



ISSUE BRIEF

FCC's Net Neutrality Rules and Implications for Research Libraries¹

FCC Votes to Enact “Net Neutrality” Rules: After years of debate and consideration, on December 21, 2010, the Federal Communications Commission (“FCC”) voted 3-2 in favor of enacting a narrow set of net neutrality rules to regulate the practices of broadband providers. “Net neutrality” is the principle that Internet users should have the right to access and provide content and use services via the Internet as they wish, and that network operators should not be allowed to “discriminate”—slow, block, or charge fees—for Internet traffic based on the source or content of its message. Additional information on the background of the net neutrality debate and its implications for research libraries can be found in an article from ARL’s current issue of the *Research Library Issues* publication, entitled “[The Importance of Net Neutrality to Research Libraries in the Digital Age](#),” as well as the [Principles Statement Letter](#) submitted to the FCC by ARL and higher education organizations in March of 2010, calling on the FCC to codify open Internet principles.

The wording of the net neutrality rules, advanced by FCC Chairman Julius Genachowski, appears to reflect an attempt at a compromise between network operators and advocates for strong net neutrality protections—including ARL, ALA, and EDUCAUSE. Ultimately, however, the limited scope of protection in the rules has not fully satisfied the concerns voiced by parties on both sides of the issue and thus has set the stage for further debate over regulation in the courts and in Congress.

The FCC’s [Report & Order](#) imposes three basic requirements on broadband Internet access providers, and develops selected definitions to clarify which entities are regulated and which are protected by the rules. The rules distinguish fixed (cable and DSL) broadband providers from mobile wireless broadband providers—with far more limited protections in the mobile wireless arena. Additionally, the rules only apply to “broadband Internet access service,” not to any “specialized services” that may be offered by the same providers—services that remain vaguely defined. Thus, the rules represent a first step toward full protection of the open Internet but are still limited in scope and application.

Legal Authority: In April 2010, the Federal Court of Appeals for the DC Circuit ruled in *Comcast v. FCC* that the FCC had not properly justified its authority to regulate the network management practices of Comcast, which the FCC had charged with unreasonably blocking BitTorrent traffic over its network. The decision rejected the Bush-era FCC’s intentionally weak rationale for authority. However, the FCC’s new Report & Order recognizes and addresses the *Comcast* court’s concerns over agency authority by offering additional grounds supporting its authority to regulate broadband. In particular, this includes an emphasis on Section 706(b) of the [Communications Act](#), which directs the agency to “take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” Thus, the FCC interprets the *Comcast* decision not as precluding any and all regulatory authority over broadband but as requiring the FCC to clarify its grounds for authority in the Report & Order.

Definition & Rules

Definition of Broadband Internet Access Service (“BBIAS”): In its Report & Order, the FCC explains that the rules apply to broadband Internet access service, which the FCC defines as a “mass-market retail service” that “transmits data to and from substantially all Internet

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endpoints.” This formulation, favored by some telecom providers, leaves undetermined the status of services that offer access to a limited number of Internet endpoints. Critical for libraries, the Report & Order explains that a mass-market service is one “marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers *such as schools and libraries*” (emphasis added). This definition ensures that a covered provider must comply with the rules when providing service to libraries and schools. Thus, libraries that rely on BBIAS from a commercial provider to reach patrons via the Internet will be covered by the rules. And users of libraries seeking access to library content and services via their service providers will be covered by the rules. At the same time, the definition places the private networks operated by libraries, colleges, and universities outside of the scope of regulation, as these institutions do not indiscriminately sell broadband service on a standardized basis to all potential customers. Thus, libraries and higher education institutions remain free to manage their private networks without FCC oversight.

Rule 1 Transparency: The transparency rule requires persons “engaged in the provision of broadband Internet access service” to publicly disclose information related to their network management practices. The purpose of the rule is to provide consumers enough information to make informed choices about the use of various services and also to supply application, service, and content providers with the information necessary to develop products that can be successfully transmitted over the open Internet.

