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Open Internet and the Law, or Removing the Cart from Afore the Horse

by

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I had the privilege of participating in one – the last, in fact – of the FCC’s Open Internet Roundtables, this one styled, [“Internet Openness and the Law.”](#) In this paper, I will offer some perspectives on this particular Roundtable and comment briefly on a few key points raised in other roundtables.

The central question presented to our panel was the appropriate legal authority for the Commission’s Open Internet rules. In other words: Section 706, Title II, neither, both, or something else? My response was to question the hypothetical: until we know the rules’ purpose, we can’t speak to the appropriate authority. Asking about the appropriate legal authority for the rules assumes we know the problems the rules are supposed to address. It is unclear today what sort of conduct would violate Open Internet principles, both because it’s unclear what those principles are and what the corresponding conduct is. Both Section 706 and Title II offer broad, different, but limited authority. Either, neither, or both could conceivably be the appropriate tool to respond to a hypothetical violation of the rules; either, neither, or both could also be an inappropriate tool.

The question, in other words, is flawed. It assumes an answer that requires *ex ante* rules to “protect the Open Internet.” The key message that I hope I left at the roundtable is that the choice between *ex ante* rules and no rules is a false dichotomy – one that has needlessly forced a heated

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debate over legal authority that has thrown the Commission into an existential crisis. It is based on a mistaken understanding, one that is pervasive in discussions about the NPRM and that has been promoted by the FCC itself. The notice for the Roundtables, for instance, starts by saying that the *Verizon* decision “left no legally enforceable rules for the Commission to prevent broadband providers from acting to limit Internet openness.” FCC Chairman Tom Wheeler has made similar remarks, as well. These statements are simply wrong.

The problem with these statements is that the Communications Act itself is a grant of such authority – indeed, it is the grant of any authority that would form the legal basis for the Commission to adopt administrative Open Internet rules. Anything the Commission can do through rulemaking it can do through adjudication as well – this is a bedrock principle of administrative law dating at least to the Supreme Court’s 1947 decision in *SEC v. Chenery Corp.* If the Commission hasn’t previously adopted rules, or at least issued guidelines, it may be limited in the punitive action that it can take against firms engaging in conduct that the Commission deems inappropriate under the Communications Act (be it under Section 706 or Title II). But it is not limited in deeming certain conduct problematic on an *ex post* case-by-case basis. And, since “preserving the Open Internet” is about curtailing problematic conduct, the ability to deem the continuation of specific conduct as problematic is sufficient to address any problematic conduct that may arise.

So *ex ante* bright-line rules aren’t needed. We can go further: they are also not desirable. There is an argument for this based on the legal theory of rules vs. standards that I will take up below. But there is an even more compelling practical reason that bright-line rules are not desirable, discussion of which featured prominently at the Roundtable: bright line rules will inevitably lead to litigation. There was remarkable agreement about this: everyone seems to agree that litigation is the inevitable result of the Commission’s rulemaking process. I will go a step further than that and say that the Commission will lose any litigation over bright-line rules. There are simply too many ways in which “non-neutral” conduct can be pro-consumer for bright-line rules to survive being challenged as arbitrary and capricious. Both the economic and technical literatures make clear that non-neutral conduct can be either good or bad for consumers under a wide range of circumstances. We cannot say in the general case that specific forms of “non-neutral” conduct will be good or bad for consumers – but that is exactly what bright-line rules must try to do. Prohibiting such conduct generally, therefore, is very likely to be rejected by the courts.

As bothersome as having the D.C. Circuit reject the Commission’s rules as arbitrary and capricious would be, inevitable litigation is problematic for an even more important reason. For better or worse, the Commission’s Open Internet proceeding has caught the public’s imagination. The continuing pendency of the proceeding is creating consumer anxiety and eroding trust in both the Commission and the Internet ecosystem. Needlessly prolonging this process – as adopting rules that would only lead to years of litigation and an eventual repeat of this entire process – would itself be contrary to the public interest.

The takeaway is simple: if the Commission doesn’t need to adopt bright-line rules, and if the pursuit of bright-line rules will only increase uncertainty, delay, and confusion, the Commission should not adopt bright-line rules.

