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The ISP Oligopoly: Can a User's Voice Be Heard?

On November 7, 2011, in Net Neutrality, by Grant P

While I was researching Net Neutrality I stumbled across a policy analysis written by the CATO institute (the libertarian think tank), which is highly critical of the concept. The article was written just short of seven years ago, and makes several predictions about the trajectory of the Internet and how government regulation could be detrimental to the ISP industry. However, most of its arguments don't seem to be withstanding the test of time.

One of its main contentions is that the interests of consumers will be able to balance the interests of Broadband Service Providers (BSPs) sufficiently, and that there is no need for FCC involvement to ensure competition and quality in the market:

"BSPs will have to strike a delicate balance, but the profit motive provides them with a powerful incentive to not overzealously police or restrict activities on their networks. That is especially the case as the broadband market grows increasingly competitive and consumers have more options from which to choose."

Ignoring the particularly troubling spliced infinitive, there are more unsettling things about this statement. Is the consumer *really* being heard? It seems to me that the industry—which is a bit of an oligopoly—has developed several ways to insulate its profit margins from public opinion and dissatisfaction with its services. In addition to unsavory existing practices, there are several disconcerting, yet plausible business plans that ISPs may yet pursue without at least some degree of FCC involvement.

The cat is you. The weird rodent is Comcast. The window behind it is a BitTorrent file. Really, I just wanted to use this picture.

Throttling is an increasingly popular method for controlling bandwidth congestion. In this practice, ISPs target users or downloads that are particularly taxing on bandwidth, and limit data speed. CATO argues that this type of discrimination is no different than "consumers paying more for roses on Valentine's Day" or giving discounts to senior citizens. But there's a pretty big difference: a lack of transparency and impenetrable unity within the industry.

First of all, most of the throttling that's happening today is pretty surreptitious. Before Comcast admitted to throttling P2P applications, it *denied the allegations.* If Comcast thought its use of throttling was a legitimate management technique, why'd they feel the need to lie about it? And why didn't they tell their customers up front? CATO says that this type of discrimination may be "perfectly rational and legitimate" and that "[t]he presumption should be that network operators are the best managers of their networks and will seek to artificially curb network use only when necessary to preserve the integrity (speed and reliability) of their networks." Sure—maybe throttling is sometimes a legitimate bandwidth management technique, but companies should at least have the integrity to own up to it.

Also, let's consider the case of smart phone providers. It's a good thing that the "profit motive" CATO mentions has kept the market in check, otherwise I'd worry that all of the smart phone providers are headed in the direction of bandwidth throttling, even in the face of strong consumer criticism. Wait…AT&T, Verizon, *and* Virgin Mobile are all implementing throttling plans? Hmm…when it comes to throttling, it looks like the oligopoly—not the people—has spoken.

Traffic Prioritization and Discrimination

Prioritization is the act of showing favoritism in the distribution of bandwidth. While some present-day prioritization attempts seem to be benign at least *in principle*—like Comcast's arguably ill-advised attempt at managing bandwidth scarcity—the practice could be corrupted outright. The FCC is worried that sites and providers may band together to make *pay for prioritization* agreements. For instance, say some small email service offers better service than a much larger competitor, and begins to win over some of its competitor's users. Who's to say that the large competitor couldn't pay ISPs for traffic to its site to be prioritized over the smaller company's, effectively degrading the smaller company's product? Similar practices have attacked other telecommunications services; in the 1940's and 50's, it became common for record companies to pay radio stations to play their music in an effort to increase public opinion of it, in a practice called payola.

Fast Food Chains and Fast Lanes

Why would Pay for Prioritization be bad? In a Slate Magazine article, Tim Wu analogizes the Internet to the interstate highway system, as opposed to a fast food chain. Let's say a fast food chain has a deal with Pepsi to purchase only Pepsi products. Since fast food is a readily available resource, that's totally fine; consumers can take their pick of hundreds of other restaurants if they don't like Pepsi. Several of those are bound to offer Coke.

As a southerner, I sympathize.

Now, let’s say Ford buys an interstate lane and says that only Ford cars can be driven on it. Even if better brands exist, consumers may be more likely to purchase a Ford, simply because it gives them access to the Ford lane. By doing this, Ford blocks useful automobile innovation, and the car industry becomes preoccupied with highway deal-making, not quality improvement. Since access to the Internet—like access to interstate lanes—doesn’t have a very large number of options, it’s important that innovation be protected in the market.

What appears to be CATO’s go-to reasoning tactic is that competition in the market means that consumers can choose their ISP, and if they have an issue with the business practices of one ISP, they can simply choose another. Unfortunately, this laissez-faire approach is unconvincing because the oligopoly of ISPs doesn’t provide a good number of options for most people. While none of us are happy about bandwidth throttling in smart phones, which company are we going to switch to? If not Verizon or AT&T, then whom? Ultimately, CATO’s free-market approach doesn’t work because the ISP market isn’t diverse enough, and threatens to tend towards anti-competitive behavior.

Is Net Neutrality the Right Solution?

In the past, the United States has protected openness in telecommunications networks to great success. The United States’ protection of open access—that is, the ability to create new devices that use an existing communications system—started with *Hush-A-Phone v. United States*. Hush-A-Phone was a device invented to attach onto Bell Telephones to provide a greater degree of acoustic insulation in phone calls. AT&T argued that the Hush-A-Phone was a “foreign attachment” to its network, and that only the network owner should be able to produce such attachments. The FCC initially ruled in favor of AT&T, but was reversed by the D.C. Court of Appeals, which argued that as long as a device “does not physically impair any of the facilities of the telephone companies,” it should be able to connect to the network.

Hush-A-Phone, the world's most poorly named invention

The decision turned AT&T’s network into an open network, and anyone was able to produce any invention that lawfully interfaced with the telephone wire. This paved the way for innovations like the fax machine, answering machine, and eventually the modem—the very device that made the Internet accessible to the modern household.

Why shouldn’t we protect the openness of the Internet in the same way? The oligopoly of ISPs could conceivably threaten the burgeoning free market of Internet sites. Should it not be the responsibility and purview of the FCC to protect it?