

June 2014

Regulating Internet Access as a Public Utility

A Boomerang on Tech If It Happens

Robert Litan, Nonresident Senior Fellow, The Brookings Institution

Net neutrality - the notion that all internet traffic, regardless of its source, must be treated the same by Internet Service Providers (ISPs) - is back on the political radar because of a decision in January by the D.C. Court of Appeals in *Verizon v. FCC*, which overturned the Commission's prior "Open Internet Order." The essence of the court's ruling was that the Commission lacked legal authority to impose the specific anti-discrimination requirements embodied in that order, which prohibited telephone and cable companies, on the one hand, and content providers on the other, from negotiating rates for speedier delivery or "paid prioritization." The court's rationale was that the Commission had previously declined to designate Internet access "common carriage" under Title II of the Telecommunications Act, a classification that the court essentially suggested could have justified the rules.

The court's decision has unleashed a vigorous debate over both paid prioritization and whether Internet access now should be subject to Title II. Broadly speaking, public interest and consumer groups, coupled with many in the tech community, want the same (zero) price for all types of online content, regardless of the volume of traffic on each site. The surest legal way to that result, many in this camp believe is for the FCC to accept the federal court's implicit invitation to impose Title II "public utility style" regulation on Internet access. Understandably, the ISPs oppose that path forward, and so do others who fear that public utility regulation of Internet access - complete with rate filings and FCC approvals, among other requirements - would dampen innovation and investment in more, faster broadband.

The key to a possible resolution may be the eventual realization that Title II regulation of Internet access would not only hurt the ISPs, but could one day boomerang on certain major tech companies, too.

Unfortunately, the debate between the two sides has taken on the character of a religious dispute, with many in both camps unwilling to budge. The key to a possible resolution, however, may be the eventual realization by at least some in the tech world, especially by some of the largest players, that Title II regulation of Internet access would not only hurt the ISPs, but could one day boomerang on certain major tech companies too. Policymakers at the FCC and within the White House who are highly sensitive to the views of the tech community should also take this potential outcome into account. I conclude with a suggestion for how the FCC can and should move forward on net neutrality.

Where the Commission Is and How It Got There

In his initial response to the federal court's ruling, the Commission's Chairman, Thomas Wheeler, posted a blog on the agency's website giving up the effort to prohibit ISPs from charging content providers for faster delivery, but proposing that the Commission reserve the right to stop "unreasonable" pricing of priority delivery. Wheeler probably added the backstop price regulation clause in an effort to mollify those who wanted a full-throated reinstatement of the earlier net neutrality rule, but with a different legal justification, namely a Title II designation for ISPs.

If that was Wheeler's intention, it didn't work. The proposal was attacked by public interest and consumer advocates, as well as many in the tech community. It also didn't garner support from Wheeler's fellow Democratic Commissioners.

Accordingly, Wheeler tried again, proposing at a Commission meeting on May 15 a new proposal: one that would ban ISPs from slowing or blocking traffic at all websites, and asks whether and, if so, how to ban paid prioritization. The proposal also asks for comment within the four month comment period on whether to subject ISPs to Title II regulation. By a 3-2 vote, split along partisan lines, the Commission endorsed this proposal.

Common Carrier Designation as Solution?

Those who want to banish paid prioritization objected to Wheeler's first attempt at restoring net neutrality post-*Verizon* are still not happy. These critics apparently want Title II imposed on ISPs to assure that the practice is banned.

What some critics of the Commission's recent proposal may not realize is that even if the FCC agrees to impose the price, non-discrimination, and other forms of common carrier regulation on ISPs, Title II reclassification, would not necessarily ban paid prioritization. As former enforcement director at the Federal Trade Commission, David Balto, has pointed out, the title only prohibits "unjust and unreasonable" differences in services. Carriers regulated under Title II still "may offer different pricing (including volume and term discounts) ... so long as they are 'generally available to similarly situated customers.'"

In plain English, all this means that if some websites, like Netflix, want "faster lanes" on broadband networks, the providers of those networks can charge extra for that service even under Title II, so long as they stand ready to offer the same service to all similarly situated comers.

Recently, I authored a blog for *Wall Street Journal's* new "Think Tank" section¹ in which I argued that one possible outcome of the FCC's latest net neutrality proposal is that the FCC goes ahead with classifying Internet access as a Title II "telecommunications service" but explicitly preserves the right of providers of that service to charge for prioritization, which it has the right to do under that title. I noted that a downside of that option is that it might be challenged in court by the providers.

Since writing the blog, I've continued to read what others have said about the FCC's proposal, plus I've thought more about this particular option. And I realize there is another, far more troublesome downside to subjecting ISPs to common carrier regulation. Ironically, that downside could be felt by some of those in the tech industry who may now be considering whether to endorse Title II regulation. After reading the next section below, they might want to reconsider.

The Unintended Dangers of Title II for Tech²

Title II was included in the original Telecommunications Act of 1934 to address potential problems created by having one company, the "old" AT&T, being the monopoly provider of "telecommunications services" which at the time and for much of the rest of the century meant services provided by the "public switched telephone network." Title II authorized the FCC to regulate the price of telephone services provided across state lines, or long-distance calls (while individual states regulated prices of "local" calls within states). Later, after the old AT&T was split up following years of antitrust litigation, and as some competition developed in telephone services, the FCC used Title II, as amended by the Telecommunications Act of 1996, to prohibit the pieces of the old AT&T (the regional "Bell Operating Companies" or "RBOCs") from discriminating against companies wanting access to the network, while overseeing the systems that were developed for payment of traffic origination and termination.

Title II was never intended to apply to services that were not characterized by monopoly; I do not see how, from an economic perspective, it can be appropriate to apply this designation to ISPs.

