 9:30am).

when the Federal Communications Commission (FCC) aggressively adopted new rules to legalize the concept of net neutrality. In fact, in April 2010 the D.C. Circuit Court of Appeals has warned in *Comcast* case that the FCC does not have legal authority to enact these regulations on the Internet.[5] The FCC, like any federal agency, can only issue regulations if Congress delegates it the power to do so. Although the FCC has the power to regulate telecommunications and broadcasting, it has not been granted the power to regulate the Internet. But it seems not to stop FCC going ahead and issue the rules anyhow.

This article aims to query the goal of FCC's net neutrality rules to preserve the open Internet and address that the kernel of such a debate should focus on (or return to) the competition policy itself. Part II will depict the net neutrality development in the United States from the two-camp debate and a brief analysis of *Comcast* case. Part III will discuss how the FCC to codify such a vague term. Part IV will indicate the view of Europe regarding the issue of net neutrality and its new legal development. Part V will introduce a court case in Taiwan that might be involved with the discussion of net neutrality. Part VI will conclude some remarks regarding the real problem of a net neutrality regulation.

II. The Development of Net Neutrality in the United States

A. Concept of Net Neutrality

The Internet is a network of networks, including public, private, and governmental networks, which have been linked together and exchanged traffic on the basis of a standardized set of protocols. And these protocols, depending on the type of application involved, deal with the flowing data by dividing into several pieces, or called "packets," that are passed across the Internet from source to destination. Despite the lack of any regulatory obligation then, Internet

[5] Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

traffic has generally been handled by service providers on a "best effort" basis.[6] However, technological innovations, commercialization, continuing diversity of users and proliferating service choices has created the ability and incentive for ISPs to pursue price and service discrimination.[7] In contrast, many neutrality proponents raised concerns about the ability of broadband providers to use their last-mile infrastructure to block certain Internet applications and content, even excluding other competitors. Based on the above premises, pro and con camps were developing their own theories, which both aimed to encourage Internet innovation and protect consumers from abuses.[8]

B. Arguments For and Against

The debate over net neutrality has incorporated even the term itself, to the extent that there has been significant disagreement over what "net neutrality" should mean.[9] In general, net neutrality advocates, most of them the service/content providers, argue that broadband providers should not be permitted to treat different packets flowing to or from their customers differently depending on the type of data in the packet, its source or destination and so forth. They want broadband providers to continue operating their networks on a best effort basis, without favoring any category of content provider or consumer. Advocates also expressed concern that the potential exists for broadband providers to use diversifying service requirements as a business strategy to favor their own content and to blackmail additional payments from users and content providers by threatening degradation of service, and thus enable broadband providers to delay or shut out competitors.[10] They believe the worst case scenario could reduce industry innovation

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[6] FEDERAL TRADE COMMISSION, STAFF REPORT, BROADBAND CONNECTIVITY COMPETITION POLICY, June 2007, at 2, *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf (last visited May 2, 2011).

[7] Rob Frieden, *A Primer on Network Neutrality* (Nov. 2007), *available at* http://ssrn.com/abstract=1026633.

[8] Brian Stelter, *F.C.C. Is Set to Regulate Net Access*, NY TIMES, Dec. 20, 2010, at http://www.nytimes.com/2010/12/21/business/media/21fcc.html (visited May 5, 2011).

[9] *See* Adam D. Thiere, *"Net Neutrality" Digital Discrimination or Regulatory Gamesmanship in Cyberspace*, POLICY ANALYSIS, No.507 (Jan.12, 2004), *available at* http://www.cato.org/pubs/pas/pa507.pdf.

[10] Daniel L. Brenner and Winston Maxwell, *The Network Neutrality and the Netflix Dispute: Upcoming Challenges for Content Providers in Europe and the United States*, 23(3) INTELL. PROP. & TECH. L.J. 3, 5 (2011) ("Net neutrality advocates fear that premium services would lead to an inexorable decline in the quality of best-efforts Internet,

and efficiency, consumer welfare and national productivity.[11]

Opponents of compulsory net neutrality, most of them the broadband service access providers, seek to differentiate service, in terms of quality, price and features to accommodate diverse user requirement; however, they reject such a commercially infeasible scenario where broadband providers would unreasonably discriminate or degrade service. They claim that net neutrality would create disincentives for broadband providers to invest in next generation network (NGN) upgrades, because offering "one size fits all" Internet cannot recoup the investment without such flexibility.[12] For instance, service providers who want to offer some quality services, such as IPTV, online games, VoIP, may need prioritization of their special traffic streams due to the characteristics of the service feature and the possibility of network congestion. Opponents also oppose the net neutrality that prevents broadband providers from tiered pricing (price differences or consumer tiering). They believe that price differences attributable to differences in the quality of service are not "discriminatory" but instead can reflect the higher cost of providing higher quality services.[13] In addition, opponents see no actual or potential problems arising from broadband providers having freedom to discriminate and diversify service. If there is any net neutrality rule (it does exist), it is nothing more than a solution in search of a problem.[14]

C. Comcast Case

Many advocates argue that the operators might discriminate against websites that are

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which no one wants to see.")

