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Who shapes network neutrality policy debate? An examination of information subsidizers in the mainstream media and at Congressional and FCC hearings

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ABSTRACT

Recognizing policy-making process as a communicative process, this study examines who has subsidized information relating to the net neutrality policy debate. Empirical data has been collected from net neutrality stories published in four national newspapers, as well as from hearings by Congress and the Federal Communications Commission (FCC), during the period of February 2004 through January 2009. Study findings reveal that corporate interests have played a significant role in subsidizing information on net neutrality, both to the public through the mainstream media and to legislators through Congressional hearings. Furthermore, study results show that experts played a larger role in defining net neutrality through the mainstream media and FCC hearings than they did through Congressional hearings. Finally, the role of advocacy group representatives was more apparent at Congressional hearings than via the other two available information channels.

1. Introduction

Network neutrality (hereinafter, "net neutrality") is one of the most important issues in telecommunications policy. Tim Berners-Lee, cherished as the father of the World Wide Web, expressed his concern over this issue, warning that "the net would not be the same if we lost net neutrality" (Berners-Lee, 2008). Whether the Internet would be worse off if net neutrality were lost is a matter of dispute, but the magnitude of altering the fundamental basis of its 41-year-old infrastructure has not gone unnoticed, generating a great deal of attention and conflict over net neutrality in recent years.

Despite the recent and heated attention paid to net neutrality, there have not been enough systematic studies of who plays a key role in the net neutrality policy debate. Relying upon Oscar Gandy's (1982) notion of information subsidy, this study aims to explore those who influence the net neutrality policy debate by supplying information. Specifically, this study asks the following question: Who has subsidized information on the policy issue of net neutrality to the public through the mainstream media and to legislators through testimony in FCC and Congressional hearings? Examination of information subsidizers in this context is vital, since the range and type of information supplied may ultimately lead to a policy decision.

Section 2 reviews the development of net neutrality debate and relevant legislation, providing background on the issue of net neutrality. Section 3 draws upon existing literature to set research questions, and Section 4 explains the study methodology. Then, Section 5 presents major findings, followed by conclusions in Section 6.

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2. Background: development of network neutrality debate and legislation

Basically, the net neutrality debate involves a network design principle (Wu, n.d.). It has been argued that the end-to-end (e2e) design principle[1] is conducive to the extraordinary growth of the Internet (e.g., Lemley & Lessig, 2001; OECD, 2006). First articulated in 1981 by Jerome Saltzer, David Reed, and David Clark, this principle is best summarized as proposing that the intelligence should be located at the ends and the pipes should be as simple and general as possible (Lemley & Lessig, 2001). The Internet, created based on the e2e design principle, does not discriminate among applications and assigns all transmissions equal priority as they are passed along the network. Advocates of net neutrality argue that the Internet has to stay as neutral as it has been, because it is this "open" and "neutral" nature of the network that enables anyone with an Internet connection to invent and implement a better way to use the Internet, which in turn maximizes competition and innovation (Lemley & Lessig, 2001).

However, technological developments have led some to question the validity and sustainability of this original design, as it does not provide the quality of service or security that many current Internet applications now require (OECD, 2006). Those who see the need to change the current architectural model of the Internet perceive differentiated levels of service as "an opportunity to build quality of service into networks and provide very-high-quality connectivity for time-sensitive applications such as voice and video" (OECD, 2006, p. 6). The prominent proponent of such an approach is Christopher Yoo, who advocates for a network diversity principle that would allow network providers to differentiate their services (Yoo, 2006). Others, on the other hand, worry that such changes would destabilize many of the business models that have been successful on the Internet, or would create anti-competitive incentives for network providers to block or slow certain types of competitive traffic (OECD, 2006).

