

US court muddles outlook for 'Open Internet'

January 16 2014, by Rob Lever



A woman looks at her email on a computer screen in Washington on November 23, 2010

With the "Open Internet" rule [struck down by a US court](#), the future of the online landscape is now murkier than ever.

An [appeals court](#) in Washington this week ruled unconstitutional a "Net Neutrality" rule that bars broadband Internet providers from

discriminating or playing favorites for online services.

Backers of the Federal Communications Commission's Open Internet rule say the [court decision](#) could lead to a radically different online landscape controlled by Internet firms, but some analysts say it will change little and may even improve [consumer choice](#).

The decision "opens the door to a very different future for the Internet," said David Sohn, an attorney with the digital activist Center for Democracy & Technology.

"The rules tried to preserve this innovation that allows cool new services to bubble up at any time."

Sarah Morris at the New America Foundation said that "without these rules, consumers are at the mercy of their providers and the business arrangements those providers have already said they would implement... business arrangements that could severely limit access to certain content online."

But analysts noted that the court relied on a narrow legal argument, saying Internet providers were not "common carriers," or regulated utilities. The court also said, however, that the FCC still has a role for some kind of regulation of the carriers as "information services."

Annemarie Bridy of the University of Idaho College of Law said the FCC still could enforce neutrality if it has "the political will."

Bridy said the FCC would need to separate, for regulatory purposes, the connectivity aspect of the Internet from "the information component."

"By reclassifying the connectivity component as a telecommunications service, the FCC would be operating squarely within the bounds of its

statutory authority to impose anti-blocking and non-discrimination obligations on broadband providers," she said in a blog post.

Scott Cleland, a former White House telecom adviser with the consulting firm Precursor LLC, said the court ruling was "a win-win, because both sides got what they wanted the most."

Cleland said Verizon, which brought the lawsuit and was backed by a number of allies, averted the prospect of heavy regulation, which he said could have meant price controls.

"These companies have invested \$1 trillion over the past decade under the premise they would not be regulated as a telephone monopoly," Cleland told AFP.

But Cleland argued that big services like Netflix and Google, which use a lot of the bandwidth, "could come in and pay for some of that.. they would get a marketing benefit."

"The sky is not falling," he said. "The (Internet) companies have said they would not slow, degrade or impair service, and it's not in their interest to do that. It is in their interest to find additional funders for the huge cost of bandwidth so the consumer doesn't have to shoulder the entire burden."

Cleland said either side could appeal to the Supreme Court, but that they might prefer to avoid the risk of an adverse decision: "Both sides have a lot to lose by appealing this."

Everett Ehrlich, a consultant and senior fellow at the Progressive Policy Institute, said the court ruling opens the way to "tiered pricing," which he said is reasonable and effectively subsidizes the cost of service for many people.

Under this system, the carriers "would post the prices of tiers and websites can decide if they want to buy a better one," Ehrlich said.

The Internet, he said, should not be immune from the same economic forces as other kinds of services.

"The idea that everything on the Internet having to travel at the same speed at same terms is like the dress code from the Cultural Revolution," said Ehrlich.

"If you had tiers of service, you could get innovation. Some stuff would be faster than other stuff, but that's how the world works."

The former undersecretary of commerce said it's unlikely carriers would shut out or degrade some services because "consumer insistence would force a balance in the market."

If Internet firms did not offer the same terms to everyone, he said, they could run afoul of antitrust laws or other regulations.

Ehrlich said that while big firms like Google would have an advantage under this system, "small firms continually rise up and challenge big firms."

He said the [court ruling](#) "opens up some interesting possibilities," and that the FCC could still have leverage over the carriers because the court confirmed the agency as a "steward" of the Internet.

"I think now we can begin a period of experimentation for tiered service," he told AFP.

"The situation is a little vague. Everybody's trying to figure it out, but the FCC still has a seat at the table."

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