The rule applies to both fixed and wireless broadband providers. The network management information providers must disclose relates to how heavily providers manage their networks as well as plan and pricing options—including details about roaming fees, performance during peak times, congestion management practices, and rate controls on specific applications.

Rule 2 No Blocking: This rule prohibits providers from blocking access to certain lawful services, content, and applications (or degrading or delaying access in a way that has the same effect as blocking). The rule differentiates, however, in its requirements for providers of fixed broadband and providers of mobile wireless broadband.

Fixed vs. Wireless Broadband

Providers of fixed broadband are prohibited from blocking “any lawful content, applications, services and ‘non-harmful devices’”—meaning all broadband traffic to or from an end-user—subject to reasonable network management. Mobile wireless providers, on the other hand, are only prevented from blocking access to “lawful websites” and applications that compete with the provider’s own voice or video applications. The rule does not prohibit the blocking of applications or devices that do not directly compete with those offered by wireless providers, nor does it apply to the management of mobile application stores, such as Apple’s iTunes App Store.

“Lawful Content” and Copyright

Both the No Blocking rule and the No Unreasonable Discrimination rule make clear that they apply only to “lawful” traffic, i.e., that “unlawful” traffic may be blocked or slowed. The Report and Order specifies that the rules do not “impose any independent legal obligation on broadband Internet access service providers to be the arbiter of what is lawful.” However, it does note that nothing in the rules prohibit “reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.” While the rules cite child pornography and copyright infringement as examples of unlawful traffic, they do not clarify how, if at all, broadband providers should determine the lawfulness of broadband traffic.

Additionally, the Report & Order explains that nothing in the rules affects current copyright law, but any policy that would enable a broadband provider to determine lawfulness of Internet traffic without a prior judicial determination could lead to unnecessary blocking of legitimate traffic over the open Internet—impairing rights (such as fair use) that copyright law creates for libraries, universities, and Internet users. Given this risk to user rights and the complexity of copyright law, it is arguably unreasonable for broadband access providers to take measures that would block or slow traffic without a prior determination of infringement by a court.

Rule 3 No Unreasonable Discrimination: Under the rules, broadband providers are allowed to reasonably manage their networks in order to accommodate the flow of traffic, which can be particularly heavy during peak usage times. However, under this third rule, fixed broadband providers are not allowed to “unreasonably” discriminate in the transmission of lawful traffic over a consumer’s broadband Internet access service. This rule applies only to fixed broadband, not mobile wireless broadband.

To provide guidance on this rule, the FCC notes that “reasonable network management shall not constitute unreasonable discrimination” and describes aspects of reasonable network management. The Report & Order states that the more transparent network management practices are, the more likely they are to be found reasonable. Additionally, the ability of the end-user to maintain ultimate control over access to content is also an important element of reasonable network management. Finally, network management practices that allocate access to bandwidth based on an effort to provide an equitable amount to various consumers over time is more likely to be found reasonable than practices that allocate bandwidth access based upon the content or source of the traffic.

Paid Prioritization Not Clearly Prohibited By Rule 3

The unreasonable discrimination rule does not explicitly ban the practice of paid prioritization—the idea that a network operator could prioritize the flow of traffic based upon which content and application providers are willing to pay the most to reach the broadband provider’s subscribers. Instead, the language of the Report & Order merely notes that paying for priority would “raise significant cause for concern” and would be unlikely to satisfy the unreasonable discrimination rule.

The Report & Order discusses the problems that paid prioritization poses to non-commercial content providers—specifically mentioning libraries, schools and advocacy organizations—but ultimately does not say all paid prioritization is unreasonably discriminatory. The ability of network providers to allocate the flow of traffic based upon which entities are willing and able to pay the most poses a great threat to libraries and educational institutions that cannot compete monetarily with for-profit entertainment companies. Broadband providers charging for access to subscribers could have the effect of relegating educational and scholarly content to the “slow lanes” of the Internet and, ultimately, chilling free expression.