[11] *See generally*, J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2(3) J. COMPETITION L. & ECON, 349 (2006).

[12] Frieden, *supra* note 7, at 5-6.

[13] *See* Gary S. Becker, Dennis W. Carlton and Hal S. Sider, *Net Neutrality and Consumer Welfare*, 6(3) J. COMPETITION L. & ECON. 497, 501 (2010).

[14] Anne Broache, *Tech Manufacturers Rally against Net neutrality*, CNET NEWS, Sept 19, 2006, *available at* http://news.cnet.com/Tech-manufacturers-rally-against-Net-neutrality/2100-1028_3-6117241.html (last visited May 4, 2011) (Representative Bobby Rush, Illinois Democrat, spoke to the reporter "Net neutrality is a solution in search of a problem.")

resource intensive, such as Hulu,[15] which offer several competitive services against operator's own services. Or hinder traffic to networks of which it discourages by limiting the available bandwidth, such as the peer-to-peer networking software—BitTorrent (BT)—permitting users to tap into networks of others using BT where the user will get many pieces of the files from many different users. However, these discouraging practices occurred in the past few years. In 2005, Vonage found its Internet-based telephony service offered for nearly two hundred of its rural subscribers was blocked by a subsidiary of Madison River Communication (MRC), which offered traditional telephone service in addition to Internet access. Later, MRC agreed to stop this practice after rendering a voluntary payment and entering into a consent decree with the FCC.[16]

The most cited example of a net neutrality violation occurred in 2007 when subscribers of Comcast, the nation's second-largest ISP, accused the company of slowing down some forms of traffic, like BT's fire-sharing activity, while giving others priority,[17] and this practice was proved positive.[18] On November 1, 2007, Free Press and Vuze Inc. filed a complaint against Comcast with the FCC, requesting the FCC to "take immediate action to put an abrupt end to [Comcast]'s harmful practice."[19] FCC found that this action violated its "Internet Policy Statement," a 2005 declaration of general principles regarding consumer's use of the Internet,[20] and asserted its jurisdiction based on the "ancillary" authority under Title I of Communications Act—that is, the FCC's power to implement regulations that support or enable its other, specifically authorized

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[15] Hulu offers various Internet-based services, such as television shows, movies, clips for free, anytime in the United States. *See* Hulu, http://www.hulu.com. Many websites like Hulu are demanding of large bandwidth to carry extensive data, and ISPs potentially could lock companies like Hulu out of market to secure their own services.

[16] *See* Madison River Commc'ns LLC, Order, 20 FCC Rcd 4295 (2005); *see also* Sidak, *supra* note 11, at 416-22.

[17] *See* Jacqui Cheng, *Evidence Mounts That Comcast Is Targeting BitTorrent Traffic*, ARS TECHNICA, Oct. 19, 2007, http://arstechnica.com/old/content/2007/10/evidence-mounts-that-comcast-is-targeting-bittorrent-traffic.ars (last visited May 10, 2011).

[18] *See* Peter Svensson, *AP Tests Comcast's File-Sharing Filter*, USA TODAY, Oct. 20, 2007, http://www.usatoday.com/tech/products/2007-10-20-2072341885_x.htm (last visited May 10, 2011)(The Associate Press discovered unusual difficulties transferring the King James Bible through connections provided by Comcast, but had little trouble transferring through connections provided by Time Warner and Cable, Cablevision).

[19] Comcast Corp., 23 F.C.C.R. 13,028, 13,032 (2008), *vacated*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010)(citation omitted) [hereinafter *Comcast Order*]. *See* Christopher R. Steffe, *Why We Need Net Neutrality Legislation Now or: How I Learned to Stop Worrying and Trust the FCC*, 58 DRAKE L.R. 1149, 1162-83 (2010).

[20] FCC Internet Policy Statement, FCC 05-151 (adopted Aug. 5, 2005).

activities.[21]

The D.C. Circuit Court of Appeals rejected the FCC's assertion of authority to regulate Comcast's network management,[22] and emphasized that the FCC is bound by the requirements imposed by Congress, and cannot invoke general policy preferences to justify regulating activities that Congress has not subjected to the agency's authority.[23] As a result, *Comcast* casts substantial doubts on the FCC's ability to rely on the same theories of ancillary authority to impose even more intrusive regulations on ISP's network management.[24]

III. Legal Reasons to Rule on Net Neutrality-- Should the FCC Act as Internet Cop?

A. FCC's Approach to Internet (Broadband) Access

In the past, the Federal Communications Commission (FCC) has been reluctant to impose traditional common-carrier regulatory obligations on the dynamic information service market since the *Computer II Order*[25] announced. After Congress enacting the Telecommunications Act of 1996,[26] the new law distinguishes ordinary "telecommunications services"[27] from

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[21] *In re* Preserving the Open Internet, *Notice of Proposed Rulemaking*, GN Docket No. 09-191, WC Docket No. 07-52 (adopted Oct. 22, 2009) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf.

