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Beyond Hypothetical: How FCC Internet Regulation Would Hurt Consumers

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Abstract

The FCC has proposed new regulations for Internet service providers, so-called net neutrality rules; the specific practices such rules would ban are unclear. While much will depend on the how the final rules are written, regulation advocates have given some indication of the types of practices they would target. Most of the practices identified by regulation supporters as activities that should be prohibited are in fact beneficial to consumers, or are conducted by challengers to the dominant firms in the marketplace. These cases—identified as examples of neutrality violations by regulation supporters themselves—show that efforts to further regulate the open Internet would hurt the very consumers these advocates claim to protect.

On November 10, President Barack Obama joined a long-simmering debate at the Federal Communications Commission (FCC), urging the agency to adopt comprehensive government regulation of Internet service providers, such as Verizon and Comcast. These regulations would require companies that provide Internet access to end users (households and businesses) to process all content passing through their networks the same way, and deliver it at the same speed. Blocking or slowing down websites would be banned, as would any premium-service plans for companies that provide web apps and services.

The FCC tried to impose similar, though less drastic, requirements in 2007, and again in 2010; both times its actions were overturned in the courts. Now, the agency is trying for a third bite at the apple, proposing a new set of rules that would be the most restrictive yet. These rules would be a substantial threat to both innova-

KEY POINTS

- The Federal Communications Commission (FCC) attempted to institute Internet regulations in 2007 and 2010, but the courts invalidated both efforts. Since then, proponents of "net neutrality" rules have been pushing for even more comprehensive FCC regulation.
- Despite claims of possible abuses, actual abuse of market power by Internet service providers has been vanishingly rare. Any provider that does abuse its position will be constrained by competitors or by existing antitrust laws.
- Most of the practices that have been identified by regulation supporters as activities that should be prohibited are, in fact, beneficial to consumers or are conducted by challengers in the marketplace, not by established, dominant players.
- FCC regulation of Internet access would not protect consumers or ensure "neutrality." New rules would only distort the Internet marketplace and inhibit the innovation and investment that has made the Internet the dynamic economic force it is today.

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tion and growth of the Internet. Even the prospect of such rules being adopted has had an effect, as AT&T, in the wake of President Obama's declaration, announced it would "pause" new investments in fiber optic lines nationwide.[1]

Advocates of FCC intervention into the Internet marketplace nevertheless argue that regulation is essential in order to protect consumers, innovators, and even democracy itself from unconstrained Internet service providers (ISPs) who, without the regulations, would block competing or opposing websites and applications. They raise the prospect of strangled innovation, impaired broadband speeds, and suppressed political speech.

But this is a rather unlikely parade of horribles. In reality, incidents of marketplace abuses of this sort have been vanishingly rare.[2] And any provider that does abuse its position would be constrained by competitors or by existing antitrust laws.

Ensnared by Internet Regulation. The types of activities that, in fact, would be ensnared by Internet regulations are far different. Most of the practices that have been identified by regulation supporters as activities that should be prohibited are in fact beneficial to consumers or are conducted by challengers in the marketplace, rather than by established, dominant players. Few if any involve additional fees or increases in consumer prices; in fact, one of the most controversial practices involves a shift of fees *away* from consumers. Based on these real-life case studies—identified as examples of neutrality violations by supporters of Internet regulation themselves—FCC neutrality regulation would hurt consumers and the Internet, not help them.

So far, the FCC has taken action only twice to remedy perceived "neutrality" violations in the Internet marketplace. Furthermore, neither case shows a market failure that would require comprehensive new regulations.

Madison River and Vonage. The most cited incident involved Madison River Communications, a small, rural telephone company in Mebane, North Carolina. In 2004, it blocked its customers' broadband access to a competing service, Vonage, a voice-over-Internet-protocol (VoIP) telephone service. Although its authority was unclear, the FCC quickly entered into a consent decree with Madison River stopping the practice.[3]

Even without FCC intervention, it is unclear how long Madison River's blockage could have been maintained. Today, for instance, residents in Mebane have access to five broadband providers,[4] undercutting the ability of a single company to block services.

