

II-4.6: The Federal Communications Commission announces new rules for the regulation of broadband Internet service on May 6, 2010

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MAIN INFORMATION

The Federal Communications Commission (FCC) announces on May 6, 2010 that it will reclassify broadband Internet service as a Telecommunications Service, in order to overcome the ruling by the United States Court of Appeals for the District of Columbia on April 6, 2010, which found that the FCC's approach to network neutrality lacked sufficient legal basis.

CONTEXT AND SUMMARY

Julius Genachowski, Chairman of the Federal Communications Commission (FCC), announced his agency's decision to reclassify broadband Internet service as a telecommunications service, in the sense of Title II of the Communications Act of 1934.

This reclassification follows a decision handed down by the United States Court of Appeals for the District of Columbia on April 6, 2010, which invalidated the FCC's approach to the enforcement of network neutrality, on the grounds that the FCC had no legal justification for doing so under Title I of the Communications Act.[1]

Previous to the Court's decision, the FCC had classified broadband Internet service as an 'information service', and only applied minimal and case-by-case regulation to this sector, under its 'ancillary authority' granted by Title I of the 1934 law. Furthermore, a 2005 Supreme Court decision in *National Cable and Telecommunications Association vs. Brand X Internet Services* allowed the FCC to decide the legal foundation it would use to regulate broadband Internet services, and upheld the FCC's classification of broadband Internet as an 'information service' rather than a 'telecommunications service'.

However, in this same decision, Justice Antonin Scalia wrote a dissenting opinion, joined by Justices Souter and Ginsburg, which said that there were two separate components of broadband Internet service: the "computing functionality", which is the content transmitted by the "transmission component", which is the telecommunications service transmitting the information. The former is unregulated, as it concerns information services, while the latter is regulated, as it is a telecommunications service.

The FCC is therefore announcing that it is adopting the dissenting opinion of the court, and will subject broadband Internet service to portions of Title II of the Communications Act of 1934.

In 1996, the US Congress amended the Communications Act in order to allow the FCC to use a power called 'forbearance', which allows the FCC to exempt corporations and services from certain portions of the Communications Act.

Thereby, the FCC has announced that it will use its forbearance powers in order to exempt broadband Internet services from most of the provisions of Title II of the Communications Act.

Specifically, the FCC will subject broadband Internet services **only** to sections 201, 202, 208, 222, 254 and 255 of the Communications Act.

- Sections 201, 202, and 208 of the Communications Act "forbid secret interference with subscribers' lawful Internet transmissions"[2]. This was at the heart of the Court of

Appeals' decision, where Comcast (an American Internet service provider) secretly limited the bandwidth available to its subscribers to access BitTorrent, a peer-to-peer downloading service.

- Section 254 "requires the Commission to pursue policies that promote universal service goals, including 'access to advanced telecommunications and information services...in all regions of the Nation'".^[3]
- Section 222 protects subscribers' privacy by requiring service providers to protect the information they transmit over networks.
- Section 255 requires service providers to make their services accessible to the disabled.

The regulatory framework that results from the application of Title II of the Communications Act is therefore equivalent to the framework that the FCC applied to broadband Internet before the April 2010 Appeals Court decision. The FCC will **not regulate subscription prices or Internet content** as a result of this change in regulation.

[1] Cf. "Regulatory Law Review", 2010 II-4.3.

[2] Speech by Austin Schlick, General Counsel of the FCC, May 6, 2010. Available at <http://www.broadband.gov/third-way-....>

[3] *Ibid.*

Links with other documents in the same sector

BRIEF COMMENTARY

This regulatory change—suggested and desired by three Supreme Court justices in the aforementioned 2005 case—is a direct response to the legal challenge to the FCC's enforcement of network neutrality by the Federal Court of Appeals for the District of Columbia.

The application of a strict and clear legal framework to broadband Internet regulation seems to be a harbinger of a new age in telecommunications regulation in the United States, reinforcing and concretising the FCC's legitimacy and scope of action in regulating this domain.

We can also surmise that the FCC's response is in part due to the desire expressed by US President Barack Obama to ensure network neutrality, or the principle that neither government nor corporations should interfere in Internet users' access to information on the Internet.

If, however, this decision has the merit of providing an irrefutable legal framework to the FCC's regulation of the Internet, it does not necessarily provide a framework compatible with the object of this regulation. Truly, Internet is not a simple telecommunications service; it is also an Internet service, and a rapidly changing field of technology. Good regulation must be the mirror-image of its object; a regulatory agency must evolve in perfect harmony with its object.

We can see that before the current financial crisis, neither the Law nor financial regulation took into account the concept of "risk", even though risk was of paramount importance to the financial sector. We all know the problems caused by this failure of regulation to perfectly correspond to the sector it regulates. By the same token, applying legislation designed for opening up land-line telephone

service to competition (albeit only a small portion of this legislation) to the Internet risks deforming regulation of this sector: telecommunications regulation does not mirror the Internet, and the rigidity of such a framework may rapidly reveal itself inadequate to deal with the speed of technological change.