[22] Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[23] As the Circuit Judge Tatel stated in Comcast opinion:

> It is true that "Congress gave the [Commission] broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies… It is also true that "[t]he Internet is such a technology," indeed, "arguably the most important innovation in communications in a generation." Yet notwithstanding the "difficult regulatory problem of rapid technological change" posed by the communications industry, "the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer…Commission authority." *NARUC II*, 533 F.2d at 618...Because the Commission has failed to tie its assertion of ancillary authority over Comcast's Internet service to any "statutorily mandated responsibility," *Am. Library*, 406 F.3d at 692.

Id. at 642.

[24] Howard W. Waltzman, *Federal Communications Commission Lacks the Authority to Reclassify Broadband Services as Information Services*, 14(10) J. OF INTERNET L. 1, 10 (Apr. 2011).

[25] *In re* Amendment of Section 64.702 of Commission's Rules and Regulations (*Computer Inquiry II*), 77 F.C.C. 2d 384, 420, ¶ 96 (1980).

[26] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[27] The term of "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153 (43). Title II's common-carrier requirements to telecommunications carriers "only to the

"information services,"[28] which means that the advanced services would be given breathing room to operate in the absence of restrictive Title II of the Communications Act. As the FCC recognized, the ownership structure governing the phone line does not affect the customers at all.

In 2002, the FCC reaffirmed the conclusion in its ruling on classifying high-speed cable modem service as an information service, and thus exempt from mandatory common-carrier regulation.[29] The result was subsequently upheld by the U.S. Supreme Court in *Brand X* case[30] in 2005, and FCC extended the classification of "information service" to DSL,[31] power line communication (PLC),[32] and wireless broadband Internet Access Service.[33] However, the Commission made a drastic shift after the *Comcast* decision. The reason is not based on the provision of Internet access but on the FCC's desire to regulate broadband network management.[34]

In fact, the FCC did not intend to let broadband providers dominate in the operation of their networks. In 2005, the FCC adopted an Internet Policy Statement stipulating four "Internet Freedom Principles" entitled Internet users to (1) access the lawful Internet content of their choice; (2) run applications and services of their choice, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) competition among

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extent that [they are] engaged in providing telecommunications services," defined as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153 (44), (46).

[28] The term is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).

[29] *In the Matter of* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities (rel. Mar. 15, 2002), Declaratory Ruling and Notice of Proposed Rulemaking (FCC 02-77), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf.

[30] Nat'l Cable Tel. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

[31] *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities (rel. Sep. 23, 2005), Report and Order and Notice of Proposed Rulemaking (FCC 05-150), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf.

[32] *In re* United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service (rel. Nov. 3, 2006), Memorandum Opinion and Order (FCC 06-165), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268331A1.pdf.

[33] *In re* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks (rel. Mar. 22, 2007), Declaratory Ruling (FCC 07-30), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-271695A1.pdf.

[34] Waltzman, *supra* note 24 at 9.

network providers, application and service providers, and content providers.[35] In later merger approval,[36] the FCC required big telecommunications companies to incorporate the abovementioned four principles as a compliance condition.

On October 22, 2009, the commission issued the notice of proposed rulemaking entitled "preserve the open Internet,"[37] which means to achieve its vision of "net neutrality." The proposed rules reiterate previous four principles and add two extra principles: nondiscrimination and transparency. In the fifth principle "nondiscrimination," the FCC expressed its intent to declare the express net neutrality requirement, which the FCC stated that "[s]ubject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner."[38] This provision, which would have outlawed commercial pay-for-priority arrangement according to the FCC's proposed rules, was strongly opposed by Internet service providers, including both cable and telecommunications operators.[39]

B. A "Third Way" of Broadband Regulation

The FCC contended that the proposed rules were within its "ancillary jurisdiction;" however, the D.C. Circuit Court of Appeals has overturned FCC's decision applying the Internet Policy Statement and lacking jurisdiction to regulate network management practices in *Comcast*, which might pose a critical barrier to the implementation of the rules. Under such impact by the *Comcast* decision, FCC's Chairman Genachowski and General Counsel Schlick considered a "Third Way" approach in response to the impact of *Comcast*.[40] They suggested the FCC

[35] FCC Internet Policy Statement, FCC 05-151 (adopted Aug. 5, 2005).
[36] *See* AT&T/BellSouth Merger Order, FCC 06-189, rel. Mar. 26, 2007 ("Effective on the Merger Closing Date, and continuing for 30 months thereafter, AT&T/BellSouth will conduct business in a manner that comports with the principles set forth in the Commission's Policy Statement, issued September 23, 2005 (FCC 05-151)").
[37] *In re* Preserving the Open Internet, *Notice of Proposed Rulemaking*, *supra* note 21.
[38] *Id*. at ¶ 104.
[39] Brenner and Maxwell, *supra* note 10, at 3.
[40] Julius Genachowski, FCC Chairman, Remarks, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf); Austin Schlick, FCC

reclassifying broadband as a Title II regulated "telecommunication service," but only in part. In particular, they also suggested the FCC reclassifying the "transmission component" of broadband as a "communication service," while maintaining all other aspects, including applications or content provided over the Internet, as an "information service" not subject to Title II. Furthermore, they proposed that the FCC exercises its statutory authority to "forbear" from the application of most of the Title II statutory requirements to broadband service, applying only the most "significant" requirements.[41]

