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MARTIN FACES DIGITAL DILEMMA
by Ron Orol

The war to control information flow links debates over media ownership and net neutrality.

The Federal Communications Commission is gearing for yet another debate over media ownership deregulation, but this time a new digital dilemma will complicate the familiar dispute.

A mix of activist groups aim to link the outcome of the media ownership debate to an FCC policy fight over "network neutrality," a principle holding that phone and cable company network operators should be prohibited from using their control over networks to favor some Web content and services over others.

Although both issues have gained a high profile in the media and telecom worlds, the two have more important connections that aren't immediately obvious. Andrew Schwartzman, president of Media Access Project, a Washington-based public interest law firm, is among those who see reasons to link the two.

"There is a concern that the government should be promoting the free flow of information, and net neutrality does that, and rules that limit the size of media companies does that as well," he says. "There is a commonality of objectives among net neutrality and media ownership rules."

Schwartzman contends that the FCC media rules are meant to ensure that individuals have access to diverse sources of local, national and international information -- and that net neutrality rules would serve the same function for new video content available on the Internet.

The strong net neutrality provision he and his allies envision would prohibit phone companies and cable operators from charging additional fees to Internet content companies that want the fastest available broadband connections and quality-of-service guarantees. The impact of such a restriction could end up as a central focus of economic studies that the FCC plans to conduct to justify new ownership rules.

FCC Chairman Kevin Martin would no doubt prefer to keep the issues separate -- intertwining two contentious issues is a sure path to stalemate.

Since he became a commissioner in 2001, Martin has made one of his priorities to resolve one component of the media ownership debate -- eliminating the prohibition on one company owning a daily newspaper and TV station in the same market. Martin's chances of winning quick approval greatly improved last month when the Senate confirmed telecommunications lawyer Robert McDowell to fill the third Republican seat on the agency's five-member panel -- eliminating a stalemate between Democrats and Republicans on this contentious issue. But even with a full slate of commissioners, media ownership is likely to remain controversial on both sides of the aisle and cannot easily be bulldozed into practice.

Former FCC Chairman Michael Powell learned that lesson three years ago when he pushed through the commission a package of looser rules, only to be met with loud opposition from liberals, conservatives and print editorials. A federal appeals court overturned his plan in 2004, arguing the agency failed to adequately justify its changes.

In favor of deregulation this time around, Martin and supporters of media consolidation have a different take than Schwartzman on the connection between the Internet and media ownership.

They argue that the availability of new Internet content is sufficient reason to permit consolidation of older broadcast stations and newspapers, says Owen Kurtin, partner in the technology, media and communications group at Brown Raysman Millstein Felder & Steiner LLP in New York.

He says that in arguing against net neutrality, the Bells are repeating the argument they used when they successfully petitioned the FCC to eliminate rules allowing smaller rivals to access their networks at regulated wholesale. "The phone companies already won the argument that they would not have the incentive to roll out new networks if they can't charge the companies that use their distribution channels meaningful fees," Kurtin says.

But Jeffrey Chester, director of the Center for Digital Democracy in Washington, says that even though there may be 100,000 or more outlets for video and other high-quality content in the future, the number available to consumers may be far less, because few sites are likely to afford the fees cable and phone companies will charge for attractive traffic speeds.

"The sites that can pay will dominate the eyeballs on the Internet," Chester says. "The debate is about the future Yahoos! and the little person on the Internet, and that in many ways is the same debate about media ownership."

If consumers aren't going to the Internet content companies that can afford high fees, then cable and phone companies themselves will make sure Internet users will only use their online video content, Chester says.

"The whole plan by the phone and cable companies to broaden their control over the old media now will be played out in the new media," Chester says.

Expect net neutrality's addition to the FCC's media ownership debate to be fiercely partisan. Democratic commissioners at the FCC have been highlighting the ties between net neutrality and media consolidation. "It's interesting how all these issues kind of come together," FCC Commissioner Michael Copps told reporters in April after participating in a debate at the National Association of Broadcasters convention in Las Vegas. "The network neutrality issue kind of struck me as the highly explosive third rail of the consolidation debate."

Copps said he noticed that many people have become aware of how the two issues have come together at a hearing organized by the public interest advocacy organization Free Press in Norfolk, Va., earlier that month.

"Some of the folks in the open-mike section got up and started talking about network neutrality and open access to the Internet and brought up some of the same concerns that have been brought up about media consolidation," Copps said. "That is, he who controls the distribution wanting to control the content too."

But the arguments supporting net neutrality are not wholly coming from Democrat observers. The net neutrality effort features a wide spectrum of groups that traverse the political spectrum. These organizations are in many ways similar to the grouping of organizations that Powell's 2003 media rewrite outraged. Net neutrality supporters include the Christian Coalition, National Retail Federation, Financial Services Roundtable, Gun Owners of America, Parents TV Council and National Religious Broadcasters, Comptel, Media Access Project and Public Knowledge. They join corporate supporters Intel Corp., Microsoft Corp., eBay Inc., Amazon.com Inc. and Google Inc.

Making sure consumers continue to get local news and information via the Internet, particularly from local broadcast stations' online initiatives, is a key argument in support of net neutrality, Chester says. Indeed, he adds, the rise of the Internet requires new-media concentration rules for the digital era that go beyond prohibiting a newspaper from owning a television company in the same market.

"To keep diverse sources of information available, there must be restrictions on phone and cable companies ability to acquire newspapers, television networks and ultimately each other," Chester says.

Otherwise, Chester muses, the next major mergers will be between phone and cable companies.

Kurtin agrees there could be a wave of mergers never before contemplated. "The net neutrality debate is going to really make us all assess to what extent [there will] be barriers to entry to the continued development of the Internet as [an] unprecedented source of storage and communications," Kurtin says.

