

Christopher T. Marsden, **Net Neutrality: Towards a Co-regulatory Solution**, Bloomsbury, 2010, 301 pp., \$95.00 (hardcover).

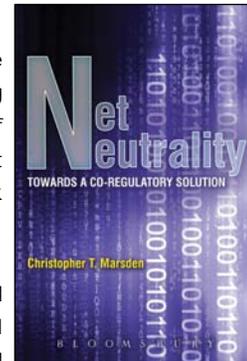
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Net neutrality controversies frequently headline the news. On one side are content providers, IT academics, and youthful downloaders who are cheering on Federal Communications Commission (FCC) moves in the direction of neutrality. On the other side are telecom and cable operators and an assortment of the old corporate guard, which claim that without appropriate network management, digital networks could grind to a halt.

In August 2010, Verizon and Google jointly proposed to the FCC and anybody else in the fray, a new framework of net neutrality policy. The proposal followed their collaboration from October 2009 that they had submitted a shared statement and a subsequent joint filing. In the proposal, they suggested nine key elements of basic net neutrality policy including nondiscrimination to content and transparency of network services. However, it was a compromise in that Verizon accepted perfect neutrality on fixed, wired networks, but sought greater flexibility for wireless networks. The FCC has yet to respond, but their decision may echo the proposals of Christopher T. Marsden in *Net Neutrality: Towards a Co-regulatory Solution*.



Net neutrality, the term used since early 2000, is a principle that all Internet traffic must be treated equally on any operator's networks. In other words, no one can be allowed to favor some of the data traffic, block access to a specific Web site, or delete the contents over the Internet without permission.

Marsden, director of LLM in Information Technology, Media and E-commerce at the University of Essex, proposes a "middle way" approach to resolve net neutrality disputes. He demonstrates the effectiveness of a "middle way" approach, also called "light touch" regulation by comparing Europe (mainly the United Kingdom) and the United States and by reviewing the history of net neutrality from the point of view of both content holders and network operators.

Marsden suggests adopting "co-regulation," a form of light touch regulation and argues that

Co-regulation expresses a form of regulation which is neither state command-and-control regulation in its bureaucratic central or NRA (National Regulatory Authority) specialized functions, nor "pure" self-regulation as observed in industry-led standard setting. It is clearly a finely balanced concept, a middle way between state regulation and "pure" industry self-regulation. (p. 163)

The proposed path forward is a quite different approach from the way the FCC is trying to recover its regulatory authority in the wake of a ruling by a District Court judge in the Comcast case that undercut FCC powers to regulate. In that case, the FCC sought to impose net neutrality on Comcast, which throttled traffic from subscribers to BitTorrent, a peer-to-peer file-sharing service. But a federal appeals court ruled on April 6, 2010, that the FCC has limited power to do so. Marsden asserts the robustness of “co-regulation” by citing two cases—OpenReach and the NGN UK. OpenReach, a separate subsidiary of wholesale telecom network, was created “voluntarily” by BT, with the threat of a referral by Ofcom (p. 165). NGN UK, an industry co-regulatory body chaired by the Telecoms Adjudicator, was formed by active participation of the incumbents.

The author explains “co-regulation” by showing a Beaufort Scale that classifies the degree of co-regulation and self-regulation from basic informal communication through formal regulation. He asserts that “levels 9/11 represent co-regulation while 0–8 represent the evolution of self-regulation from its first beginnings toward the onset of co-regulation” (p. 224). Advocates often see the imposition of strict, rigid government regulation and placing complete trust in markets as polar opposites. That allows for a wide range of choices of the “middle way.” Marsden, who is steeped in the details of the European regulatory environment, suggests that

co-regulation in the European context must also be proportional to the aims of the legal instrument, as well as conforming to the competition law of the European Union. Enforcement is the ultimate responsibility (the safety net) of the state. (p. 223)