Mobile Wireless Broadband Not Subject to Rule 3

There is no parallel unreasonable discrimination rule governing mobile wireless broadband providers; the FCC chose to limit net neutrality regulation in the wireless arena, arguing that the mobile wireless technology is still at an early stage and continually evolving, compared to fixed broadband.

While it is true that mobile wireless is at an earlier stage of development than fixed broadband, the adoption rates in the wireless platform are outpacing all other forms of broadband adoption, and mobile wireless is likely to become a primary mode of Internet access for many consumers. Already, some minority groups use mobile wireless at greater rates than fixed broadband. Broadband providers are also rapidly investing in 3G and 4G wireless technology.

Thus, the exemption of mobile wireless from the unreasonable discrimination rule significantly curtails the application and impact of the net neutrality rules.

Next Steps for Net Neutrality

While the rules represent a step toward protecting the open Internet, many advocates for net neutrality have stated that the rules have not gone far enough because they do not include strong protections for mobile wireless broadband. Additionally, opponents of net neutrality have continued to denounce any and all regulation of broadband. The result of this frustration on both sides of the issue has already prompted Congressional action and will likely lead to litigation in court.

On January 5, 2010, Congressman Marsha Blackburn (R-TN), a member of the US House of Representatives Energy & Commerce Committee, introduced a bill ([H.R. 96](#)) to overturn the FCC's net neutrality rules. The bill attempts to block any net neutrality regulation. Representative Clifford Stearns (R-FL) introduced a similar bill ([H.R. 166](#)) on January 5, 2010, which requires the FCC to refrain from enacting any net neutrality rules unless the agency presents evidence to Congress of market failure and adopts the least restrictive regulations necessary to address market failure. In addition to legislation, there are two other means by which Congress could overturn or block implementation of the rules. First, members of Congress could make use of the Congressional Review Act, which allows Congress to overturn any agency action with support by a simple majority in both Houses (overriding the filibuster in the Senate), subject to presidential veto power. And second, members of Congress could use the appropriations process as a way to ensure that the FCC has no funds available to implement the network neutrality rules.

The rules also face opposition in court. On January 20, 2010, Verizon filed a notice of appeal in the U.S. Court of Appeals for the DC Circuit challenging the FCC's authority to regulate broadband Internet access service. Under the Administrative Procedure Act (APA) and the Communications Act, those affected by agency rules (i.e., Verizon) can seek judicial review of agency regulations. In its filing, Verizon asserts that its appeal must be heard in the DC Circuit because the net neutrality rules affect Verizon's wireless spectrum license, and under Section 402(b) of the Communications Act such license disputes can only be heard by the Court of Appeals for the DC Circuit. Finally, Verizon has filed an unusual motion requesting that their appeal be heard by the same panel of judges that heard the *Comcast* case, in hopes of arguing before a panel that previously ruled against the FCC on the issue of network neutrality. Typically a three judge panel is chosen at random from among the thirteen judges on the Court of Appeals, but Verizon argues that the *Comcast* panel is particularly well-suited to hear its appeal because the judges will be especially familiar the subject of FCC authority over Internet access providers.

Verizon's filing in the DC Circuit is likely to spur net neutrality advocates to challenge the rules in other federal appellate circuits across the country. Advocates of stronger net neutrality rules will likely argue that the rules are "arbitrary and capricious" in their disparate treatment of fixed wireline and mobile wireless service, claiming instead that mobile wireless should be subject to the same rules as fixed wireline. If the rules are challenged in multiple venues, and the court rejects Verizon's argument about the DC Circuit's exclusive jurisdiction under the Telecommunications Act, there will be a lottery system to determine which circuit will hear the case. Whichever circuit is ultimately chosen, and whatever action Congress takes in the meantime, it is clear that the debate over net neutrality is far from over.

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