In order to implement the proposed rules, the FCC must retreat from its previous rulings regarding that broadband is a unitary "information service" not subject to Title II in any respect, an interpretation that has been upheld by Supreme Court's *Brand X* case.[42] However, it seems legally wrong for the FCC to change such a stance of keeping information service from intensive regulation. As the Supreme Court explained in the recent decision of *FCC v. Fox*,[43] Justice Scalia stated:

> The agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. *Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious* ***reliance interests*** *that must be taken into account…It would be arbitrary or capricious to ignore such matters*. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy…And of course the agency must show that there are good reasons for the new policy. *But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better*, which the conscious change of course adequately indicates.[44]

General Counsel, Remarks, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf.

[41] Section 202 of the Communications Act seems to impose at least some forms of "net neutrality" restrictions on broadband providers, *supra* note 10 at 2.

[42] *See supra* note 30.

[43] FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009); 556 U.S. ___(2009).

[44] *Id.* (*emphasis added*).

As to the mandate of net neutrality, the FCC must confront the challenge that such an about-face needs to be passed by a greater scrutiny by the court whether the agency provides a reasoned explanation for abandoning its prior decision based on factual findings. Justice Kennedy concurred in *Fox* indicated that "[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."[45]

C. FCC's Mandates on Net Neutrality

The FCC adopted net neutrality rules "Preserving the Open Internet"[46] just a couple days before the Christmas in 2010. This rule was based on two primary sources: one was the aforementioned proposed rules and the other was the aftermath of the D.C. Circuit decision in the *Comcast* case in 2010 that the court ruled the FCC was lack of authority to regulate network management practices. The FCC shortened and revised its proposal to three principles:

(1) **Transparency**: any broadband service providers must disclose network management practices, performance, and commercial terms;

(2) **No Blocking**: except for mobile broadband providers, fixed broadband service providers may not block lawful content, applications, services, or non-harmful devices;

(3) **No Unreasonable Discrimination**: except for mobile broadband providers, fixed broadband service providers may not reasonably discriminate in transmitting lawful traffic.

The above three rules apply only to "broadband Internet access service," and the so-called "specialized" or "managed" services are exempted so long as their creation is not to evade the

[45] *Id.* (Kennedy, j., concurring).
[46] *In re* Preserving the Open Internet (rel. Dec. 23, 2010), Report and Order (FCC 10-201), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A1.pdf (last visited Mar. 28, 2010) [hereinafter *Net Neutrality Order*].

protections of the rules. The new rules express special concerns on mobile broadband due to its emerging dedicated-purpose devices, applications, and evolution of new business models.[47] Although mobile broadband companies would have to abide by a lesser standard, but are still prohibited from blocking voice over Internet protocol (VoIP) application like Skype or video services like YouTube or Netflix that compete with their own offerings.

The net neutrality rules are obviously the result of a political process, in which three Democratic commissioners,[48] including Chairman Genachowski approved it and the other two Republican commissioners opposed it. Democrats believe that Open Internet is essential to providing fair access to information, but Republicans argue that the best way for the Internet to flourish is for the government to stay out of it.[49] In particular, Republican commissioner McDowell expressed his concerns that the net neutrality rules are an example of government overreach, and asserted that "nothing is broken that needs fixing."[50] He dissented in a 35-page length separate opinion indicated that "reasonable behavior" in the Internet cannot be decided under the preference for top-down control of agency.[51] Another commissioner Baker also wrote a splendid dissenting statement indicated the importance of regulatory certainty and seven other

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[47] FCC, News Release, *FCC Acts to Preserve Internet Freedom and Openness: Action Helps Ensure Robust Internet for Consumers, Innovation, Investment, Economic Prosperity*, Dec. 21, 2010, http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1221/DOC-303745A1.pdf (last visited Mar. 10, 2011).

[48] Chairman Genachowski voted for the Order; Commissioner Copps concurred and Commission Clyburn approved in part and concurred in part. *Id*.

[49] Tony Bradley, *Net Neutrality Debate Divided On Familiar Political Lines*, PC WORLD, Aug. 18, 2010, http://www.pcworld.com/businesscenter/article/203452/net_neutrality_debate_divided_on_familiar_political_lines.html (last visited May 10, 2011).

[50] *See* Robert M. McDowell, *The FCC's Threat to Internet Freedom*, WALL STREET J. Dec. 19, 2010, at http://online.wsj.com/article/SB10001424052748703395204576023452250748540.html

[51] In the dissenting statement Commissioner McDowell stated that:

> What had been bottom-up, non-governmental, and grassroots based Internet governance will become politicized. Today, the United States is abandoning the long-standing bipartisan and international consensus to insulate the Internet from state meddling in favor of a preference for top-down control by unelected political appointees, three of whom will decide what constitutes "reasonable" behavior. Through its actions, the majority is inviting countries around the globe to do the same thing. *"Reasonable" is a subjective term. Not only is it perhaps the most litigated word in American history, its definition varies radically from country to country……By not just sanctioning, but encouraging more state intrusion into the Internet's affairs, the majority is fueling a global Internet regulatory pandemic. Internet freedom will not be enhanced, it will suffer*.

