FCC Must Have Narrow Authority over Internet Access

July 29, 2010

Policy Posts are in-depth analyses on current tech policy issues from CDT experts. Sign up to receive the latest Policy Posts here:

FCC Reconsidering Regulatory Approach to Broadband

CDT recently filed comments on the Federal Communications Commission's Notice of Inquiry into the proper legal framework for addressing Internet access services. This proceeding is the latest in a series of developments regarding Internet neutrality and other policies outlined in the FCC's National Broadband Plan. Prompted by the DC Circuit Court of Appeals decision in Comcast v. FCC, which called into serious question the Commission's authority to issue rules governing broadband service, the Commission is wholly reconsidering its approach to Internet connectivity. The Chairman has indicated a preference for classifying Internet access service as a telecommunications service under Title II of the Communications Act, while strongly forbearing from all but a few necessary provisions. CDT supports this approach.

In general terms, the issue of Internet neutrality concerns whether operators of Internet access networks should be free to favor some Internet traffic over others, or instead should be required to handle traffic in an essentially neutral manner. Non-discrimination has long been the norm for services classified as "telecommunications services" under the Communications Act. But since a series of orders beginning in 2002, the FCC has regarded broadband Internet access not as a telecommunications service, but as an "information service" – a lightly regulated category of services subject to FCC authority, if at all, under a doctrine known as "ancillary jurisdiction."

In 2005 the FCC issued a "policy statement" intended to promote the Internet's open and neutral character by saying that broadband providers should not block subscribers' ability to access the content, applications, or services of their choice. In 2008, the agency held that Comcast had violated these principles by interfering with subscribers' BitTorrent traffic. But Comcast appealed, and the court held that the FCC did not have adequate authority to enforce the policy statement, in part because Comcast's broadband services were "information services" under the FCC's own classification scheme. This ruling also called into question the FCC's process, begun in late 2009, to codify the principles of the policy statement into rules and to add rules on non-discrimination and transparency.

The Commission went back to the drawing board, and the present Notice of Inquiry asks for comment on reclassifying Internet connectivity as a telecommunications service. Specifically, the Notice asks for comment on whether such a move would fit current uses and understanding of the service, and on how best to apply a small subset of telecom rules covering non-discrimination, disability access, and customer privacy.

CDT largely agreed with the DC Circuit in the Comcast case that the FCC may not assert essentially unbounded jurisdiction over Internet matters. But CDT does support the issuance of narrowly focused rules to ensure the Internet remains an open and level playing field for all speakers and application developers, big and small, as well as to implement other goals from the National Broadband Plan. The best approach seems to be the one the Commission has proposed: changing the classification of broadband access services in a way that accurately reflects the current ways broadband Internet service is used and does not open the door to broader regulation of Internet content or applications.

CDT Comments of Framework for Internet Access [1]

CDT statement on Comcast v. FCC [2]

FCC General Counsel's Statement on Potential Reclassification [3]

CDT Supports Placing Broadband Internet Service Under Title II

CDT supports the focused reclassification of broadband Internet access service from an information service to a telecommunications service.

First, the current classification framework put the FCC in a very difficult position. The Internet is rapidly becoming the core communications network for the 21st century. Accordingly, the FCC has recently devoted tremendous effort to crafting a National Broadband Plan, and a major focus for the agency going forward is implanting the plan and improving the availability of broadband connections nationwide. In this environment, CDT believes it is not tenable for the federal communications regulator to lack any clear and stable conception of the scope of its authority over the services people use to access the Internet. Yet that is where things stand; it currently is entirely unclear when or if the FCC may rely on "ancillary authority" to exercise jurisdiction over broadband access. Absent a change in the current framework, its will take many years of case-by-case litigation to work out what kind of role (if any) the agency may play with respect to broadband. It is hard to see how the FCC can effectively pursue its mission under the current legal framework.

Second, treating Internet access as telecommunications services is actually the most faithful application of the Communications Act. The service that Internet access providers offer to the public is widely understood, by both the providers and their customers, as the ability to connect to anywhere on the Internet – to any of the millions of Internet endpoints – for whatever purposes the user may choose. It provides a classic example of "transmission, between or among points specified by the user, of information of the user's choosing" – the Act's definition of a Title II telecommunications service.

This ability to transmit information to and from anywhere on the Internet is incontrovertibly the dominant function of Internet access service as it exists today. This is reflected in the marketing of the service providers themselves, and in commentary, surveys, and reviews of broadband providers – all of which overwhelmingly focus on connection speed. ISPs have not been "walled gardens," with editorial control over content, for some time.

ISPs do still offer this telecommunications function together with other, non-telecommunications services, such as email or personal web page hosting. But there is no basis today for concluding, as the FCC did back in 2002, that Internet connectivity service is so integrated with non-telecommunications functions that it makes most sense to think of the entire package, as a "single, . . . comprehensive service offering." Rather, the additional functions are either relatively minor "add-on" services that many users ignore entirely, or, in cases such as DNS lookup, are largely technical processes aimed at making the telecommunications function work smoothly.

