

Giving FCC authority to set policy on net neutrality

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A federal appeals court reined in the Federal Communications Commission last week, ruling that it overstepped its authority when it penalized Comcast for surreptitiously disabling a popular technology that let people share files online. But the ruling did not quell the commission's interest in regulating the way Internet service providers such as Comcast manage their networks. Instead, it set up a potential fight over whether the commission's regulatory authority should be expanded, either by Congress or the commission itself. We think the best course is for lawmakers to give the FCC clear but limited power to preserve the openness that has made the Internet not just a hotbed for innovation but also the most important communications medium of our time.

At issue is "[net neutrality](#)," which is the idea that companies selling high-speed Internet connections should treat all legal websites and online offerings equally. These companies take an essentially neutral approach today, discriminating only against malicious content and spam. But with their customers sending and receiving increasing amounts of data, Internet service providers warn that they won't be able to keep pace with the demand for bandwidth unless they can generate more revenue -- possibly by letting online companies pay extra to make their sites and services more accessible than their competitors' (the so-called Internet "fast lane"). Such a shift could help well-financed companies with established audiences cement their advantage over smaller and newer contenders.

Both sides of the neutrality debate agree that the free and open nature of the Internet is crucial to spurring innovation. What divides them are the questions of whether the government should try to protect those qualities and whether the possibility of a fast lane constitutes a threat or an upgrade. We'd prefer to rely on the market, but that would require more competition among broadband service providers. Today, most homes have at best two options for high-speed service: a cable modem from the local cable TV operator or a DSL connection from the local phone company. Wireless companies are emerging as a third option in some areas, but they may never be able to match the capacity of wired connections.

Because consumers have few real alternatives, broadband providers could abuse their position as gatekeepers to steer traffic to affiliated websites or away from competitors, and to manage congestion in a way that handicaps rival phone and video services. There's little evidence that they're doing such things; the FCC has taken action against only two companies for interfering with their customers' activities online. One was Madison River Communications, a North Carolina-based telephone and DSL provider accused in 2005 of blocking customers' access to an Internet phone service. The other was Comcast, which secretly prevented customers from using BitTorrent software to share files in 2008. But the decision Tuesday by the D.C. Circuit Court of Appeals called into question not just the Comcast ruling but the FCC's power to stop any Internet provider from interfering with its customers' access to the websites and services of their choice, no matter how blatantly.

The FCC gave up much of its authority over Internet providers as broadband services proliferated. Back in the dial-up modem days, it classified Internet access as a communications service subject to extensive federal regulation, similar to long-distance phone plans. But in 2002 and 2005, it reclassified cable modems and DSL connections as information services -- a deregulatory move that left the commission

with little clear rule-making power over them. Instead, the FCC called on broadband providers to grant their customers four freedoms online: to access any legal content, run any application, use any compatible device and be fully informed about their service plans.

Those principles were simply declared, not adopted as rules, which contributed to the FCC's problem before the D.C. Circuit. Last year the commission's new chairman, Julius Genachowski, launched a formal process to adopt the four principles as rules, along with two additional ones: broadband providers should not discriminate against any legal sites or applications, nor should they conceal how they manage traffic on their networks. That's a better approach, but the D.C. Circuit's ruling suggests that information services simply cannot be regulated that way.

One option is for the FCC to reverse its previous decisions and classify broadband as a communications service. It wouldn't be far-fetched -- the Internet is a more sophisticated and powerful communications medium than traditional telephony. In fact, phone service is just one of many communications applications the Internet supports. Considering how much has changed since Congress overhauled telecommunications law in 1996, however, it would be better to have lawmakers give the FCC specific powers to safeguard the Net than to have the commission stuff broadband providers into the same regulatory category as last century's Bell system.

Congress has dodged this issue for several years, with at least three net neutrality bills foundering in House or Senate committees since 2006. Not only is the issue complex, but there's no consensus even within the usual political and ideological alliances. For example, some social conservatives support neutrality rules on free-speech grounds, while fiscal conservatives oppose them as a regulatory intrusion. The major Hollywood studios fear the rules might impede their efforts to fight piracy, but the Independent Film & Television Alliance favors them as a

way to protect their members' access to viewers. Nevertheless, this week's ruling leaves Congress little choice. At the very least, it should give the FCC the power to stop the kinds of abuses that Madison River and [Comcast](#) engaged in. Otherwise, the commission may well give itself the power to do even more.

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