Statement of Commissioner Robert M. McDowell Dissenting the *Preserving the Open Internet*, *et al*., Report and Order (Dec. 21, 2010), at 2 (*emphasis added*).

principle objections[52] to the Democratic majority.

Although the FCC attempted to find a middle ground that would be acceptable to all, including House Republicans, the House of Representatives voted, still along the bipartisan lines, to overturn the net neutrality rules on April 8, 2011.[53] There is a small story just a few days before the toss-out. Two large mobile providers, Verizon and MetroPCS, filed lawsuits in January 2011 against new rules that prohibit mobile carriers from blocking and degrading websites for their customers; however, those suits were thrown out by the U.S. Court of Appeals in Washington, D.C. on April 4, 2011 on a technical ground that the net neutrality rules have not yet gone into effect until they are published in the Federal Register.[54]

The most controversial portion of the net neutrality debate focuses on whether a broadband provider may discriminate in how it treats different packets that pass through its network. In today's practice, there are many forms of discrimination on managing the network, such as the unsolicited bulk/commercial email (SPAM) filters. Discrimination that seeks to achieve a viable goal, such as protecting the network and guaranteeing a quality of service for all users, is a typical reasonable network management and thus do not violate net neutrality. However, discrimination based on economic motivations may or may not be legitimate according to various circumstances. Basically, discrimination with an anticompetitive objective might be forbidden, whereas discrimination based on legitimate business objective might be allowed. The "unreasonable discrimination" criterion stipulated in the net neutrality rules will be conducted by

[52] Seven objections cover the following: (1) the factual record does not support government intervention; (2) the majority's claim that consumers will benefit from this government overreach is unsupported and deeply flawed; (3) the majority's focus on preserving network operators' current conditions will distort tomorrow's Internet; (4) the majority puts the Commission in the unworkable role of Internet referee; (5) the majority fails to marshal a sustainable legal foundation; (6) the majority's decision to act a legislator, not regulator, is a mistake that may undermine our agency's mission, and (7) opportunity cost. Dissenting Statement of Commissioner Meredith Attwell Baker, *Net Neutrality Order*, *supra* note 21, at 181.

[53] Posting by Ryan Singel to Wired, *House Votes to Undo Net Neutrality Rules*, http://www.wired.com/epicenter/2011/04/house-net-neutrality-vote/ (Apr. 11, 2011 17:41 EST)

[54] Posting by Ryan Singel to Wired, *Court Tosses Net Neutrality Challenges – For Now* http://www.wired.com/epicenter/2011/04/net-neutrality-challenges-tossed/ (Apr. 4, 2011 16:32 EST).

the FCC on a case-by-case basis on what discrimination is allowed.[55] However, how to make an "accurate" judgment on this issue is very similar to "fair use" in the copyright court proceeding, in which the standard is particularly ruled by court rather than by government agencies, and it is extremely difficult to make a bright line on it.[56]

D. Concerns about the Net Neutrality Rules

It should be noted that once the FCC had gotten comfortable in its role as Internet neutrality cop, it might seek expanded authority to regulate the "neutrality" of search engines, operating systems, middleware platforms, e-commerce services, and the like.[57] I agree with Commissioner Baker's dissenting statement, especially in depicting that the FCC is miscast as the Internet's referee and acts improperly as a quasi-legislative body.[58] Indeed, there is no authority to dictate the Internet and to affect the subsequent innovation. The majority expects the new rules will ensure the new innovation and practices subject to its approval; however, the rules, in fact, create more regulatory costs, industrial uncertainty and customer's unease, especially in such a dynamic online environment that networks, device, and applications continue to evolve and converge. To place the government on the position to safeguard and shape the Internet is not a flexible and efficient solution.

In addition, Commissioner Baker argued that the newly adopted rules seem like a draft bill that should be enacted by Congress rather than an independent agency. Because it lacks any record evidence of immediate crisis to resolve, under the basic constitutional structure of check and balance, "the appropriate approach should have been to allow Congress to deliberate on the

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[55] FCC asserted that the case-by-case adjudication approach would fall in accordance with both Congressional directives and Commission precedent. *See Comcast Order*, *supra* note 19, at 13,046 (citing 47 U.S.C. § 230(b)(2)).

[56] The great copyright jurist Learned Hand characterized the fair use as "the most troublesome in the whole law of copyright." Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939). Also, it is not easy to predict the results among various courts. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 1978-2005, 156 U. PA. L. REV. 549 (2007).

[57] Timothy B. Lee, *The Durable Internet: Preserving Network Neutrality without Regulation*, POLICY ANALYSIS, No. 626 (November 12, 2008), *available at* http://www.cato.org/pubs/pas/pa-626.pdf.