Rather, the Commission should issue guidelines, or perhaps “rules” built around flexible standards (e.g., commercial reasonableness – even commercial reasonableness with a presumption against paid prioritization). These guidelines should reiterate what the D.C. Circuit in *Verizon* made clear, that the Commission has substantial authority in this area under Section 706. And the Commission should say that, if Section 706 proves insufficient to curtail problematic conduct, it will explore other tools for protecting consumers from harmful conduct – including Title II or seeking greater Congressional involvement. And it should say what everyone knows -- that the world is watching – that the Commission, aided by a concerned Congress and an army of public interest lawyers and an agitated Silicon Valley, is watching, and that it won’t hesitate to bring swift action against any firm that engages in problematic conduct.

At the Roundtable, I called this the “Hammer of Thor” authority – though it’s more often known to regulators as “regulation by raised eyebrow.” It is hard to imagine this approach not being amply sufficient to curtail any problematic conduct. Importantly, should anyone engage in conduct that does push the envelope, the Commission has a sound chance at winning a case over specific conduct – it certainly has a better chance of winning a case over specific conduct than it has of successfully defending bright-line rules. The challenge of such rules is that they address uncertain conduct with uncertain effects on consumers using uncertain authority. Adjudicating specific conduct does not subject the Commission to these risks. Even more important, this approach offers the immeasurably valuable benefit of bringing the net neutrality distraction to a close – unlike bright-line rules, which effectively guarantee these issues will continue to dominate the Commission’s agenda for another several years.

Looking Back: Some Specific Responses to Roundtables Past

As noted by Chairman Wheeler, the Commission held over 24 hours of Open Internet Roundtables. Much was said at each that merits discussion – but there were a few particularly striking moments that bear note. To put catchy names to each, I will conclude by discussing: the Technology Roundtable’s missed opportunity, Marvin Ammori’s misunderstanding of bright lines, Susan Crawford’s scrambled eggs, and Barbara van Schewick’s unseen harms.

The Technology Roundtable’s Missed Opportunity. One of the central questions in the Open Internet debate is what, at a technical level, non-neutrality actually means. It is unclear what even “paid-prioritization” means, despite it being one of the central concerns animating net neutrality advocacy. There are many ways that prioritization can be implemented, each of which has different implications for network behavior, and those implications would in turn have different effects on different types of traffic. To put it starkly, there are some circumstances under which prioritization of some traffic could harm other traffic (e.g., under congestion, it could decrease throughput or increase latency), there are some circumstances under which it could have little or no effect on other traffic (e.g., if not under congestion, it could have no effect on throughput or latency), and there are even circumstances under which prioritizing some traffic could *improve* the performance of other traffic (e.g., by reducing congestion resulting from preventable retransmission, or reducing jitter by removing bursty traffic from a queue). There are also technical questions about the difference between some forms of prioritization (e.g., committed bit rates) and other network mechanisms (e.g., specialized services, specialized access, and CDNs).

It is extremely concerning that there been so little attention paid to the underlying technology of prioritization. Without an understanding of the specific technologies by which prioritization may be implemented, there is no way to know the circumstances under which prioritization may harm (or benefit) consumers. Without a much more comprehensive understanding of how the technology of prioritization operates – and what forms of that technology the Commission finds problematic – any rule banning prioritization would be like a rule banning fire because we are concerned about arson. Such a rule would be about as arbitrary and capricious as they come. It's not enough to have a legitimate concern (such as arson) – there needs to be some reason to believe that the rule will be an effective way to address the concern and won't itself be a concern. The Technology Roundtable was an opportunity to delve into the technical meaning of neutrality and the mechanisms of prioritization – issues central to the Open Internet project. While the Roundtable was interesting, and touched on several important issues, it simply failed to address what should have been its core focus. This is disappointing in its own right, and raises questions about the Commission's concern with these technical issues.

Marvin Ammori's Bright-Line Mistake. Of course, it is quite possible that no one knows how paid prioritization would be implemented. Indeed, since the technology has not been deployed, it is likely that no one has even developed such technologies. Rather, the Commission may need to await the development and deployment of such a technology before it can assess its effects. This is precisely the sort of situation that led the Supreme Court to hold that agencies can develop their statutory authority through either rulemaking or adjudication, and it is precisely the sort of situation that calls for the use of standards over rules.