In short, Title II was designed for the bygone world of monopoly-provided telephone service. It never was intended, as advocates of extending Title II to the Internet now urge, to apply to services that were not characterized by monopoly, such as Internet access.

1. <http://blogs.wsj.com/washwire/search/FCC/?s=FCC>

2. http://www.rollcall.com/news/a_regulatory_step_backward_fcc_should_not_treat_broadband_as_a_common-233036-1.html?pg=2&dc-zone=opinion

This last sentence makes it clear for readers where my own position is: I do not see how, from an economic perspective, it can be appropriate to apply Title II regulation to ISPs, where there are at least two providers of access (wireline and wireless) in virtually all of the United States, and at least two providers of wireline access (cable and telephone) in nearly three quarters of the United States (when broadband is defined as 6 Mbps down or faster). It may also be possible, as a legal matter, that if the FCC nonetheless decides to take this step, the same federal court that decided *Verizon* would not stop the agency from doing so, having essentially invited this result in that opinion (this outcome is not a slam dunk, however, because it is unclear how all of the judges of the D.C. Circuit, sitting *en banc*, or even the Supreme Court might rule on the matter, if given the chance).

If Google's search activities were subjected to Title II, it could face discrimination complaints in the future under a different, more specific legal provision than the FTC Act from competitors.

What I want to highlight here instead is how the application of Title II to Internet access could lay the foundation for imposing Title II regulation *on some parties within the tech industry* as well, an outcome that the firms I am about to mention might not have expected but they should begin to worry about if they haven't. This prospect also illustrates that the long-run interests of public interest and consumer advocates, on the one hand, and certain tech companies, on the other, are not as coincident as some might think them to be.

Reclassifying Internet access as a "telecommunications service" within the meaning of Title II, as supplemented by the provisions of the Telecommunications Act of 1996, opens up the possibility that other tech services meet the same test. The clearest example would be Google's ultra-fast broadband service, Google Fiber, which the company is gradually rolling out. But it doesn't stop there. There is a very slippery slope from having designated ISPs as being subject to common carriage regulation to having to include other forms of Internet transmissions as well because they arguably use "telecommunications services", the legal hook in Title II for its application.

For example, why not then include within the ambit of a telecommunications service the linkage to an advertiser's website that Google or Microsoft provide for users of their search engines? By clicking on links, the search engine uses the Internet backbone which if Internet access is a "telecommunications service" because it provides "transmissions" then so, too, are the search engines. The same answer potentially applies to Amazon's Kindle book reader device and service because its owners are able to download books from Amazon, but

only because they are connected to a wireless provider of Internet access in the process. Indeed, what would stop the FCC from classifying all device makers that include the thing that connects ISPs and device makers in the definition as Title II common carriers?

In theory the FCC could decline to take any one of all of these steps - now. But what happens down the road if public interest and/or consumer advocates decide they want the FCC to impose non-discrimination requirements on any or all of these tech providers? Google, for example, was investigated for several years by the Federal Trade Commission for allegedly discriminating against certain websites in its search results. The FTC pursued the investigation under its broad mandate under Section 5 of the Federal Trade Commission Act to prevent deceptive practices, but ultimately decided against bringing a case (although the competition authorities in the European Union had different ideas, ultimately forcing a settlement with Google).

Laws or regulations implemented for one purpose are often used at a different time to justify extensions into other realms; they are not static words having only one meaning for all time.

If Google's search activities, or those of any of the companies just mentioned, were subjected to Title II, any of them could face discrimination complaints in the future under a different and more specific legal provision than the FTC Act, either from competitors or the public interest/consumer advocacy communities. Even if the Commission did not extend Title II to these activities, the same groups could petition the agency, or seek a ruling from the courts, that it must do so, on the ground that if transmitting X to Y is a telecommunications service, then so are these additional activities.

Sound far-fetched? Maybe to some, but I've lived long enough to know that laws or regulations implemented for one purpose are often used at a different time to justify extensions into other realms. The best example is the open-ended definition of pollution in Section 111(d) the Clean Air Act, written over 40 years ago, that is now being used by the Environmental Protection Agency to regulate greenhouse gases (after the EPA in 2009 used

that provision to define carbon dioxide as a pollutant). Those in the tech community, and within the FCC itself, might want to bear this history in mind: laws or regulations are not simply static words on paper having only one meaning for all time.

Case-by-Case Adjudication of Internet Discrimination is the Way To Go

So what should those in the tech industry that could be caught within the Title II's net support? Likewise, what should the FCC do about net neutrality?

In 2013, I co-authored a Brookings book with Hal Singer, *The Need for Speed*, which outlined one answer³. Because much of the impetus for net neutrality arose out of a concern that ISPs would discriminate in favor of their own content (think online video), we proposed the FCC implement the same case-by-case process to adjudicate discrimination complaints it has established for cable companies to broadband providers.

In April, FCC Chairman Wheeler floated essentially the same idea as part of his initial reaction to the Verizon decision, discussed earlier. Net neutrality advocates claimed that his proposal did not go far enough - specifically did not embrace Title II regulation for Internet access - and sought to kill that compromise.

Yet this case-by-case approach is precisely what the Verizon majority also said would pass legal muster under a separate provision, Section 706, of the Telecommunications Act, without going all the way to a Title II reclassification. This is also the least intrusive of all the options for addressing what is now a potential, not a real, problem.

As for paid prioritization, Title II reclassification may not prohibit it, as argued earlier. But there is no good economic rationale for doing that. Even when the postal service was a monopoly, it charged for faster delivery of the mail by air than on solely on the ground. Broadband access clearly is not a monopoly, but even if it were, the same principle that is found in all other parts of our economy - those who want faster service pay for it - should dictate the same result for the Internet.

3. <http://www.brookings.edu/research/books/2013/the-need-for-speed>