The rise of "cloud computing" means that, for virtually any kind of information service function one might want, there are a variety of providers who are completely independent of a user's Internet connectivity provider. All of the information services the FCC previously held to be fully integrated with Internet connectivity – email, newsgroups, personal web page hosting, obtaining and aggregating content, and provision of a "home page" – are now widely available and easily obtained from third parties. None is an integral part of a user's Internet access subscription. There is thus only one indispensable function a consumer looks to the connectivity provider for: the connection link that in turn enables access to the essentially unlimited range of Internet-based services.

In short, in today's marketplace, Internet access services are functioning as "telecommunications services" within the meaning of the Communications Act.

Finally, classifying Internet access services as telecommunications neither should nor would result in

such services being subject to the entire regulatory regime developed for monopoly telephone services, such as rate regulation with tariff filing. The FCC has indicated that, in conjunction with reclassification, it would plan to exercise its authority to forbear from all but a core set of regulations. CDT supports this approach.

FCC's Focus Must Remain Narrow

It is crucial, however, that the FCC's reclassification effort remain narrowly focused on data transmission and the provision of Internet access. The Commission must make clear that it neither intends to expand the scope of regulation to Internet content and applications, nor would it have such authority under the Communications Act. The current Notice of Inquiry appropriately focuses on transmission and access, excluding content regulation, but the Commission should clarify that this is not only a discretionary policy choice; it is compelled by law.

From a policy perspective, without clear legal limits, there remains a possibility that an assertion of jurisdiction today could be used as precedent by a future FCC, pursuing any number of potential concerns, to attempt to regulate various conduct and communications traversing the Internet. Such a result would be directly contrary to longstanding policy objectives. Section 230 of the Communications Act declares the policy of preserving the current competitive market for online services "unfettered by Federal or State regulation." Accordingly, the FCC should do everything it can to ensure that any action it takes cannot be misused to help justify broad Internet regulation in the future. To safeguard an open and vibrant Internet, the FCC should strive to articulate a conception of its jurisdiction that, far from laying the groundwork for broader Internet regulation in the future, actually serves as a bulwark against it.

Legally, a narrow focus on transmission and access services provides the most stable theory of jurisdiction. The FCC's subject matter jurisdiction centers on the actual transmission of communications by wire or radio. Courts have held that the agency lacks jurisdiction over activities that are not closely connected to the actual transmission of communications. For example, the FCC lacks authority to regulate non-transmission-related functions of consumer electronics. By the same logic, the actions of websites and other services accessed via the Internet (search engines, social networks, cloud computing services, etc.) are thus outside the FCC's subject matter jurisdiction.

In addition, FCC regulation of Internet applications or content would raise serious constitutional issues. In Reno v. ACLU, the Supreme Court held that communications over the Internet warrant the full protection of the First Amendment, and courts have repeatedly struck down as unconstitutional a range of government regulations of Internet content. In the Internet context, users have unprecedented ability to control their Internet experience, and thus direct government regulation of Internet content and applications cannot survive constitutional scrutiny.

Lastly, the recent decision in Comcast v. FCC clearly reinforces the proposition that the Commission's jurisdiction is subject to significant limitations. In light of that, and of the limitations discussed above, the wisest legal approach for the FCC is not to push the envelope and test the boundaries. The FCC and the public interest would be better served by a jurisdictional theory that expressly acknowledges limits and that centers on the core of FCC authority: the function of actually transmitting communications by wire or radio.
Fortunately, the FCC has expressed that it does not intend to "regulate the Internet" in a broader sense. The agency can best demonstrate that it harbors no such intent by specifically disclaiming any legal authority over the myriad applications and content provided over the Internet by entities that are not providers of Internet access.

CDT Comments in Open Internet Rulemaking [4]

Congress Also Mulling Telecom Overhaul

As this debate has evolved, Congress, too, has begun to consider addressing the FCC's jurisdiction over Internet access services. Having Congress provide specific guidance may well be the best long-term solution to this question, and indeed CDT has supported a legislative approach in the past. But telecommunications law is not an area in which Congress tends to move quickly, so the

possibility of legislative action should not deter the FCC's effort to ensure a sensible framework for implementing the Communications Act as currently written. After all, the Commission remains charged with implementing the existing Act for however long it remains on the books. The agency cannot simply go dormant and abdicate its role for what could be multiple years in anticipation of a legislative update. Moving forward with the agency's existing responsibilities means developing a sound and stable legal footing for agency action under the existing statute.

Source URL: https://www.cdt.org/policy/fcc-must-have-narrow-authority-over-internet-access

Links:
[1] http://cdt.org/files/pdfs/CDT_Comments-Framework_for_Broadband.pdf
[2] http://cdt.org/pr_statement/cdt-reaction-comcast-v-fcc-decision
[3] http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html
[4] http://cdt.org/files/pdfs/2010_CDT_openness_comments.pdf