[58] Dissenting Statement of Commissioner Baker, *supra* note 21, at 187-93.

proper means to address network management concerns."[59]

IV. European Views on Net Neutrality

In the context of European Union (EU) regulatory framework, the debate on net neutrality and freedoms translates into the general concern that the potential of the Internet would be threatened if network or services providers, other than users, were to decide which content, services, and applications can respectively be accessed or distributed and run. The EU adopts a different view on said prioritization, or in other words product differentiation,

> "is generally considered to be beneficial for the market…so long as users have choice to access the transmission capabilities and the services they want… Consequently, the current EU rules allow operators to offer different services to different customers groups…, but do not allow those who are in a dominant position to *discriminate* in an anti-competitive manner between customers in similar circumstances."[60]

Unlike the U.S. regulatory environment, EU adopted unbundling the local loop of the telephone company with dominant market power and wholesale "bitstream" provision as key means to permit competitive providers to enter the retail market of Internet access. Where effective competition exists and switching costs are not too high, in theory, EU customers can churn to other alternative broadband providers if a provider takes the measures like degrading traffic or blocking access to certain applications.[61] In case where a competitive market not exist, the national regulator can, under EU framework, impose *ex ante a*ccess obligations on the dominant operator to let other competitors offer their own broadband services.[62] In an OECD study notes that the competitive markets together with the current provisions on access and interconnection should be sufficient to protect "net freedom" and to offer an appropriate open

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[59] *Id*. at 192.
[60] European Commission, *Impact Assessment on the Proposals to Amend the European Regulatory Framework*, Working Document, SEC(2007) 1472, Nov. 13, 2007 [hereinafter *Impact Assessment*].
[61] Brenner and Maxwell, *supra* note 10, at 6.
[62] European Commission, *Impact Assessment*, *supra* note 60, at 92.

environment for both consumers and service providers.[63]

In Europe, the behavior of ISPs has been subject to EU regulations through the various telecommunications directives, including the Framework Directive and the associated directives on access, interconnection and universal service.[64] Despite no definition of net neutrality in EU laws or regulations, Article 8 (4)(g) of the Framework Directive requires national regulatory authorities to *promote the interests of the citizens of the EU by promoting the ability of end-users to access and distribute information or run applications and services of their choice*.[65] As to the net neutrality issue, the European Commission (EC) indicated in a consultation report that incidents of net neutrality abuses in Europe are rare and that each case was resolved quickly without need for regulatory intervention.[66] In fact, discrimination in favor of a related company attracts attention under antitrust law, although it has never been tested in a relevant context to date.[67] The current regulatory framework does not provide national regulators with the means to intervene if the quality of service for transmission in an IP-based communications environment is degraded to an unacceptable low level. The impact of prioritization or degradation of connectivity could be larger on the services, such as IPTV or VoIP (in which latency is critical), demanding real-time communications and affect user's choice in the end.[68] Hence, the consultation report indicated that traffic management is necessary and essential part of the operation of an efficient Internet, and the regulator should consider setting minimum quality of service standard for

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[63] OECD*, Internet Traffic Prioritisation: An Overview*, TIPS, Apr. 6, 2007 (DSTI/ICCP/TISP(2006)4/FINAL),at 4 *available at* http://www.oecd.org/dataoecd/43/63/38405781.pdf (last visited May 10, 2011).

[64] Directives 2002/21/EC (Framework), 2002/19/EC (Access) and 2002/22/EC (Universal service), all published at OJ L 108, Mar. 7, 2002.

[65] Directives 2002/21/EC (Framework Directive).

[66] European Commission, *Report on the Public Consultation on 'The Open Internet and Net Neutrality in Europe,'* Nov. 9, 2010, at http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/net_neutrality/report.pdf (last visited May 10, 2011).

[67] There have been some disputes over providers' behavior, particularly Virgin in the United Kingdom, who engages in significant "throttling" (applying artificial bandwidth restrictions to heavy users) and are introducing specific restrictions on BitTorrent application. Besides, Plus.net published "priority" policies that set out the status of various categories of services, such as gaming and VoIP. *See* Daithi Mac Sithigh, *Regulating the Medium: Reactions to Network Neutrality in the European Union and Canada*, 14(8) J. OF INTERNET LAW 3, 7(Feb. 2011).

[68] European Commission, *Impact Assessment*, *supra* note 60, at 92.

