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Article — Published Version

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Intereconomics

Suggested Citation: Frieden, Rob (2015) : Network neutrality in the EU, Canada and the U.S., Intereconomics, ISSN 1613-964X, Springer, Heidelberg, Vol. 50, Iss. 6, pp. 363-364, <https://doi.org/10.1007/s10272-015-0562-y>

This Version is available at:

<https://hdl.handle.net/10419/172675>

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Network Neutrality in the EU, Canada and the U.S.

News that the European Union will enact a network neutrality regime has triggered predictably divergent views in America. Given the fractious and politicized nature of the debate, advocates for an open Internet welcome validation of the need for affirmative, *ex ante* regulatory oversight. Opponents consider the EU to have joined the bandwagon of nations seeing problems where none exist, a classic example of a false positive triggering meddling government oversight.

The decision whether to impose network neutrality safeguards has become a referendum on the need for government oversight in both the United States and Canada. Both countries have enacted regulatory safeguards, but the Canadian strategy appears more like the EU approach, with the U.S. opting for more muscular safeguards.

The Canadian Radio-television and Telecommunications Commission (CRTC) established open Internet rules in 2009 that mandate equal treatment of traffic and establish a consumer complaint and carrier dispute resolution process.¹ The CRTC's traffic management rules ostensibly prevent content discrimination and traffic prioritization, traffic delaying techniques, and content blocking by Internet Service Providers (ISPs), but the burden of proof lies with parties filing a complaint. Critics of this approach worry that the CRTC will not undertake a full investigation, particularly if the carrier characterizes the intrusion on traffic as legitimate and discloses it to subscribers. Canadian ISPs may slow down ("throttle") some types of traffic without penalty.

University of Ottawa law professor Michael Geist considers the CRTC approach ineffectual and passive:

Canada's net neutrality rules have provided consumers with a system to address concerns with their Internet service. However, with no penalties for ISPs that fail to abide by the rules and no limits on throttling that is publicly disclosed, there is surely room for improvement.²

On the other hand, the CRTC recently ordered Bell Mobility Inc. and Quebecor Media to halt the practice of offering a service that exempts ten hours of video content from a wireless subscriber's monthly data allotment. The "zero rating" of specific traffic streams can have the effect of creating consumer incentives to access content that will not debit a monthly data allotment. Such a preference could result from the data cap exemption rather than the superior nature of content offered, an outcome network neutrality proponents consider unfair.

In March 2015, the U.S. Federal Communications Commission (FCC) imposed more aggressive open Internet rules by reclassifying all forms of broadband Internet access as a telecommunications service, a category triggering common carrier regulation.³ Having previously lost two appellate court reviews of decisions imposing requirements deemed too much like common carriage, the FCC opted to reclassify Internet access so that it could apply telephone company regulations, subject to extensive streamlining of unnecessary safeguards.

1 CRTC: Telecom Regulatory Policy CRTC 2009-657, File number: 8646-C12-200815400, Review of the Internet traffic management practices of Internet service providers, 21 October 2009.

2 M. Geist: When it comes to net neutrality, Canada's going at half-throttle: Geist, Toronto Star, 7 August 2015.

3 Federal Communications Commission: Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24.

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The FCC emphasized the need for narrowly crafted rules designed to “prevent specific practices we know are harmful to Internet openness—blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness.”⁴ The Commission stressed that ISPs have both the incentive and ability to leverage access in ways that can thwart the virtuous cycle of innovation and investment in the Internet ecosystem.

Clear and direct statutory authority provides the FCC with the power to mandate nondiscrimination and to sanction violations even after an extensive culling of regulations which the Commission deems unnecessary. The FCC’s ruling reports that

there will be fewer sections of Title II applied than have been applied to Commercial Mobile Radio Service (CMRS) [the regulatory classification for wireless voice telecommunications service], where Congress expressly required the application of Sections 201, 202, and 208, and permitted the Commission to forbear from others. In fact, Title II has never been applied in such a focused way.⁵

The FCC established “clear, bright-line rules” prohibiting ISPs from blocking lawful traffic, deliberately slowing traffic absent legitimate network management requirements and offering to manage and deliver traffic on a preferential basis. Additionally, the Commission established a general prohibition on ISP practices that would unreasonably interfere with or disadvantage downstream consumers and upstream edge providers of content, applications and services.

As the debate over network neutrality has become quite contentious and hyperbolic, stakeholders widely disagree on whether the FCC has identified necessary safeguards or engaged in massive and illegal “mission creep.” The FCC considers it necessary to state with clarity and specificity that it has direct statutory authority and jurisdiction to impose rules. With the common carrier reclassification, the FCC considers it lawful to impose explicit requirements that significantly constrain ISP conduct. The U.S. regulatory model identifies specific conduct and prohibits it, while it appears that the European model accords carriers somewhat greater opportunities to justify any type of network management process, provided it satisfies a reasonable and necessary standard.

The FCC concluded that the information services/telecommunications services regulatory dichotomy necessitated a reclassification of broadband Internet access. It appears that the EU approach offers greater flexibility for carriers to engage in tactics they deem necessary and lawful network management. While the FCC continues to support in theory such flexibility, the more exact and strident rules imply that the Commission will use comparatively greater vigilance for carrier tactics that tilt the competitive playing field among ventures creating and distributing content.

European and American regulators both want to accord ISPs sufficient flexibility to prevent spam, denial of service attacks and other practices that harm consumers. Each regulator has come up with different strategies to do so. Canadian and European regulators seem more inclined to defer to carrier network management strategies until such time as complaining parties identify tactics that harm competition and consumers. The U.S. regulator has created more proactive rules authorizing greater regulatory scrutiny and less carrier flexibility.

⁴ *Ibid.*, paragraph 4.

⁵ *Ibid.*, paragraph 38.