

Legal Regulation & Education: Doing the Right Thing?

Inderpreet Heire

University of East Anglia

indiheire@hotmail.co.uk

Time to 'neutralise' the attack on Net Neutrality

January 14 2014 marked another blow to the Federal Communications Commission's (FCC) longstanding ambition "to ensure that the...networks on which the Internet depends continue to provide a free and open platform for innovation and expression".

The United States Court of Appeals for the District of Columbia Circuit responded to the telecommunications company, Verizon's, legal challenge against the FCC's 2010 net neutrality rules by vacating the anti-discrimination and anti-blocking rules under the Open Internet Order. The crux of the decision lay with the FCC's classification of broadband providers in a manner that exempts them from treatment as common carriers thus preventing the FCC from regulating them as such.

These common carrier regulations are intended to protect consumers by requiring companies to serve all customers on a non-discriminatory basis and were initially implemented to regulate the telephone network, which historically was a monopoly. However this non-discriminatory ideal has manifested itself in the realm of Internet networks where it has been submitted that the Internet works best when all content, sites and platforms are treated equally. This need for network neutrality – or 'net neutrality' as it has been termed – became more apparent as the Internet transformed from a research and academic tool, used by a small number of people, to a proprietary service offering access to the public.

Yet to date the FCC appears unsuccessful in exerting its authority in this arena and commentators fear that the upshot of the Verizon ruling could allow for the emergence of a double-sided market for bandwidth where both the content provider and consumer must pay to disseminate content and receive it.

Nonetheless, it has been acknowledged that this ruling potentially provides scope for the FCC to reassert its authority over broadband providers. The 'obvious solution' is for the Commission to reclassify broadband providers under the common carrier status thereby placing them under the FCC's regulatory regime. Although, appealing the Court's decision has not been ruled out and arguably if an appeal fails, there is also the possibility that the FCC could seek the necessary authority from Congress to preserve the rules. As such, previous calls that it is necessary for Congress to adopt legislation to clarify the FCC's authority regarding the regulation of broadband providers emerge as an attractive alternative.

One cannot however help but note the parallels to the aftermath of Comcast where it was envisaged that that decision created a course of action for the FCC to gain the basis for the authority it needs to empower net neutrality. But with that post-Comcast action seemingly manifesting itself in the very rules the Court has now ruled the FCC does not

have authority to impose, the question arises as to which option will provide the FCC the most successful means of moving the net neutrality saga forward.

This paper will examine the implications of the Verizon ruling; providing an overview of the 'net neutrality' debate in the US. Part I will look into how the case came about leading to a discussion in Part II as to what 'net neutrality' represents. Part III will outline the legal and regulatory background to the case – noting the provisions granting the FCC its authority and previous case law in this area. The significance of the decision and possible routes of action now available to the FCC are covered in Parts IV and V.