Comcast and BitTorrent. The second case involved Comcast Communications, which in 2007 was reported to be limiting service speeds of certain consumers using BitTorrent peer-to-peer (P2P) software.

Regulation advocates immediately seized upon the incident as a smoking gun—supposed proof that the marketplace had failed consumers. Responding to the furor, in August 2008 the FCC brought an enforcement action against Comcast, ordering it to stop the practice.[5]

Many observers speculated that Comcast was slowing down BitTorrent downloads in order to reduce competition to its own video-on-demand offerings. In its August enforcement order, the FCC noted that BitTorrent could have been seen as a competitive threat to Comcast.

But, as FCC commissioner Robert McDowell pointed out in his dissent to the commission's enforcement order, the agency could not find that Comcast acted for anti-competitive reasons.[6]

1. Marina Lopes, "AT&T to Pause Fiber Spending on Net Neutrality Uncertainty," Reuters, November 12, 2014, http://www.reuters.com/article/2014/11/12/us-at-t-regulations-internet-idUSKCN0IW1JC20141112 (accessed November 13, 2014).
2. For a fuller background on this issue, see James L. Gattuso, "Broadband Regulation: Will Congress Neuter the Net?" Heritage Foundation *Backgrounder* No. 1941, June 2, 2006, http://www.heritage.org/research/reports/2006/06/broadband-regulation-will-congress-neuter-the-net.
3. Declan McCullagh, "Telco Agrees to Stop Blocking VoIP Calls," CNET, March 3, 2005, http://news.cnet.com/Telco-agrees-to-stop-blocking-VoIP-calls/2100-7352_3-5598633.html (accessed November 5, 2014).
4. The five broadband providers are Time-Warner Cable, CenturyLink Broadband, AT&T, HughesNet, and DishNet. See InMyArea.com, https://www.inmyarea.com/internet/27302/providers (accessed November 12, 2014).
5. The order was later struck down in federal court for lack of proper authority. See *FCC*, 600 F.3d 642 (D.C. Cir. 2010), http://www.scribd.com/doc/29489974/Full-Text-Comcast-vs-FCC-Federal-Court-Ruling (accessed October 7, 2014).
6. Dissent of Commissioner Robert McDowell, "Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for 'Reasonable Network Management,'" FCC 08-183, August 1, 2008, https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf (accessed November 6, 2014).

Instead, it soon became clear that Comcast was slowing down BitTorrent users to protect its other subscribers. BitTorrent allows users to share massive amounts of files via direct, P2P, connections, straining the capacity of the network. A few heavy users were hogging bandwidth at the expense of the others.

If Comcast had taken no action, it is these other users who would have had a legitimate complaint, as their neighbors consumed the available bandwidth. Far from being an abuse of market power, Comcast's action was an entirely reasonable network-management decision made on the behalf of its everyday users.[7]

In addition to these two cases, there are a number of situations where the FCC did not act, but which regulation advocates still identified as violations of neutrality principles. These provide some idea of the sorts of things that would be banned under the new rules being considered:

BitTorrent II: T-Mobile and Data Hogs. In August 2014, in what some viewed as a rerun of the Comcast kerfuffle, wireless carrier T-Mobile announced it would slow down speeds for heavy data users who ran peer-to-peer software or other applications that used excessive bandwidth in violation of their terms of service.[8] Like the Comcast case, T-Mobile acted in the interest of its average users, who would see their service deteriorate as those who used exponentially more data strained the network's capabilities.

Regulation advocates jumped on the case as another instance of abuse. But here even they admitted that T-Mobile had "no anticompetitive reason to block P2P,"[9] given that it was not in the video business. Nor did T-Mobile have the market power to act anticompetitively without losing customers to its rivals. T-Mobile stands only fourth in subscribers, with less than half the number of wireless subscribers of either AT&T or Verizon.[10] Imposing net neutrality limits in such a case would reduce competition and hurt consumers, helping only the industry's big guys. Yet under the one-size-fits-all rules being considered by the FCC that would make no difference.

