



What is Net Neutrality's Future in the United States?

Winston Maxwell

► To cite this version:

| Winston Maxwell. What is Net Neutrality's Future in the United States?. 2021. hal-03280998

HAL Id: hal-03280998

<https://hal.science/hal-03280998>

Submitted on 7 Jul 2021

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

La parole à



WINSTON MAXWELL

Director of law and digital technology studies - Télécom Paris - Institut Polytechnique de Paris

WHAT IS NET NEUTRALITY'S FUTURE IN THE UNITED STATES?

Net neutrality in the US has been boxed into a narrow debate about whether internet access providers are “common carriers” under the US Communications Act. The FCC has flipped back and forth on this issue depending on which political party controls the White House, and each of the FCC decisions has been challenged in court. The US has never passed a law on net neutrality, leaving the federal regulator with only a few statutory ‘hooks’ on which to hang a neutrality policy. Will the election of Joseph Biden change things, perhaps permitting the adoption of a national net neutrality law? Probably not.

Net neutrality remains politically divisive, and many things have changed since the FCC’s 2015 net neutrality order. Internet access providers, whether fixed or mobile, still have bottleneck control over access to the internet, and still have the means and incentive to discriminate. But there have been few instances of actual blocking or improper discrimination at the access network level. Today’s questions revolve around zero rating, and how future 5G differentiated service levels will fit with neutrality principles. Most instances of discrimination and abuse of bottleneck power have occurred at the level of major social media platforms, leading to calls for regulation of “Big Tech”, including even the break-up of certain large platforms.

The Biden administration will support net neutrality, but may not make it a priority, preferring instead to focus

on platform regulation, the roll-out of 5G, cybersecurity and closing the digital divide. When the Trump administration FCC annulled the Obama administration FCC’s 2015 net neutrality order, California adopted its own law on net neutrality, which the Trump administration promptly acted to block in court. The Biden administration recently withdrew the federal government’s lawsuit against California, leaving California and other states free to apply their own net neutrality laws. California’s law resembles Europe’s, and will serve as a useful test for how net neutrality can deal with new 5G services, for example. The new FCC could potentially re-enact the old 2015 order, calling internet access providers common carriers, but without a new federal law, the FCC will remain on fragile ground.

The fierce debate on platform regulation leads us to ask whether neutrality might transcend internet access providers, potentially applying to large social media platforms and mobile operating systems as well. The harms that net neutrality is intended to prevent also exist at other levels of the internet ecosystem. For example, the problem of giving undue preference to content providers that have some capitalistic or contractual link with the internet access provider also exists for certain platforms and mobile operating systems. The problem of limiting the choice of content that internet users can consult or publish also exists, albeit in different forms, at different

levels of the internet ecosystem. Stifling innovation, another net neutrality concern, finds its way into the platform debate.

Might we be able to create common neutrality principles that apply to all bottleneck players in the internet value chain? Coming up with common principles will not be easy, because the problems are not identical between social media, mobile operating systems and access networks. Nonetheless, by focusing on the harms caused by all forms of bottleneck power on the internet, net neutrality might be transformed into guiding principles of internet fairness that apply to platforms, mobile operating systems and access networks alike. A major new aspect in the debate relates to freedom of expression on the internet. During the internet’s youth, any form of content filtering was considered an unacceptable interference with freedom of expression and the proper functioning of the marketplace of ideas. More recently, open and unfiltered discourse on social media has led to extreme and manipulative content drowning out all the rest, posing a threat to democratic institutions, the very thing that freedom of expression and net neutrality are meant to protect. Any new approach to neutrality should take this shift into account, and consider how online content moderation at any level of the internet ecosystem can support free speech values while not leading to a meltdown of democratic processes, reasoned debate and belief in science.