Concern that network providers may block or slow certain types of traffic has been realized in several instances in the United States, resulting in the need to enact some sort of net neutrality legislation. Two law professors made the first call to action: Lawrence Lessig and Tim Wu expressed their concerns about some ISPs blocking access to certain websites in 2002 (Zhu, 2007). In October of that same year, Lessig (2007) testified before the Senate Commerce Committee about net neutrality and later wrote that he believed it was the first time Congress had heard the term "network neutrality". Meanwhile, in his now widely cited paper published in 2003, Wu differentiated net neutrality as the end, as compared to open access and broadband discrimination as the means. He also acknowledged that there are legitimate interests in discriminating against certain uses. Thus, according to Wu, net neutrality legislation should adopt an antidiscrimination principle which strikes a balance between forbidding broadband operators, absent a showing of harm, from restricting what users do with their Internet connection, and giving operators general freedom to manage bandwidth consumption and other matters of local concern (Wu, 2003).

In 2003, Wu and Lessig sent the FCC a letter proposing a set of net neutrality rules on Internet broadband access (Wu & Lessig, 2003). Seconding their suggestion, then FCC Chairman Michael Powell mentioned the following Internet freedom principles at a conference in February 2004: (1) freedom for consumers to access to their choice of legal content; (2) freedom for consumers to run applications of their choice; (3) freedom for consumers to attach any devices of their choice to the connection in their homes, as long as they do no harm to the network; and (4) freedom for consumers to obtain service plan information (Powell, 2004). Powell's discussion of these principles did not bind the FCC in any way.

In 2004, Madison River Communications, a phone company in North Carolina, blocked its customers' access to Vonage's VoIP service, an emerging alternative to ordinary service. After an investigation by the FCC, Madison River which was subject to the common carrier rules (47 U.S.C. § 201) agreed to pay a fine and stop blocking VoIP services for the next two years (FCC, 2005a). The FCC's decision in *Madison River* seemed to be in line with the net neutrality principle and somewhat alleviated net neutrality proponents' fears.

However, a foreseeable threat to net neutrality arose due to the U.S. Supreme Court's 2005 decision in *National Cable & Telecommunications Association v. Brand X Internet Services* (545 U.S. 967, 2005). Confronting the question of whether broadband cable modem service is an information service or a telecommunications service, the Court affirmed the FCC's authority to classify broadband cable modem service as an information service.[2] This classification was critical because information service providers, unlike telecommunications service providers, are not subject to mandatory regulation as common carriers. Soon after the *Brand X* decision, the FCC reclassified DSL from a telecommunications service to an information service (Reardon, 2005).

[1] The origin of net neutrality – although the term is new – can be traced all the way back to 1860, when telegrams were operated under the e2e principle. However, this study reviews only recent developments of net neutrality.

[2] A brief explanation is warranted regarding how the *Brand X* case reached the U.S. Supreme Court. Two conflicting classifications of broadband cable modem service existed before the *Brand X* litigation. In March 2002, the FCC issued a declaratory ruling that classified broadband cable modem service as an information service (*In re* Inquiry Concerning High-Speech Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 2002). However, prior to the FCC's declaratory ruling, the Ninth Circuit held in *AT&T Corp. v. City of Portland*, 216 F. 3d 871 (9th Cir. 2000), that cable modem service was a telecommunications service. Thus, when the Ninth Circuit heard the *Brand X* case in May 2003, the court had to consider whether any deference to an agency definition was warranted. When a statute is ambiguous, according to the U.S. Supreme Court's ruling in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), courts are required to defer to an agency's interpretation of the statute if that interpretation is reasonable. However, the Ninth Circuit noted that it had held in *Portland* that a cable broadband modem provider was a telecommunications provider. Also, the Ninth Circuit found support for adhering to precedent instead of to agency construction in the case of *Neal v. United States*, 516 U.S. 284 (1996), to rule that *Portland* should govern its *Brand X* decision. On appeal, the U.S. Supreme Court rejected the Ninth Circuit's reasoning and ruled that the Ninth Circuit should have applied the *Chevron* deference test. For more information on the *Brand X* decision, see Signaigo (2007).