Still Preoccupied with Competitors and Forgetting End Users: A Response to the Network Neutrality Debate of Tim Wu and Christopher Yoo

Barbara A. Cherry *

Network neutrality has emerged as a major public policy issue. Yet, notwithstanding an increasingly prolific discussion of network neutrality, its meaning is still ill-defined and the historical evolution of distinctive legal principles underlying the differing types of access problems embedded within the debate are still inadequately acknowledged and explored. As I have previously discussed in depth, varying forms of discrimination related to access to an essential service or facility underlie the network neutrality debate, but they arise in the context of *the provider-to-(end user) customer relationship as well as the provider-to-competitor relationship*.[1] Furthermore, different legal principles historically evolved to address differing types of access problems, and recent actions by the FCC altered some of these longstanding principles for both end users and

* Professor of Telecommunications, Indiana University.

[1] Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System,* 33 N. KY. L. REV. 483 (2006).

competitors.[2] Unfortunately, "the discourse of *network neutrality* . . . conflates the legal bases for addressing access problems for end user customers and competitors. As a result, there is an unsubstantiated over-reliance on antitrust principles to address provider-to-customer access problems."[3] Preoccupation with the provider-to-competitor relationship, both in economic and legal terms, is also prevalent in the Tim Wu and Christopher Yoo debate on network neutrality published in the *Federal Communications Law Journal.*[4]

Yoo asserts that "the debate has focused primarily on a type of discrimination known as 'access tiering,'"[5] that "network neutrality is really about vertical integration between content and conduit," [6] and that "a large part of the network neutrality debate can be viewed as nothing more than an intramural fight between the large content providers (like Google) and the large network providers (like Verizon and Comcast)."[7] With reference to antitrust jurisprudence to address alleged discrimination by network owners, he claims that the "proper focus of broadband policy is to identify the level of production that is the most concentrated and the most protected by entry barriers and to try to make it more competitive."[8] Therefore, rather than focusing on "[n]etwork neutrality proposals … aimed at preserving competition in applications and content, … the real focus should be on the impact network neutrality regulation would have on the competitiveness of the last-mile."[9]

Wu asserts that "[n]etwork neutrality is a useful way of talking about discrimination policies, on networks or otherwise."[10] In response to Yoo, Wu states that "the economics of the last mile … are a shortcut for talking about the economics of infrastructure, which is really the center of this debate."[11] However, Wu disagrees that the importance of infrastructure economics justifies allowing last-providers to run discriminatory networks.[12] Furthermore, Wu is skeptical of Yoo's assertion that the basic economics of the last mile is significantly changing, and believes "that over the next decade the infrastructure market will continue to heavily favor the

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[2] *Id.* at 488-89.
[3] *Id.* at 484 (emphasis in original).
[4] Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate,* 59 FED. COMM. L. J. 575 (2007).
[5] *Id.* at 578.
[6] *Id.* at 583.
[7] *Id.* at 589.
[8] *Id.* at 583.
[9] *Id.*
[10] *Id.* at 577.
[11] *Id.* at 584-85.
[12] *Id.* at 587.

main incumbents."[13] For this reason, Wu asserts that "net neutrality's prohibitions on discrimination are most important for favoring the lowest-end market entrants — application companies."[14]

To be sure, discrimination by network providers that may impede access by competitors in ancillary markets is an important dimension of network neutrality. However, the FCC's rulings in its *Cable Modem Declaratory Ruling* and its *Wireline Broadband Access Order* not only failed to impose requirements on the network provider to provide the transmission component of Internet broadband access on a common carriage basis to competitors, *but it also eliminated the common carriage requirement (under the statutory regime) on the network provider to provide the transmission component of Internet broadband access to end user customers.* Yet, most discussions of network neutrality fail to focus on the implications of such elimination of common carriage in the context of the provider-to-(end user) customer relationship.

Wu and Yoo likewise fail to focus on the problems of discrimination in the economic relationship of network providers to end user customers. Why is this omission significant? Because the provider-to-(end user) customer and provider-to-competitor relationships are both economically and legally distinct transactions. Furthermore, different bodies of law evolved to address the provider's relationships to end user customers as opposed to competitors. Legal principles of common carriage and public utility evolved under the common law to address access problems in the provider-to-(end user) customer relationship, which were later codified in both federal and state statutory regimes. On the other hand, legal principles prohibiting refusals to deal with competitors evolved either on an industry-specific basis under statutory regimes, such as interconnection and eventually unbundling requirements imposed on telecommunications carriers,[15] or in specific cases through interpretation of antitrust law applicable to general businesses.

Importantly, the origin of common carriage obligations that govern the relationship between carriers and end user customers is *not* based on concerns with monopoly power. Common carriage is a status-based legal category, applying merely by virtue of a party's holding oneself out to

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[13] *Id.* at 590.
[14] *Id.* at 591.
[15] In this regard, through its *Computer Inquiry* proceedings under the Communications Act of 1934, the FCC had previously required the Bell Operating Companies to unbundle the transmission component and to provide it on a common carriage basis to enhanced service providers. Subsequent to passage of the Telecommunications Act of 1996, the FCC had initially imposed the same requirement on carriers' provision of DSL for use by Internet Service Providers (ISPs).

serve the public. Furthermore, the common law of common carriage arose under tort – not contract – law to protect customers from economic coercion derived from a bailment relationship and to require fairness in economic transactions under the just price doctrine.[16] The relevance of monopoly evolved later under public utility law, when government sought to require extension of facilities to serve the public through the grant of monopoly franchises.

Failure to understand or appreciate the true origins and function of common carriage has led to over-reliance on antitrust analyses based on assessments of monopoly or market power by many proponents and opponents of network neutrality. But use of legal principles, such as application of antitrust law, to address problems of discrimination in the provider-to-competitor relationship do *not* address problems of discrimination in the provider-to-(end user) customer relationship. Yet, much of the discourse of network neutrality, including the exchange by Wu and Yoo, implicitly assumes that consideration of market power to address the provider-to-competitor relationship is the beginning and end of the matter.

The reality is that problems of discrimination in the provider-to-competitor relationship are distinct from those in the provider-to-(end user) customer relationship. Addressing those of the former will not magically avoid or solve those of the latter. The legal gap created by the FCC's elimination of common carriage requirements to govern the provider-to-(end user) customer relationship in the provision of broadband Internet access is why the role of consumer protection regulation is of such importance. It is for this reason that no discussion of network neutrality can be complete without also directly confronting the legal principles that are necessary to govern the provider-to-(end user) customer relationship.

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[16] Over time, carriers were permitted to limit some aspects of the tort obligations in contracts with customers. For a discussion of the common law origins of common carriage and public utility law, *see* Barbara A. Cherry, *Utilizing "Essentiality of Access" Analyses to Mitigate Risky, Costly and Untimely Government Interventions in Converging Telecommunications Technologies and Markets,* 11 COMMLAW CONSPECTUS 251 (2003).