Sprint's Facebook-Only Plan. The number three firm in wireless has also been accused of neutrality sins, and for offering a plan that would make basic Internet access more affordable. Hoping to target low-data users that primarily use their wireless broadband to check social networks, Sprint is planning to offer its users a Facebook-data-only plan for $12 per month, according to a July 2014 *Wall Street Journal* report.[11] Users could also add Twitter or three other social media apps for $5 each, or pay $15 for all four additional services. The social media sites would not pay Sprint in the arrangement, although Dow Draper, president of Prepaid at Sprint, did not rule the possibility out in the future.[12]

This service would provide users who have no interest in expensive all-you-can-use data plans with access to the Internet through social media at extremely low cost. Regulation advocates derided the plan because it would favor already dominant social networks, supposedly limiting competition. Adam Clark Estes of the tech blog Gizmodo went so far as to call the plan "a sad internet future," and declared it "at odds [with] the fundamental idea that all traffic on the internet should be treated equally."[13]

7. In any case, it appears that FCC regulators were not needed to solve the dispute. Even before Comcast's actions against BitTorrent users were made public, the two firms were in discussions regarding a settlement, which was voluntarily agreed to by both in March 2008, six months before the FCC acted. In the settlement, the two committed to work together to resolve the network congestion problems. See James Gattuso, "Comcast-BitTorrent: A Triumph for Regulation?" Technology Liberation Front, March 28, 2008, http://techliberation.com/2008/03/28/comcast-bittorrent-a-triumph-for-regulation/ (accessed November 6, 2014).
8. Cam Bunton, "T-Mobile to Throttle Customers Who Use Unlimited LTE Data for Torrents/P2P," TmoNews, August 13, 2014, http://www.tmonews.com/2014/08/t-mobile-to-throttle-customers-who-use-unlimited-lte-data-for-torrentsP2/ (accessed August 18, 2014).
9. Michael Weinberg, "Hey T-Mobile: 2007 Called and It Wants its Net Neutrality Complaint Back," Public Knowledge Blog, August 14, 2014, https://www.publicknowledge.org/news-blog/blogs/hey-t-mobile-2007-called-and-it-wants-its-net-neutrality-complaint-back (accessed August 19, 2014).
10. "Grading the Top U.S. Wireless Carriers in the Second Quarter of 2014," FierceWireless, August 8, 2014, http://www.fiercewireless.com/special-reports/grading-top-us-wireless-carriers-second-quarter-2014 (accessed September 23, 2014).
11. Ryan Knutsen, "Sprint Will Sell a $12 Wireless Plan that Only Connects to Facebook or Twitter," *The Wall Street Journal*, July 30, 2014, http://blogs.wsj.com/digits/2014/07/30/sprint-tries-a-facebook-only-wireless-plan/ (accessed September 19, 2014).
12. Ibid.
13. Adam Clark Estes, "Sprint's New Facebook-Only Data Plan Is a Sad Internet Future," Gizmodo, July 30, 2014, http://gizmodo.com/sprints-new-facebook-only-data-is-a-sad-internet-future-1613266022 (accessed September 19, 2014).

But the criticism is unwarranted. Sprint has no interest in favoring one social network over another. If it did, it would be unable with its small market share to foreclose any competition. Instead, Sprint's plan would give affordable access to users who likely otherwise would forgo any access at all. Furthermore, innovative plans such as this would allow Sprint to better compete with industry leaders Verizon and AT&T.

Google Fiber's Ban on Servers. Google, long one of the staunchest supporters of net neutrality rules, has itself been accused of violating neutrality principles. The 2013 contretemps involved Google Fiber, a broadband ISP run by Google. Under the terms of service issued by Google Fiber, subscribers were not to run "servers" on Google Fiber connections. Google Fiber, the company explained, was intended as a consumer service, not a business service. Still, a consumer in Kansas filed a complaint against Google with the FCC, citing the neutrality rules' ban on blocking "non-harmful devices."

Despite its dominant position in the search engine market, Google is a new entrant into the ISP marketplace. Google Fiber is a major initiative by the firm, intended to challenge the incumbent broadband providers by creating a new competitor to their networks.

The complaint posed an obstacle to this pro-consumer effort. But rather than reduce unnecessary barriers to this welcome competition, the FCC's interference would simply have added another roadblock. And, given Google's total lack of market power in this marketplace for broadband access, there was no plausible benefit for consumers.

