Insight

Keeping the Internet Open and Free Doesn't Mean Title II

WILL RINEHART | APRIL 26, 2017

While there is wide agreement that the Internet should be kept open, opinion diverges when it comes to the way to achieve this end. Translating the concepts of openness and innovation into a workable regime takes more than just a catchy slogan like network neutrality.

Indeed, there are a variety of methods to ensure that consumers are protected on the Internet. In this debate, it is important to delineate among three kinds of questions:

1. Why are the *principles* of openness and innovation important to the Internet?
2. How do specific *policies* or *rules* support these broad principles?
3. And finally, which *legal justifications* will root the policies into law?

With the reinvigoration of the debate, here is a list of the proposals that have been suggested to help secure openness and innovation. Some muddy the conversation by calling Title II reclassification the only *real* network neutrality, but this is a sleight of hand. There are a number of different combinations of policies and supporting legal justifications to secure openness and innovation on the Internet. The list below begins at the current legal regime supported by Title II reclassification and Section 706, and works through legislative options, a regime orbiting around the Federal Trade Commission, and some creative alternatives. In the end, however, the only long term solution is for Congress to act.

Title II Reclassification

In 2015, FCC Chairman Tom Wheeler, under pressure from the White House, reclassified broadband service to provide legal support for the agency's network neutrality rules.

For nearly a decade, the FCC fought two legal battles over this issue. In 2005, the agency was brought to court over a Policy Statement it adopted. After that case was lost, the

agency tried again with more formal rules. Those rules, too, were shut down by courts, but in doing so, the DC Circuit gave the agency a wide interpretation of Section 706 of the Communications Act, sparking the agency to take another shot. The finalized rules in 2015 included four broad rules:

- Transparency – Internet service providers (ISP) must provide information about their network management practices;
- No Blocking – Consumers who subscribe to a retail broadband Internet access service must get access to all (lawful) destinations on the Internet;
- No Throttling – Retail broadband services cannot degrade lawful content, applications, services, or devices; and
- No Paid Prioritization – Paid prioritization occurs when a broadband provider accepts payment (monetary or otherwise) to manage its network in a way that benefits particular content, applications, services, or devices.

With the 2015 order, the FCC went further than ever before, beyond the four principles of the 2005 Policy Statement, and the less onerous rules in 2010. This time around, the agency took the power to police a step further under a new catchall, the "General Conduct" Rule. Even ardent supporters of reclassification were worried about the new expansive role that this open ended rule, separate from the four other rules, would give the agency.

As the Electronic Frontier Foundation explained,

> The Commission has an important role to play in promulgating 'rules of the road' for broadband, but that role should be narrow and firmly bounded. We fear the proposed 'general conduct rule' may meet neither criteria. Accordingly, if the Commission intends to adopt a 'general conduct rule' it should spell out, in advance, the contours and limits of that rule, and clarify that the rule shall be applied only in specific circumstances.

Currently, the reclassification stands, but it isn't a smart policy package, as AAF has explained elsewhere. For one, Congress never gave the agency direct legislation to regulate in the name of network neutrality, so the FCC had to cobble together the legal backing in over 300 pages. Since no law requires the agency to enforce these rules, the agency is likely to change legal regimes with every new administration. Not surprisingly, those who favor legally sound and consistent rules of the road have not been proponents of Title II.

Second, reclassification takes power away from the Federal Trade Commission to police broadband providers, fracturing privacy protection on the Internet.

Lastly, and most importantly, reclassification grants the FCC broad and unchecked power. Title II goes much further than simply grounding the four rules. While ISPs are hardly the heroes of this story, the FCC has an even longer record of meddling.

Section 706

While the big story in 2015 was reclassification, another legal coup occurred as the agency wrote into the federal code their claim via Section 706. According to public documents from the FCC, the "rules are grounded in the strongest possible legal foundation by relying on multiple sources of authority, including: Title II of the Communications Act and Section 706 of the Telecommunications Act of 1996."