Internet access.[69]

This April the EC officially published a report underlining *the need to ensure that citizens and businesses are easily able to access an open and neutral Internet*.[70] The EC will see to it that the new EU telecoms rules[71] on *transparency*, *quality of service* and *the ability to switch operator*, due to enter into force on 25 May 2011, are applied in a way that ensures that these open and neutral Internet principles are respected in practice. The EC asked the Europe's national regulators – who together make up the Body of European Regulators for Electronic Communications (BEREC) – to investigate issues crucial to ensuring an open and neutral internet, including *barriers to changing operators*, *blocking or throttling certain internet traffic*, *transparency and quality of service*. By the end of the year the evidence from BEREC's investigation will be published.[72]

V. Chunghwa Telecom v. NCC -- Taiwan's First Net-Neutrality-like Court Case

In Taiwan, the likely rule to deal with the discriminatory practices could be Article 21 of Telecommunications Act[73] stating that: "A telecommunications enterprise shall provide services in a fair and non-discriminatory manner unless otherwise provided." But there is no obvious issue that is similar to the net neutrality debate occurred in the United States. The recent developments of net neutrality in the European counterpart may inject a better rationale into the first court

[69] European Commission, Consultation Report, *supra* note 66.
[70] European Commission, *The Open Internet and Net Neutrality in Europe*, COM(2011)222 final, Apr. 19, 2011, at http://ec.europa.eu/information_society/policy/ecomm/doc/library/communications_reports/netneutrality/comm-19042011.pdf (last visited May 10, 2011).
[71] Directive 2009/140/EC, OJ L 337, Dec. 18, 2009 ("Telecoms Reform Package"), at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF (last visited May 10, 2010). Until May 25, 2011, European legislatures have to incorporate the amended provisions of the electronic communications directives into national law.
[72] European Commission, *The Open Internet and Net Neutrality in Europe*, *supra* note 70.
[73] Telecommunications Act, Jul. 11, 2007, English text *available at* http://www.ncc.gov.tw/english/news_detail.aspx?site_content_sn=17&is_history=0&pages=0&sn_f=364 (last visited May 10, 2011).

case[74] regarding bandwidth throttling. Like many European countries, the ever-state-run telecommunications operator, Chunghwa Telecom Co. Ltd. (Chunghwa), is under a set of strict or so-called asymmetrical regulations to control its market power, pricing (retail and wholesale), even the commercial dealings, like network interconnection, with other operators. Those imposed regulations are typically *ex ante* per se.

On March 15, 2011, the Taipei High Administrative Court upheld the decision of National Communications Commission (NCC), an independent regulator of communications industry, to force Chunghwa to remove certain restrictions on its fiber-to-the-home (FTTx) high-speed internet service, Hinet FTTx. The case related to a price plan which enabled subscribers to download at speeds of 20 megabytes per second (Mpbs) and upload at speeds of 2 Mpbs. In the ruling, the NCC prohibited Chunghwa from imposing a restriction whereby it would lower the download/upload speed to 10 Mpbs/2 Mpbs for subscribers whose download volume exceeded 200 gigabytes in a given month for the remainder of the month in question.

A. Facts

In June 2009 Chunghwa proposed several new rate plans for its Hinet FTTx services, including the fees for fixed and non-fixed types of Hinet FTTx with download/upload speeds of 20Mpbs/2Mpbs and the fixed type of asymmetric digital subscriber line (ADSL) services with download/upload speeds of 256K/64K. However, Chunghwa added a condition whereby the speed of its 20Mpbs/2Mpbs FTTx service could be automatically downgraded to 10Mpbs/2Mpbs when the subscriber's download volume exceeded 200GB. The NCC approved Chunghwa's proposed rate, but removed the aforementioned condition on the grounds of the principles of net neutrality and non-discriminatory treatment, the fact that there was no guarantee on assured transmission speed and efficiency, and for reasons of consumer protection.

[74] Chunghwa Telecom Co. Ltd. v. NCC, Su-Tzu No.99-1654 (Taipei High Admin. Court, 2011), *available at* the website of Judicial *Yuan*: http://jirs.judicial.gov.tw/FJUD/FJUDQRY01_1.aspx (in Mandarin).

B. Arguments

Chunghwa argued that the NCC had abused its regulatory power in amending the proposed rate plan. Chunghwa claimed that pricing plans are inseparable from service operations, and that this included download/upload speed adjustments based on volume. In order to balance the constitutional freedom of business and public policy, the NCC should be allowed only to:

- turn down the proposed plan;
- order Chunghwa to withdraw the plan; or
- persuade Chunghwa to revise the plan by itself.

Chunghwa argued that by arbitrarily amending the proposed rate plan, the NCC not only upset the operator's evaluation of the service according to future economies of scale, but also affected its profit and loss predictions relating to the overall business. In addition, Chunghwa alleged that its downgrading measure was implemented to prevent high-volume users from consuming the limited bandwidth, thereby squeezing other users' opportunities to use the Internet at the same rate and causing unfairness related to the network cost burden.

In terms of the concept of net neutrality, Chunghwa argued that the contentious service was intended to gather statistics on network usage volume, and would not influence the free flow of information. Further, the plan did not involve the control of users' behavior. The speed adjustment established a better model for users fairly to use the Internet and upgraded the efficiency of the network as a whole. Chunghwa argued that the plan did not violate the principle of net neutrality, which holds that Internet access should be kept open and free. Chunghwa pointed out that in general, most communications regulators in other countries have adopted a light touch with regard to the regulation of internet services and have allowed more room for market competition.