Google argued in response to the FCC that the server ban was "reasonable network management," exempt from regulation. The FCC took no further action.[14] Google Fiber has since continued to expand, challenging the leading ISPs in a small but growing number of cities.

Questioning Usage-Based Pricing. Usage-based pricing and data caps have been in use in mobile provider plans since smartphones hit the market. The practice, however, is garnering increased scrutiny as regulation advocates seek to limit providers' ability to create unique pricing strategies. Usage-based pricing plans offer users a certain amount of data (for instance, 100 gigabytes (GB) or 200 GB) to be used in a certain period of time. Like any market pricing system, it allows demand and supply to balance, based on users weighing how much they need and what they are willing to spend on it. Such pricing systems can serve as an alternative to simply throttling "data hogs."

But some regulation advocates see the concept of usage-based plans as problematic in itself. For instance, Representative Anna Eshoo (D–CA) recently declared, "In the midst of the net neutrality debate, there is a new threat to the free and open Internet and that is usage-based pricing."[15] Data allowances could, she said, have a "damaging effect on the free and open internet as we know it," expressing concern that the caps could discourage people from watching online videos.[16]

But this is not a market failure; it is how markets should work. Marketplace pricing is just a mechanism to ensure that consumer demand is consistent with supply. Interfering with that signal would disrupt the Internet more than any non-neutral practice.

Comcast's Xbox Data Cap Exemption. Whatever the verdict on usage-based pricing, exemptions from such pricing have garnered even sharper complaints from regulation advocates. One recent controversy concerned an agreement in early 2014 between Microsoft and Comcast in which Comcast's XFINITY streaming video application for Xbox live was exempted from Comcast's monthly data cap. The cap, 250 GB per month, was adopted in 2008 in the wake of the BitTorrent controversy.

14. For a discussion of the Google Fiber controversy, see Paul Venezia, "No, Google Fiber Doesn't Violate Net Neutrality," Infoworld, August 5, 2013, http://www.infoworld.com/d/data-center/no-google-fiber-doesnt-violate-net-neutrality-223828 (accessed November 5, 2014).

15. News release, "Eshoo Shares Preliminary Finding of Study on Broadband Data Caps with FCC," Representative Anna Eshoo (D–CA), July 29, 2014, http://eshoo.house.gov/press-releases/eshoo-shares-preliminary-findings-of-study-on-broadband-data-caps-with-fcc/ (accessed September 19, 2014).

16. Government Accountability Office, "Internet Usage-based Pricing," briefing to the Ranking Member of the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, July 29, 2014, http://eshoo.house.gov/uploads/7.29.14%20Preliminary%20GAO%20Report%20Findings%20from%20Data%20Cap%20Study.pdf (accessed September 19, 2014), and Brandon Sasso, "Democrat Warns Data Caps Could Undermine Net Neutrality," *National Journal*, July 30, 2014, http://www.nationaljournal.com/tech/democrat-warns-data-caps-could-undermine-net-neutrality-20140729 (accessed September 19, 2014).

Regulation advocates immediately complained, arguing it gave XFINITY an unfair advantage over rival video streaming apps. Aaron Sankin of the web-focused news site the Daily Dot even included this practice in his list of "The Worst Net Neutrality Violations in History," claiming that Comcast unfairly "incentivized" users to use its own streaming service.[17]

But, XFINITY content is not transported over the Internet—it is delivered over a separate network built by Comcast. It is one of many "specialized services," which use Internet protocol technology but do not fully connect to the Internet. Examples range from heart-rate monitors to VoIP digital telephone services, as well as Internet TV systems (such as FIOS).

Many of these limited Internet access services require large investments to put in place, and have been critical to introducing new competition into marketplaces, such as telephony and video, previously dominated by a few incumbent firms.

