

**Network Neutrality after Comcast:
Toward a Case-by-Case Approach to Reasonable Network Management**

by

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Recommendations and Conclusions

To date, the debate over network neutrality has been framed in largely categorical terms, with both sides trying to claim the virtues of freedom, innovation, consumer welfare, and competition. A closer analysis of the issue reveals that it is more complex and variegated than the terms of the existing debate suggest. The economic literature does acknowledge the existence of circumstances under which deviations from network neutrality might give rise to anticompetitive harms. At the same time, the literature shows that those harms can only arise under limited circumstances and that deviations from network neutrality may actually create substantial benefits.

The ambiguity of network neutrality's policy implications underscores the propriety of adopting a case-by-case approach. As the Supreme Court has long recognized, *ex ante*, categorical rules are blunt instruments that do not permit fine distinctions. This is why the Supreme Court has reserved them for things that are so clearly detrimental that little would be lost if the practice were to be banned altogether. And even then, the Supreme Court has long recognized that such *ex ante* approaches should not be applied when a practice is so new that the Court does not have sufficient experience to predict the likely economic impact of prohibiting it. When a practice is either new or when its economic impact is unclear, as seems to be the case with deviations from network neutrality, the better approach is to take an *ex post*, case-by-case approach.¹

The bigger question is how that case-by-case approach should be applied. The foregoing analysis identifies numerous considerations that policymakers should take into account. In most cases, these considerations require a close examination of the facts of each particular case. Eventually, enough precedents will exist to permit those planning in the shadow of network neutrality rules to discern the principles being applied. The problem is that considerable uncertainty will exist until a sufficient critical mass of decisions is reached.

The FCC would thus be well advised to offer more details about the approach it will apply in future cases. The most logical approach would be to use the basic principles animating antitrust law to fill in the content of the case-by-case analysis. Antitrust jurisprudence represents perhaps the most systematic and comprehensive body of law designed to evaluate practices to make sure that they promote the interests of consumers and innovation. Equally importantly, by placing the burden of proof on the party challenging a particular practice, antitrust law is

¹For classic statements, see *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1957); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-51 (1977); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-9 (1979); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988). For the Court's most recent statements, see *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712-13 (2007).

designed to ensure every economic actor has enough breathing room to experiment with different approaches. Although it is tempting to place the burden of proof on those who wish to deviate from the status quo, there are risks in adhering to, as well as deviating from, the status quo. That is why leading theorists have concluded that prophylactic regulation in favor of the status quo is justified only when the potential adverse consequences are truly catastrophic and irreversible.² Any other rule would prevent society from finding which, if any, alternative states of the world might be socially beneficial.³

In addition, antitrust law teaches that any case-by-case approach must also be careful to protect consumers, not competitors. Every change inevitably creates winners and losers, and deviations from the status quo are often opposed by the players dominating the current market, as they are the ones with the most invested in the network as it exists today and thus are the ones with the most to lose. The success that the Internet has enjoyed under its current architecture should not blind policymakers to the fact that the world is constantly changing. They should instead take care to remain open to the possibility that abandoning the one-size-fits-all solution that has long characterized the Internet may be the best way to promote innovation and to benefit consumers.

²See CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 26-34 (2005).

³See Yoo, *Beyond Network Neutrality*, *supra* note Error: Reference source not found, at 12, 74; Yoo, *supra* note Error: Reference source not found, at 1852, 1855, 1899, 1908.