The Free State Foundation

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Perspectives from FSF Scholars
February 14, 2007
Vol. 2, No. 8

Blue Jeans, Vodka, and Wireless Services

By

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In the beta release 1.1 version of his new paper entitled **"Wireless Net Neutrality,"** Columbia Law Professor Tim Wu argues for regulation of the wireless industry. Wu prefers to talk about areas "warranting particular attention." But I've got a bridge to somewhere I'll sell you cheap if you do not think Professor Wu ultimately is seeking new forms of "neutrality" regulation.

Professor Wu is concerned that carriers exercise "excessive control" over what equipment may be used with the carriers' wireless services and over how the services may be used. For example, he seems particularly concerned that Verizon and AT&T may have implemented bandwidth limitations for their wireless services, citing anecdotes indicating some consumers might be willing to pay higher charges to take service without such restrictions, while others might not understand the bandwidth limitation or may have been misled by the promotional materials. Of course, nowadays, restrictions such as these are labeled offenses against "net neutrality"....as if merely uttering the phrase decides all.

There is a lot that can and will be said in constructive critique of Wu's paper, and I will have more to say later. And, on the positive side, if the paper exposes to public scrutiny some practices that should be remedied, such as the existence of misleading promotional materials, there are laws and regulations already on the books to deal with this type of disclosure issue.

But the most fundamental point to make is that the paper quite simply reflects a *bias* --however well-intentioned-- in favor of regulatory solutions because it severely discounts the extent to which wireless companies operate in a competitive marketplace. Here is a key statement that appears near the beginning of Wu's paper: "The wireless market may be competitive by the standards of the telecommunications industry and other regulated industries. But it is not like the market for blue jeans and vodka...."

What are we to make of this? First, with four nationwide wireless providers and a few regional ones, Wu at least acknowledges there is competition in the wireless market, even if he insists on referring to the "wireless oligopoly." But it is fundamentally a mistake to think of a "wireless" market as separate from the broader "telecommunications industry." Wireless operators are part of a larger broadband market that includes wireline, cable, satellite, and potentially other technologically-distinct platform providers like BPL.

Second, making blue jeans and vodka does not require the huge capital investment that building, maintaining, and constantly upgrading a telecom network does. Many individuals make the equivalent of their own jeans and their own vodka. Unlike building out telecom networks, not much capital investment needed there. But while the telecom industry, including the wireless segment, may not have the same market structure as the jeans and vodka markets, there is sufficient competition to leave consumer protection to the marketplace rather than to the government regulators. This is certainly the case absent some more convincing evidence of market failure and consumer harm than the anecdotes Professor Wu provides. In the event such persuasive evidence is produced demonstrating a market failure, any remedies should be carefully targeted *post-hoc* to address the specific instance of anti-competitive conduct. That is a far preferable way to proceed than the adoption of an *ex ante* regulatory regime that almost certainly will be overly inclusive and ambiguous.

More than anything else, Professor Wu relies on the FCC's *Carterfone* decision to argue for unbundled and open networks. Before I saw Wu's paper, I wrote a piece last week entitled **"Back to 1968? No Way!"** that explains why this newfound invocation of *Carterfone* is misplaced in today's environment. In listing the differences between the competitive, operational, technical, and business environments then and now, it bears directly on Wu's discussion.

Just consider a few of these differences. In touting the *Carterfone* model, Professor Wu refers to "the ability to build a device to a standardized network interface (the phone plug, known as an RJ-11)." At that time, the ubiquitous Bell System analog network was mostly standardized from a technical point of view. The network carried almost exclusively a subscriber's own content. The network had been stable for decades and largely remained so. In this context, it was much easier to legislate standardization in regulations. Contrast this with today's technologically-dynamic environment with multiple digital networks that change rapidly and carry various voice, data, and video applications, including many with content that must be protected from piracy. The type of standardization that inherently is part and parcel of network neutrality regulation simply does not make sense today. It would stifle innovation and investment, rather than promote it.

Wu's paper just doesn't acknowledge the vast difference between the period of the 60s and 70s and now. Then, with the integrated Bell System dominating the transmission and equipment markets, unbundling remedies made sense in order to prevent Bell from leveraging its monopoly power to prevent competition. In 1982, two landmark court decisions approved new regimes designed to foster a competitive environment in CPE and enhanced services, and language contained in these famous decisions is instructive for those who are not familiar with the

communications environment at the time. In *Computer and Communications Industry Association v. FCC*, 693 F. 2d 198, 211 (DC Cir. 1982), the federal appeals court affirmed the FCC's *Computer II* decision requiring AT&T to offer CPE and enhanced services through separate subsidiaries. In doing so, the court repeatedly refers to AT&T's "monopoly" services, as in this representative statement: "The Commission found that this separation requirement will effectively protect the public interest by limiting the power of AT&T to gain an unfair advantage in the marketplace by cross-subsidizing its competitive services by its *monopoly* ones."

The other, even more famous 1982 case was, of course, Judge Harold Greene's opinion approving the proposed decree that would lead to the 1984 break-up of the AT&T. Here the way Judge Greene described the pre-divestiture AT&T in United States v. AT&T, 552 F. Supp. 131, 187 (D.C. 1982): "The Bell System is a vast, vertically integrated company which dominates local telecommunications, intercity telecommunications, telecommunications, telecommunications research, and the production and marketing of equipment."

Today's communications competitive marketplace landscape is as vastly different from the one that existed in the Computer II and AT&T divestiture days as the old Bell System's own vastness. Oscar Wilde once glibly remarked that: "The one duty we owe to history is to rewrite it." But I assume even Mr. Wilde would not have wanted to extend such rewriting of history to telecom policy. That being so, it makes sense to pay homage to *Carterfone* for the role it played in the 60s and 70s in introducing new competition into the then-monopoly market.

Long before Oscar Wilde graced the English language, Cicero said, in Latin no less: “To know nothing of what happened before you were born is to remain ever a child.” It does not make sense to use the *Carterfone* decision, grounded as it was solidly in the monopoly environment of the time, in an ahistorical way to achieve unsound regulatory results in today's competitive environment.

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