As FCC Commissioner Meredith Attwell Baker wrote in her dissent to the FCC's 2010 net neutrality rules: "Specialized services have been one of the primary drivers of greater voice and video competition in the United States.... The Commission should be promoting specialized services to help spark greater broadband deployment."[18]

AT&T and Sponsored Data Programs. In January 2014, AT&T unveiled an innovative pricing plan for wireless services known as "sponsored data" or "zero-rating." The idea is simple—participating content providers would pick up any data charges incurred by consumers when using their sites. By freeing potential users from the risk of exceeding their data caps and being hit with additional charges, the plan allows them to spend more time on each site.

For instance, potential viewers of streaming video of sports programming might be hesitant to do so, for fear of incurring excess data charges. Under a sponsored data arrangement, that risk could be covered by the Internet content provider, not the consumer. It would be like offering 1-800 numbers for the web, with content providers paying the cost of connection, but getting more business in return.

When the idea was being considered by the ESPN sports network last year, it set off alarm bells in the pro-regulation community. When ESPN was reported to be considering a similar deal with Verizon last year, pro-regulation groups immediately cried foul, with one posting a commentary titled: "This Is What a Net Neutrality Violation Looks Like."[19] Another outraged regulation advocate, Matt Wood of Free Press, complained: "Letting the carriers charge more or less money to reach certain sites is discriminatory, and it's not how the Internet is supposed to work."[20]

Wood is flat wrong: That is precisely how the Internet marketplace—and any other marketplace—*should* work. In effect, sponsored data provides consumers a discount on the sponsor's products. Lower prices are a good thing, except perhaps in the upside-down world of neutrality regulation.[21]

Nor is the plan unfair to smaller firms. In fact, sponsored data is likely to be a valuable tool for new challengers in a marketplace, making it easier for potential customers to try their service. This would not only spur competitive challenges among online content providers, but also make it easier for an online provider to challenge established services, such as cable TV.

There is no new toll here—websites are merely providing a discount for consumers. Some content providers will be able to match them, others not. That is how a marketplace, and the Internet, is supposed to work, and hardly justifies regulation.

MetroPCS and Unlimited Access to YouTube. MetroPCS, a smaller, low-cost wireless pro-

17. Aaron Sankin, "The Worst Net Neutrality Violations in History," The Daily Dot, May 21, 2014, http://www.dailydot.com/politics/net-neutrality-violations-history/ (accessed September 23, 2014).
18. Meredith Attwell Baker, "Dissenting Statement of Commissioner Meredith Attwell Baker," FCC 10-201, October 5, 2011, http://www.fcc.gov/document/verizon-v-fcc-no-11-1355-dc-cir (accessed October 7, 2014).
19. Michael Weinberg, "FCC: This Is What a Net Neutrality Violation Looks Like," Public Knowledge Policy Blog, May 10, 2013, http://www.publicknowledge.org/blog/fcc-what-net-neutrality-violation-looks (accessed November 5, 2014).
20. Free Press, "AT&T Sponsored Data Scheme Is a Lose–Lose for Customers and App Makers," January 6, 2014, http://www.freepress.net/press-release/105490/att-sponsored-data-scheme-lose-lose-customers-and-app-makers (accessed February 4, 2014).
21. Ibid. Bizarrely, Wood also argues that sponsored data would increase consumer costs, through higher cable bills or website fees as the companies try to recoup the cost of the discount. In other words, lower prices mean higher prices. That is *Alice in Wonderland* logic at its worst.

vider now owned by T-Mobile, attempted to shake up the mobile market in 2011 by offering unlimited wireless access to YouTube on its introductory $40 per month price tier service.[22] Metro PCS spokesman Drew Crowell explained that Metro PCS had no special relationship with YouTube, but "saw that YouTube is one of the main ways that our customers get multimedia content and we wanted to make sure that content was available to them."[23]

The company drew the ire of pro-regulation groups, such as Free Press, which described the plan as "a preview of the wireless future in a world without protections," and accused the company of "anti-consumer practices."[24]

But MetroPCS was not harming consumers—it was helping them. No one was prevented from enjoying other services. Access to streaming video, VoIP, and other data-intensive services was not only available on the company's higher priced tiers, but part of plans offered by MetroPCS's many larger rivals. As economist Tom Hazlett of Clemson University notes, MetroPCS

> customers were mostly price-sensitive cord-cutters who had little use for the bells and whistles of larger carrier plans, especially at higher price points. Metro PCS's plan was poised to bring wireless data to this market segment. But instead it found itself facing the threat of agency action because its plan did not match the Federal Communication Commission's preconceived notion of what the wireless broadband experience should be.[25]

The FCC's "alarming" approach, Hazlett later noted, "looks to attack efficiency" by eliminating YouTube service for those who otherwise would have no access to streaming video.[26] Is the practice really "anti-consumer" if the so-called solution calls for less—not more—access to the internet for low-income customers?

