

Digital Technology Challenges: Net Neutrality (Greenway Ballroom A, J)

Chair: Chris Russill - University of Minnesota

Catherine Sandoval - Santa Clara University - Network Management, Net Neutrality and Unfair and Deceptive Business Practices

The FCC has launched an investigation into Comcast's alleged behavior in "delaying" the packets of a subscriber who was using Comcast's "high-speed" service to download a video game from BitTorrent. Comcast sells a higher tier of internet access through its cable network charging higher fees for "lightening fast" internet access "without limits." Yet, in the name of "network management" Comcast is alleged to have interfered with the user's download, sending false messages that made it seem the delays arose from BitTorrent, not Comcast. This behavior is all the more troubling because the FCC allowed cable companies to deny competitor internet service providers (ISPs) access to their networks, a ruling upheld by the Supreme Court in *NCTA vs. Brand X and FCC*. Shortly thereafter the Commission adopted a Policy Statement on Broadband Internet Access stating its belief that consumers should be able to access the lawful internet content of their choice. Subsequently, the FCC made these consumer rights "subject the needs of reasonable network management."

The paper argues that "reasonable network management" gives undue discretion to the carriers who have the power to manage internet traffic and usage on their networks, and who no longer have to share those networks with competitors. This paper argues that these practices may also be anticompetitive in that they limit access to potential competitors such as video game services which compete with cable for consumer screen time. Additionally, both the FCC and antitrust authorities should also be concerned about the deceptive nature of the carriers' promises to the consumer. This paper examines potential actions under the Federal Trade Commission Act to challenge these actions as unfair business practices and deceptive advertising. Although Comcast promises and charges for "unlimited internet access," cable companies and wireless carriers providing internet access routinely threaten to cut off or throttle access of

heavy users in the name of “network management” and preventing network congestion. Yet, they do not let consumers know what the magic line is they cannot cross, and advertise and charge for services they leave themselves complete discretion to limit or terminate. The paper explores whether an action under the FTC act would be preempted by FCC regulation, discusses potential theories of contract liability and makes recommendations the FCC should take into account to protect consumers and promote broadband availability and net neutrality in its Broadband Practices Inquiry.

Robert Handley - University of Texas - For Mandated Net Neutrality: Normative Priorities

I argue that ensuring network neutrality over the Internet is important because telecommunications firms have obtained the legal ability to discriminate against data and applications at their will and have a market and ideological incentive to do so. Most alarmingly, some neutrality opponents have claimed a Constitutional right to censor political speech. Net neutrality is usually described as a technical, non-legal principle built into the Internet’s architecture. With technical and regulatory changes, the neutrality principle is threatened. No longer will pipes be “dumb” to the data and applications that travel through them. Therefore, we must undo regulatory changes in order to make “technical neutrality” a legal principle that prevents telecommunications firms from blocking, slowing, or impairing data and applications.

However, we must acknowledge that technical neutrality is not value neutral. Technical neutrality favors some data and applications over others, with the potential to favor some content over others. Neutrality must be conceived in normative terms in which democratic requirements trump all other uses of the Internet. When network congestion occurs, packets carrying political speech must be favored over those carrying non-political speech. For Internet communications to be truly democratic broadband must be diffused and we must win an access right.

Brian Dolber - University of Illinois - 'Divide and Conquer': The Racial politics of the COPE act and the Network Neutrality Debate

In June of 2006, the U.S. House of Representatives passed the COPE Act, promising to expand competition in cable television while helping to bridge the digital divide. The legislation was opposed by media reform and consumer rights organizations across the board. However, the telecom industry's strategy in promoting the bill as a piece of civil rights legislation worked to divide the African- American community. Through their public relations and lobbying efforts, the industry won the favor of many black political leaders, helping them to push forward a bill that would ultimately reinforce racial segregation in cyberspace.

This paper uses Stauber's and Rampton's explanation of the 'divide-and-conquer' strategy in public relations—isolating the radicals, 'cultivating' the idealists and 'educating' them into realists, and co-opting the realists—to demonstrate how advocates for network neutrality were marginalized, while broadband providers constructed the expansion of 'access' as a pragmatic goal, at the expense of a broader view of Internet democracy.

Moran Yemini - University of Haifa - Mandated Network Neutrality and the First Amendment: Lessons from Turner and a New Approach

The debate over Network Neutrality -- one of the most hotly debated public policy issues in the United States in recent years -- has been focused primarily on economic and technological aspects of Internet governance. This Article treats Network Neutrality primarily as a free speech issue and comprehensively examines the First Amendment implications should neutrality rules be enacted. The Article explains why the current legal environment does not support a Network Neutrality law and questions, using an analogy to the Supreme Court's rulings in the Turner cases, the constitutionality of potential neutrality rules under existing First Amendment jurisprudence. It traces the jurisprudential difficulty in upholding neutrality rules to the traditional bilateral concept of the First Amendment, which sees any First Amendment conflict as a two-variable equation (a speaker

and the Government), making it ill-suited to deal with the multiple-speaker environment of the Internet. The Article identifies the various mechanisms by which the Court has traditionally reduced the multilateral matrix of conflicting First Amendment rights into the familiar bilateral pattern, the result being the deprivation of rights of some speakers. Network Neutrality, the article asserts, protects content providers', and especially users' individual free speech rights, which stem from the First Amendment. The Article calls for the adoption of both network neutrality rules and a new, multilateral concept of the First Amendment, in which the rights of all relevant variables in the constitutional matrix are assessed on equal terms.