

FCC Looks for Balance in Net Neutrality Debate

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FCC Commissioner Michael Copps said this week, during a debate on net neutrality hosted by VON TV, that the time has come at the FCC for a specific and enforceable principal on non-discrimination regarding network management and he re-affirmed the commission's position on establishing case-by-case adjudication in the matter of net neutrality.

He said this principal should allow for reasonable network management, but make crystal clear that network operators cannot twist reasonable network management into a not-so-reasonable mechanism for blatant network discrimination.

"That would only shackle the promise of the Internet, and to do that would invite the opprobrium of both present and future Internet users," Copps said.

Once a non-discrimination principal was established, the next, much harder, task would be to determine when and where to draw the line between discrimination and reasonable network management. "For that, I think the commission would be well advised to establish a systematic expeditious case-by-case approach for adjudicated claims of discrimination. That way, over time we would develop a body of case law that would provide clear rules of the road for those who operate on the edge of the network — namely consumers and entrepreneurs — and those who operate the networks," Copps said.

He acknowledged that the boundaries between reasonable network management and discrimination will shift over time and that a clearly articulated and well-understood principle, with enforcement, married to a case-by-case approach has the best chance at keeping up with technology and preserving the freedom of the Internet.

"If we can actually strike the right balance here, I believe the wonders of the Internet we have seen in the last decade will not begin to hold a candle to the future benefits it will bring us — and by us I mean every citizen in the land."

Sparking the discussion about discrimination are the allegations against Comcast that rose in October when the Associated Press reported that Comcast subscribers were able to show that their data, being shared through a file-sharing application called BitTorrent was being blocked.

Chairman Kevin Martin said this week he was unsatisfied with Comcast's denial of traffic blocking.

During the VON TV debate, Marvin Ammori, general counsel of Free Press, took Comcast to task and said Comcast and other broadband companies have an incentive to block certain traffic not in order to solve congestion issues but because they compete with their TV service, video on demand and other services. {vpiimagebreak}

"Comcast and other network providers have asserted the right to determine what content consumers can access and how they can access it," Ammori said.

Harold Feld, senior vice president of Media Access Project, was more militant. "Comcast lied," he said. "Comcast lied repeatedly about what it was doing. They lied when their customers asked them point blank whether they were interfering with their attempts to use their broadband connection. There is no other business in the United States where we let companies lie."

Then he answered. "There should be some limits because in the best case where companies are genuinely trying to deliver the best experience for their subscribers, what we will have is a homogenized Internet with no room for innovation," he said. "At worst, there is the threat of real anti-competitive behavior...then we will lose the vibrant free-speech engine that has revolutionized this election cycle and how we interact with each other."

Feld went so far as to say there also should be limits on profits. "So in the rush to maximize profit they do not run over our free speech, our right to innovate and our natural desire to find the next new and big thing that is going to change all our lives."

Toning down the rhetoric, Ken Ferree, president of the Progress & Freedom Foundation said that one point beyond debate is that network resources are limited. "We can't all use the Internet all the time for all applications. So the question is not whether there will be some kind of traffic management, but what that traffic management might be," Ferree said. "One option is apparently that [the Internet] is a free for all and whoever is first on can use the Internet as much as they want for as long as they want and the rest of the world be damned."

The other might be metered use where those who demand large amounts of network resources pay for them. "That is an

area I would have no objection to. It might work, but at this point there has been very little consumer testing and it is not clear if the market will accept that form of traffic management. But that may be where this all ends up," Ferree said. {vpiimagebreak}

Lawrence Spiwak, president of the Phoenix Center for Advanced Legal and Economic Policy Studies toned the rhetoric down further and returned to Commissioner Copps' advocating the case-by-case approach to anti-competitive claims. "I am very pleased that there is increasing call for case-by-case adjudication rather than broad proscriptive rules which may end up causing more harm than good," he said.

Spiwak said the entire debate is troubling because things people are moving very fast and this issue has become very political. "We haven't really grounded ourselves in solid analysis to figure out what exactly are the problems and how do we deal with them," Spiwak said. "Is it a horizontal issue [related to] the number of firms involved in the market? Is it a vertical issue, a free speech issue, a sabotage issue that involves price regulation? Is it about disclosure? We have to determine what the standard is that we want to apply in looking at those issues."

Ammori said the number of firms is an issue. He called it the cozy duopoly where the maximum number of competitors in any given market is two. "So if you don't like your cable company you can switch to your DSL company and that's about it. With this kind of imperfect competition ...we have to rely on regulation because we can't rely on competition," he said.

Many people against net neutrality legislation say that the market should play itself out because there are too many unknowns to make long-term regulatory rules now. Feld said that is a bad idea. "We have seen time and time again that while waiting for the market to play out, we put all the eggs in the competitor's basket and if it comes out wrong then we have seriously destroyed one of our important critical infrastructure, one of the drivers of our economy and one of the most important engines for free speech and civic engagement that any of us have ever seen," Feld said. "For that reason, net neutrality that speaks to very limited rules that say we are going to prevent certain kinds of conduct by providers is the right way to go until we know for sure whether we can let competitors act without any kind of restraint."

Ferree believes the market already is fiercely competitive and that the worst thing we can do is impose regulation. "Regulation discourages investment. Let the market grow and see what happens," he said. {vpiimagebreak}

Spiwak said that if Comcast was trying to block access to the downstream market, that would be a legitimate anti-competitive issue. But if congestion was the issue and the company had to make a decision based on one user or all the others, that's not anti-competitive.

The bottom line, Spiwak said, is that every time the Commission has looked at these vertical issues, it has always taken a case-by-case approach. "That's where we need to go rather than these bright line rules and automatic presumptions of discrimination."

The Phoenix Center released a study this week called "The Welfare Impacts of Broadband Network Management: Can Broadband Service Providers Be Trusted?" In it, Spiwak, along with George Ford and Thomas Koutsky, concluded that: "If it is shown that a congestion externality is present and that a traffic management tool directly remedies that externality, it is appropriate to presume that this type of traffic management by a private firm is legitimate and welfare enhancing."

The center defines a congestion externality as the use of applications by some users that reduce the value of broadband service for other users on the broadband network, without compensation, by causing delays or other service quality problems. The study found that this type of traffic management has been deemed appropriate by society. Furthermore, it is socially desirable to charge a congestion premium when congesting-causing applications are used on a broadband network.