Kindle Fire. Amazon.com, a longtime supporter of neutrality regulation, has itself stoked criticism with the release of the Kindle Fire in 2011, which featured Amazon's enhanced browser "Silk." Silk was intended to give users a smooth and faster-than-ever browsing experience because the browser "optimizes and accelerates the delivery of Web content by using Amazon's cloud computing services." However, regulation advocates were concerned that Amazon would leverage its cloud computing dominance to slow or even block competing sites with its browser. Professor Scott Jordan of the University of California at Irvine stated that the technology raises "net neutrality questions…that revolve around whether the company is favoring one website over another and/or changing the content of a website."[27]

Amazon denied the possibility that its browser was manipulating websites and claimed that all sites were rendered "exactly as the website developer intended," and that page speed optimizations were applied equally to each site. The claim was not pursued, but it indicates that regulation may not be limited to last-mile practices by ISPs, and indeed may spread to all corners of the Internet.

T-Mobile's Unlimited Access to Streaming Music Apps. As a distant number four wireless carrier in the U.S. marketplace, T-Mobile must create innovative plans to effectively challenge its larger opponents. T-Mobile did just that when it decided in June 2014 to provide its users with access to various streaming music apps, such as Pandora, Spotify, iTunes Radio, and Rhapsody without contributing to their monthly data allotment. Under the potential

22. Ryan Kim, "MetroPCS LTE Plans to Charge More for VoIP & Streaming," Gigaom, January 4, 2011, https://gigaom.com/2011/01/04/metropcs-lte-plans-charge-more-for-skype-and-streaming/ (accessed September 19, 2014).
23. Ibid.
24. News release, "Free Press Urges FCC to Investigate MetroPCS 4G Service Plans," Free Press, January 4, 2011, http://www.freepress.net/press-release/2011/1/4/free-press-urges-fcc-investigate-metropcs-4g-service-plans (accessed September 23, 2013), and Kim, "MetroPCS LTE Plans to Charge More for VoIP & Streaming."
25. Thomas W. Hazlett, "FCC, Net Neutrality Rules, and Efficiency," *Financial Times*, March 29, 2011, http://www.ft.com/intl/cms/s/0/f75fd638-5990-11e0-baa8-00144feab49a.html#axzz2gFHqNfa (accessed October 9, 2014).
26. Tom Hazlett, "The Economics of Net Neutrality," remarks at the Hudson Institute, October 1, 2014, http://hudson.org/events/1188-the-economics-of-net-neutrality-102014 (accessed October 3, 2014).
27. Eliza Krigman, "Amazon's Fire May Rekindle Net Neutrality Debate," *Politico*, October 26, 2011, http://www.politico.com/news/stories/1011/66936.html (accessed October 9, 2014).

arrangement, which the network debuted as "Music Freedom," T-Mobile would not charge the music services for the data-cap exemptions.

However, Public Knowledge's Michael Weinberg objected to this freedom and accused T-Mobile of violating net neutrality principles: "This type of gatekeeping interference by ISPs is exactly what net neutrality rules should be designed to prevent."[28] Chris Ziegler of Verge called the prospect of such a plan "really, really, really bad," and asked, "What's to stop [T-Mobile] from using data cap exemptions as a punitive measure against content providers that aren't on good terms with T-Mobile (or its parent company Deutsche Telekom)?"[29]

By this reasoning just about any discounting of consumer products or services could also be condemned. Once again, the threat of net neutrality regulation was being used not only to block potential price breaks for consumers, but also to stymie competition from smaller players in the marketplace.