Marsden believes that in addition to co-regulation, there also is a need for transparent “reporting requirements” (p. 167) if “evidence-based regulation” is to be achieved (p. 227). Reporting requirements would require network operators to provide comprehensive data about their traffic management practices and QoS (quality of service) to regulators for their internal use. Why would network operators agree to such a proposal? Marsden says that making such reports in good faith would demonstrate to regulators and to consumers that they were acting responsibly and could be trusted. As a precaution against bad behavior, however, Marsden proposes that “regulators equip themselves with the skills and evidence to rapidly investigate potential problems of unjustified discrimination” (p. 227). The author contends that this arrangement would strengthen regulatory power and efficiency but also lighten substantial burdens that now hamper network operators.

However, it seems that there is still room for self regulation, as demonstrated by cases in the Japanese market. My view is that regulators, network operators and content holders can work together to voluntarily realize minimal self-regulation from industry. In Japan, net neutrality is not as a pressing topic simply because there is no case like Comcast, and because self-regulation in Japan works well. Most network operators release their own policies of network management detailing how they handle ill-intentioned traffic, which is considered reasonable for customers. In addition to their regular unlimited access plan, many network operators provide cheaper price plans with limited access to traffic-consuming services. This so-called “two-tiered service” is widely accepted by Japanese customers. The point is that both cases have been done voluntarily without government direction. This raises questions to Marsden’s blanket dismissal of the prospects for workable self-regulation.

The author discusses the net neutrality of wireless and fixed networks separately. Net neutrality may apply differently to wireless networks than to fixed wireline networks because of spectrum limitations, speed, and other factors. Essentially, this is what Verizon/Google argued, although each had vested interests in making this distinction as well. Marsden categorizes the business model of wireless communications as follows: 1) "walled garden," in which the mobile network operator controls everything, but offers a finite number of channels and programs to its subscribers; 2) "open access," in which Internet access over any mobile network is allowed; and 3) "semi-open," in which open Internet access is available but "walled garden" content is accessed more easily (p. 186). In addition, he categorizes the current situation of the U.S. wireless communication market, especially Apple's iPhone, as a "walled-garden" approach rather than "open access" because devices are blocked from networks, technologies are excluded, and content is filtered (p. 196). In the wireless communications industry, "self-regulation would have the benefit, but co-regulation would provide more transparency, accountability and room for public and governmental engagement" (p. 194).

Marsden also proposes an expansion of the wireless broadband market, calling for a "fixed strategy." His idea is based on the attempt to regulate the mobile termination rates, which are much higher than those for the fixed network. He urges regulators to reduce mobile termination rates first, giving fixed-network operators more room to invest in mobile broadband due to the lighter financial burden. His point is that regulators should enforce net neutrality against mobile broadband of more than 14.4Mbps because the network operators can afford to give their customers the whole Internet (p. 208). I agree that mobile termination rates should be decreased, but it is debatable whether that will lead to more investment in the mobile broadband infrastructure because mobile network operators need to return a profit to customers by providing cheaper services due to the competitive market environment. It also is doubtful that 14.4Mbps of mobile broadband can provide enough bandwidth to perfectly accept net neutrality because the actual throughput may not be so different from the current speed of 7.2Mbps. This discussion might better be postponed until 4G—such as LTE—is commercialized.

Marsden provides excellent coverage of the net neutrality dispute from the perspective of both regulators and network operators, but he does not deeply step into advocacy from the content holders and IT academics who point out the negative impact of anti-neutrality on technological and economic development. Its theoretical and statistical analysis is expected to be completed for further discussion.

However, Marsden's view of a "middle way," in which a proper "light touch" approach to net neutrality prevents harm to the current Internet (p. 236), is valuable and practical amid today's fierce battle over the desirable extent and scope of network neutrality. Most academics on this subject speak loudly for freedom of the Internet. Marsden's volume, *Net Neutrality: Towards a Co-regulatory Solution*, provides a thoughtful analysis that too often misses the network operators' perspective. By judiciously considering the interest of the major stake holders, he provides a significant contribution.