Before reclassification, FCC Chair Wheeler was largely expected to root the four basic rules in Section 706 authority. Even that interpretation stretched the limits. Section 706 merely encourages the deployment on a reasonable and timely basis of advanced telecommunications by removing barriers to infrastructure investment. The 2015 Order took the court's advice and ran with it. Indeed, in the waning days of the Obama presidency, Wheeler tested the outer limits of this regulatory creep by pressing forward on cybersecurity, unchartered territory for the FCC.

A Congressional Mandate

With a decade of legal battles already behind us, the only route out of this mess runs directly through Congress. Republican leaders in both the House and the Senate have offered support for a compromise bill, echoing a 2010 bill from Democrat Senator Markey. Yet, bipartisan support is still needed for a bill to move through Congress, and it seems there is little appetite to take up this issue.

Federal Trade Commission

Much has changed since the early 2000s when network neutrality began. In his paper outlining the concept, Tim Wu calls for a balanced approach, noting that "we need distinguish between forbidden grounds of discrimination, those that distort secondary markets, and permissible grounds, those necessary to network administration and harm to the network." In that paper, he proposed a bill that broadly mandated "no restrictions on the use of an Internet connection," but carved out a number of instances when it could be permissible. Those that remain faithful to this original vision tend to gravitate towards the Federal Trade Commission as the top cop.

Under this regime, ISPs would have to conform to broader policies of discrimination and harm as defined by the contours of competition law. Using the FTC to police harm wouldn't

result in specific rules like the FCC currently has on the books. To some, this is a detriment. But, it is important to remember that companies will have strain to follow the spirit of the law. This productive ambiguity would still secure the principles of an open Internet, even though it would be achieved through a different set of policies and legal justifications.

The FTC + The FCC

Another approach would employ mixed methods, combining the knowledge of the FCC in the broadband industry with the economic analysis and legal footing of the Federal Trade Commission. Like other sectors of the economy with dual agency jurisdiction, the two agencies did formalize an agreement on privacy, outlining how the FTC and FCC will coordinate consumer protection efforts. In this memo, both agreed upon the "agencies' expertise in their respective jurisdictions," similar to what FCC Commissioner Robert McDowell suggested be done for broadband writ large.

As the former commissioner explained,

> In lieu of new rules, which will be tied up in court for years, the FCC could create a new role for itself by partnering with already established, nongovernmental Internet governance groups, engineers, consumer groups, academics, economists, antitrust experts, consumer protection agencies, industry associations, and others to spotlight allegations of anticompetitive conduct in the broadband market, and work together to resolve them. Since it was privatized, Internet governance has always been based on a foundation of bottom-up collaboration and cooperation rather than top-down regulation.

McDowell is right that this standing committee style of organization, which is a feature of nearly every Internet coordinating body, has created a near-perfect track record of resolving Internet management conflicts without government intervention. It too is another way to achieve openness on the Internet.

Something Borrowed, Something Blue, Something Old, Something New

The range of options doesn't end there.

Having worked closely with the court, Hal Singer thinks we should borrow the mechanisms of the adjudication process of Section 616 of the Cable Act. Instead of being in the hands of the FCC, this system works through an administrative law judge, requiring a complaint and the normal standards of evidence. Considering the extensive legal apparatus already involved in the debate, attorneys working on the behalf of the public could have a sizeable impact.

Walt Mossberg, a veteran journalist, believes we should begin anew, and cajoled Congress to pass a new broad law that sets out the national interest in protecting the Internet. In that same piece of legislation, a special, permanent, nonpartisan, independent commission or court would adjudicate disputes about Internet issues as they arise, by interpreting that law.

Conclusion

Whichever specific policies are eventually chosen, it is simply not the case there is only one singular network neutrality regime, but a number of different pathways. Yet, given just how contentious the last decade has been, Congress needs to find a legislative fix and put this issue to rest.