Netflix and "Paid Peering." Since 2010, the video streaming system Netflix has been involved in a series of disputes with the major ISPs regarding whether the ISPs should be paid for carrying Netflix traffic. The disputes were originally triggered when Netflix decided to switch much of its video streaming traffic to "backbone," or long-haul, Internet carriers such as Level 3 and Cogent.

This seemingly innocuous change had big implications for how Netflix's content was treated. Previously, Netflix was in a customer relationship with the ISPs, with its content sent more or less directly to them for a fee. But backbone carriers act as "peers," not customers, of ISPs. Usually, "peering arrangements" in such situations allow the peered networks to interconnect and carry traffic to and from each other without payment. Because the traffic loads are about even in both directions, the costs are assumed to balance out.[30]

However, after Netflix started using the backbone carriers—starting with a deal with Level 3 in 2010—the ISPs requested payment for handling Netflix traffic. Regulation advocates declared the request for payment to be a neutrality violation, aimed at shutting down Netflix as a rival to their own video offerings. Online petitions were soon circulating, demanding that the FCC "Stop Comcast from blocking Netflix."[31]

But the ISPs' stance was entirely reasonable and consistent with long-standing practice. Netflix's traffic load—estimated at 34 percent of all peak-hour Internet traffic[32]—is titanic. And, it mostly flows one way—videos are sent inbound to consumers, with very little outbound traffic in return. Given the imbalance, a settlement-free payment system would not make sense.

The implications were disturbing: Net neutrality principles had not been seen (even by most advocates) as applying to the competitive backbone market. The concept had only applied to how traffic was treated once it entered the ISP's network, not the (potentially costly) connection *to* the ISP. It may sound like a technical difference, but the consequences could be substantial. Requiring ISPs to deliver content free in such circumstances would cause massive economic distortions,[33] discouraging investment and increasing direct costs to consumers.

28. Jon Healey, "Should Net Neutrality Rules Stop T-Mobile's Music Streaming Offer?" *Los Angeles Times*, June 21, 2014, http://www.latimes.com/opinion/opinion-la/la-ol-t-mobile-data-caps-spotify-sprint-20140620-story.html#page=1 (accessed September 23, 2014).

29. Chris Ziegler, "T-Mobile's 'Music Freedom' Is a Great Feature—and a Huge Problem," The Verge, June 18, 2014, http://www.theverge.com/2014/6/18/5822996/t-mobile-music-freedom-net-neutrality (accessed September 23, 2014).

30. Fred Campbell, "Netflix Secretly Holds Subscribers Hostage to Gain Favorable FCC Internet Regulations," Center for Boundless Innovation in Technology, September 16, 2014, http://cbit.org/blog/2014/09/netflix-secretly-holds-subscribers-hostage-to-gain-favorable-fcc-internet-regulations/ (accessed November 6, 2014).

31. Nancy Gohring, "FCC Looks into Level 3, Comcast Content Dispute," *PC World*, November 30, 2010, http://www.pcworld.com/article/212078/article.html (accessed February 4, 2014).

32. Jared Newman, "Netflix Crowned King of Streaming with More than a Third of Peak Traffic," *Time*, May 14, 2014, http://time.com/98987/netflix-streaming-traffic/ (accessed October 7, 2014).

33. Netflix has now entered into agreements with major ISPs, including Verizon, AT&T, and Comcast to pay for interconnection with their networks. Alex Wilhelm, "Netflix and AT&T Sign Peering Agreement," Tech Crunch, July 29, 2014, http://techcrunch.com/2014/07/29/netflix-and-att-sign-peering-agreement/ (accessed November 6, 2014).

Conclusion

The record is clear. Despite rhetoric indicating that neutrality regulation is needed to address anti-consumer misconduct by dominant Internet service providers, the rules would hardly be limited to these cases. The vast majority of claimed violations of neutrality principles involved challengers in the marketplace and practices that would reduce consumers' costs. The predictable consequences of such regulation would leave competition reduced and Internet users worse off. The FCC and Congress should reject calls to impose this dangerous regulatory scheme on consumers. Instead, it should allow the Internet marketplace to function unimpeded, policed by competition and the same competition laws that apply to other industries.

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