Congress Versus the Open Internet, Part Two

by Andrew McDiarmid [1]
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Yesterday, while the Senate Judiciary Committee was contemplating COICA's risky architectural remedies to thwart online intellectual property infringement (see David Sohn's thoughts here [2]), the House Energy and Commerce Subcommittee on Communications and Technology held a major hearing to question the wisdom of the FCC's Internet openness rules [3]. And question the rules opponents did: For over three and a half hours, Commissioners faced familiar rhetoric about the supposed lack of any problem, regulation's effects on commerce and investment, and whether the FCC actually had the authority to issue the rules in the first place. Many on the committee made it clear that they would seek to repeal the rules, and after the hearing, they followed through: Resolutions were introduced in both the House [4] and Senate [5] under the Congressional Review Act to nullify the rules.

Repealing the rules would be a huge mistake. As we've written before [6], to strip the nation's communications regulator of any authority over what is rapidly becoming the core communications network of the 21st century would be absurd. Not having a cop on the beat would leave carriers free to discriminate amongst Internet applications, picking winners and losers, to the detriment of consumer choice, competition, and online innovation.

The attempt at repeal comes despite FCC Chairman Julius Genachowski's strong (to CDT ears) arguments defending the rules. Genachowski and his allies – on both the Commission and the Subcommittee – stressed the arguments in favor of openness rules that readers have heard before on this blog and from other neutrality proponents: that the rules are a light-touch and flexible approach to preserving the competitive environment that currently exists on the Internet; that there is ample evidence that in the absence of rules carriers would discriminate (as a few have done already) against some lawful traffic; that the rules do not amount to "regulating the Internet"; and that the Commission indeed possesses jurisdiction to enact them.

On this last point the courts will have the last word. It's worth noting, though, that the main legal question will be whether the specific legal theory the FCC relied on holds water. The FCC chose that legal theory out of respect for concerns about overreaching and over-regulating; it stopped short of an earlier proposal [7] that carriers viewed as more regulatory but which would have put the rules on surer legal footing.

But congressional critics obviously have no appreciation for that concession. The irony here is that many of the opponents who claim the FCC acted brazenly when it should have waited for direction from Congress actually blocked a compromise effort last fall to legislate a narrow role for the agency to protect the open Internet. Henry Waxman spent weeks negotiating a bill that received broad stakeholder support but stalled in Congress [8]. The political stalemate on the Hill put the action back at the FCC, and the Commission wisely enacted rules that resembled Waxman's proposal. And now they face a likely repeal vote in the House, although uncertain prospects in the Senate and the strong possibility of a veto by the President stand as major obstacles to the repeal effort.

Repealing the rules would be a serious blow to the open, innovative Internet. Our friends at Public Knowledge have launched a campaign [9] to tell Congress to reject the repeal of Internet neutrality rules, and we encourage you to join the fight.

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- Julius Genachowski

- FCC
- Congress

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