On the other hand, the NCC argued that it was empowered to add any terms and conditions

to the administrative act, according to Article 9 of the Regulations Governing Tariffs of Type I Telecommunications Businesses (the Tariff Regulations). After reviewing the proposed plan, the NCC decided to remove the restriction on the following grounds:

- The tariff of the plan was higher than other FTTx services with different speed and Chunghwa imposes no similar restrictions on download volume in any of its other plans;
- Chunghwa provided no assurances on internet access bandwidth and transmission speed; and
- The restriction on heavy-volume downloading could easily cause consumer disputes and increase the social cost of dealing with disputes.

The NCC asserted that it had not exceeded its executive discretion in approving the service plan after removing the restriction. In addition, the NCC held that consumers could have been harmed by the discriminatory nature of the rate, since Chunghwa intended to continue to collect the 20Mpbs/2Mpbs service rates even after the download/upload speed had been downgraded to 10Mpbs/2Mpbs. The NCC argued that Chunghwa should design another rate plan based on transmission volume if it believed that high-volume users were using too much bandwidth.

C. Court Decision

The court held that the NCC has the authority to add certain conditions or remove unfeasible operational measures in specific cases because the telecommunications market is highly regulated and, specifically, the pricing plans proposed by dominant market players should be critically reviewed under the Tariff Regulations. Telecommunications operators, according to Article 21 of the Telecommunications Act, must provide services in a fair and non-discriminatory manner unless otherwise provided.

In the case of Chunghwa's Hinet FTTx 20Mpbs/2Mpbs service, the court found that the service tariff and the restriction on the download volume were not inseparable. It noted that no restrictions applied to similar non-fixed and no volume-limit services (i.e., 100Mpbs/5Mpbs,

50Mpbs/3Mpbs, 10Mpbs/2Mpbs and 3Mpbs/768K). The downgrading of high-volume user's download/upload speeds could harm the benefits enjoyed by users who had specifically chosen the 20Mpbs/2Mpbs connection speed. The court noted that Chunghwa did not reward low-volume users by cutting their service fees. As a result, the plan compromised the principle of fairness and thus violated the net neutrality principle.

In conclusion, the court found that the NCC's regulation of the service tariff was intended to safeguard consumer rights and prevent unfair competition. As such, the court held that the NCC's imposition of adequate conditions on Chunghwa's rate plan did not exceed the NCC's administrative discretion.

D. Comments

The term "net neutrality" is applied broadly to describe a principle relating to users' access to networks and participation on the Internet. The principle advocates that no restrictions be imposed by internet service providers or governments on content, sites, platforms, equipment and modes of communication. Extreme care should be taken in the interpretation of the term, especially by industry regulators and the courts, in order to prevent misunderstandings.

In the case at hand, the purpose of tariff regulation was to safeguard users and maintain sustainable competition; discriminatory pricing without reasonable cause is condemnable. The NCC adopted the concept of net neutrality narrowly, so as to elaborate on the interpretation of "non-discriminatory treatment" in Article 21 of the Telecommunications Act. To be noted, U.S. regulator FCC has adopted the "no unreasonable discrimination" rule in December 2010, in which it includes an exception to allow "reasonable network management." In its decision, the Taipei court did not state whether it considered the downgrading of performance to constitute "reasonable network management." Notwithstanding the court's failure to elaborate on its interpretation of the term "net neutrality," with its decision to apply the net neutrality principle

narrowly, the NCC appears to have set out its position regarding non-discrimination in the provision of telecommunications services.

The real problem of the broadband access, especially the FTTx service, is not whether the network management is reasonable or not, but whether the broadband market is competitive or not. In fact, the Internet peering (or transit) fees control the lives of small broadband Internet access providers in Taiwan. Although those smaller providers could get access to or lease lines from Chunghwa, Chunghwa always use the “price cutting” or “low-price promotion” strategy to squeeze out the room for the competitors. That Taiwan’s government needs is not the “real” net neutrality rules, but a dynamic competitive broadband policy.

VI. Conclusion—Imposing Strict *Ex Ante* Rules on Internet Has Nothing to Do with the Preservation of Open and Competitive Internet

Net neutrality is a vague and controversial term and a responsible government should not use it as a concrete mandate trying to correct all the commercial practice in the Internet world. No one, even the absolute neutrality opponents, would argue that the unreasonable network management should let it free and not be restricted; however, the regulator should prove the existence of reasonableness, which is the most difficult mission for a government agency to do. In fact, opponents see no actual or potential harms resulting from broadband operators having freedom to discriminate and diversify service. They believe that a net neutrality regulation is nothing more than a solution in search of a problem.

If the goal of the net neutrality rules is to preserve the competition in the broadband market, it is a really wrong and risky hypothetical statement, which not relying on any technical expert resources but just put the rigid rules from the very beginning. As a matter of fact, broadband providers would not deliberately degrade their service to some types of subscribers. It is arguable that any unnecessary degradation of service in a robustly competitive marketplace would

motivate subscribers to “vote with their feet” and take their business elsewhere. If a competitive marketplace for the last-mile access does not exist (indeed in most of countries), the issue should be solved through the *ex post* antitrust proceeding, but not through the *ex ante* net neutrality rules. The debate is far from over.