In his defense of bright-line rules, Marvin Ammori seems to misunderstand the literature on rules vs. standards. He calls net neutrality a “textbook example” case for rules, on the grounds that the market needs certainty and the costs of adjudication are high. Were these the “textbook” conditions for rules, we would never have standards: we always prefer certainty and adjudicating standards is always more costly than adjudicating rules (and note: Marvin seems to assume that rules mean there will be no adjudication – or litigation – so places a zero on the cost side of the ledger). What Marvin omits is the cost of getting to the *right* outcome, be it by rule or standard. But as the above discussion makes clear, figuring out what the right rules are is not simple. We cannot simply assume that all paid prioritization harms consumers. Rather, we need to engage in a more nuanced analysis to understand the circumstances under which it would be harmful, neutral, and beneficial to consumers so that we can tailor the rules to permit or prohibit conduct under the right circumstances. Where, as here, it is difficult to know these circumstances *ex ante*, the case for rules is weak.

Marvin's advocacy for bright-line rules (as well as his extreme criticism of presumptions) is made more puzzling when he defends rules for the Open Internet on the grounds that they should provide lots of flexibility. Flexible rules are standards; flexible bright-line rules are standards with presumptions. He endorses both in function while castigating them by name. Rather it seems he is not so much concerned about standards vs. rules, as he wants to prohibit a specific type of conduct – ISPs charging to carry content – and is simply unwilling to subject to scrutiny his assumptions that this conduct is uniformly harmful to consumers.

Susan Crawford's Scrambled Eggs. I will finish by noting two curious things said by Susan Crawford and Barbara van Schewick during the first Roundtable. Most of Susan's discussion was unsurprising: the Internet is nothing more than a sidewalk. The surprising comment she made was to argue for prophylactic rules because it is hard to "unscramble an egg." This phrase, perhaps most familiar to communications lawyers from the antitrust context, captures the idea that because it can sometimes be difficult to "undo" harmful conduct after the fact we may prefer to prevent it on the front end. For instance, if a merger between two companies is deemed illegal a year after it is consummated, it will be difficult (possibly impossible) to separate the companies. Half the management team has likely been fired, facilities have possibly been sold, finances mixed, equipment and facilities integrated, and financial and other proprietary information intermingled between employees of the firms. This is why merging firms need to give notice to the government prior to a merger – it is in the interest both of the government and the firms to determine whether two eggs shouldn't be mixed before their shells are cracked.

While evocative – it is the sort of phrase that sticks uncritically in people's minds – it is not apt to this context. If a firm does violate "Open Internet" principles in a way that is harmful to consumers, it is straightforward to end that harm: prioritization would just need to be disabled in routers. Moreover, practically speaking, firms that do embrace prioritization will recognize the litigation risk – net neutrality is not a foreign concept to anyone in this industry – so are fully aware of, and bear the risk of, the "egg scrambling" concern. Perhaps there could be other complexities, such as civil liability and disgorgement of profits, or unwinding of contracts – but these would be straightforward to calculate and are common in commercial litigation.

Barbara Van Schewick's Unseen Harms. Perhaps Susan Crawford's scrambled eggs are Barbara van Schewick's unseen harms: the loss of all the innovation that they imagine would occur in a world without prioritization but that would not occur in a world with it. During her time, Barbara invoked a very sound economic concern – that we would underestimate the harms of prioritization because we would never see the foregone innovation that would have occurred in the "but-for" world without prioritization. Both Susan's argument (assuming that this is her concern about unscrambling eggs) and Barbara's argument are sound, but they are also incomplete. The same argument applies going the other way. Prohibiting prioritization could prevent some types of innovation from occurring – these are the unseen harms of a world in which prioritization is banned. Worse, since much of the net neutrality agenda functions as a cross-subsidy from low resource consuming users to high resource consuming users – pushing the cost of Internet access up for those users most likely to forego Internet access entirely in response to a price increase – the harms from banning prioritization are more likely to directly impact end-users (whom the Commission's marching orders are to protect). What's more, those harms are likely to be more diffuse and affect the users with the least access to the Commission. In other words, the unseen harms that Barbara correctly expresses concern about are more likely to occur, and less likely to be remedied, if we ban prioritization than if we allow it.

This seems a good note on which to end, as it brings me back to the lodestone of telecom policy: the consumer comes first. Marvin, Susan, and Barbara are representative of net neutrality advocates generally – they forget about the general consumer in their zeal to protect a certain vision of the Internet that is beneficial to a certain class of innovators and a certain class of users. Just as the millions of generally affluent, educated, Netflix-watching, social-media consuming,

John Oliver-loving, form-letter-based-comment submitting Internet users forget that there are millions more users who prefer or need a less robust Internet experience that is better tailored to their needs and means. Fortunately, there is a way to protect both sets of interests: case-by-case adjudication against practices harmful to consumers.

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