Chapter 9.
Regulatory Relationships

9.1 Introduction

Much of this thesis has been devoted to analyzing the relationships between regulators and ISPs and the influence of those relationships on traffic management outcomes. This chapter elaborates a vital but heretofore unaddressed aspect of that relationship – litigation – while putting it in context of other stakeholders' interactions with the regulatory agencies. Together with the reputational motivations discussed in the last chapter, litigiousness and broader interest group pressures combine to explain the differences in approach to traffic management between the FCC and Ofcom.

9.2 Litigiousness

As discussed in Chapter 3, scholars have suggested that increases in the depth and breadth of judicial review of regulatory agency decision-making causes agencies to become more conservative, to get bogged down creating excessively thorough rules to stand up in court, and to seek alternative ways of regulating to circumvent the judicial process. The case of traffic management regulation reveals that these effects are moderated by the extent of the tradition of litigation in a particular context. The FCC is accustomed to being sued and exists within a long-standing litigious culture, whereas for the much younger Ofcom legal challenges are a more recent and influential phenomenon. This contrast and its relationship to reputation, uncertainty, and regulatory remit in both countries are explained in this section.

9.2.1 FCC

The FCC is subject to judicial review as outlined in the Administrative Procedures Act of 1946 and associated case law developed since then, including the seminal *Chevron* and *Mead* cases discussed in Chapter 3. Over the course of decades, nearly every major order that the FCC has issued has been challenged in court. As interviewees noted, the agency gets sued

"every time" it makes a big decision, "for doing nearly anything controversial" and when it acts on "anything that's actually going to matter to consumers." Companies and trade associations have challenged the agency on media ownership, data roaming, broadcast indecency, pole attachment, universal service, number portability, and many other issues. Of the major decisions that relate to net neutrality and open access, nearly all of the FCC's major orders have been subject to litigation: the *Computer Inquiries*, the agency's decisions related to unbundled network elements and line sharing for local loop unbundling, the *Cable Modem Declaratory Ruling*, the *Comcast Order*, and the *Open Internet Order*. Whenever the agency is considering a weighty or contentious issue, the likelihood of litigation is high; a former senior FCC official explained that in telecommunications, the carriers' "standard is they're always going to sue." For those who work at the Commission, litigation is an inevitability.

Because legal challenges are always expected and have been for decades, they do little to deter the Commission from regulatory intervention when that is the desire of the chairman and the majority of the commissioners. That the potential for judicial review does not inspire conservatism at the Commission is especially evident in the context of the *Open Internet Order*. As one former FCC official who was involved in drafting the order explained, "I don't think the consciousness of being sued had a tremendous effect. It was more like consciousness of the uncertainty in the law about our authority and trying to make sure we were within the bounds of that authority." The Commission drafts its orders "knowing that they may come before a skeptical court," but it does not necessarily decline to act because of fear of a reversal. Another former official explained the balance between the inevitability of litigation and the compulsion to set a particular regulatory direction:

> I think we felt that whether we did a Title II approach or a Title I approach, they both would be subject to significant legal challenge. And you could poll whatever lawyers you want, you're going to find some on one side and some on the other side as to which is more risky. But either way we thought doing the rulemaking was a good idea because you never get certainty. Every order we do is challenged.

The inevitability of litigation is intertwined with the particular pressures that FCC chairmen face as a result of the agency's structure. Chairmen have only a handful of years to

accomplish their goals in office and establish their legacies as regulators. As discussed in the previous chapter, their personal reputations are bound up with the Commission's achievements during their tenures. As a result, the fact that courts may overturn their decisions (often when they are already out of office) is not necessarily of significant import to them; their reputations are established based on the policies they enact, not whether those actions withstand judicial scrutiny. The former senior official noted that "if you don't proceed because someone tells you that they think that they can stop you, then you're never going to be able to proceed on anything."

Chairmen do not put litigation risk entirely aside, but nor do they allow it to divert them from their need to establish their reputations according to their own preferences during the short time that they have to do so. One former official explained that "there's an understanding that the people at the commission are judged in the way that they feel they will be judged . . . based on the rules that they create. Whether or not they get overturned, often a year plus later, is sort of not their problem." They may prefer not to be overturned, but as one industry interviewee observed, "they're going to say what they're going to say and make their decision. If it gets thrown out in court, at least they can go back and say, 'Look, we tried. And we disagree with the court and we think we knew what was in the public interest and we thought we had the authority, but the court did what the court did.'" FCC chairmen are known for the particular regulatory decisions they make, not whether the courts later find them to have overstretched their authority. The former official's conclusion was unequivocal: "of this I am totally confident having known well several chairmen and worked with them closely: they don't give a shit about being overturned by judges. That's not the thing that's going to drive their decision-making."

This dynamic was clearly in evidence during the *Open Internet* proceeding. The chairman was committed to enacting nondiscrimination rules. Both the Title I and Title II approaches seemed tenuous. Although he and his staff dedicated many months to creating a set of rules that they hoped would go unchallenged by industry, Verizon was "very clear all the way

through that they didn't think this was right and they probably weren't going to support it. And they would certainly come in and talk but the unspoken premise was that they didn't see any huge advantage to them in agreeing to support something that they clearly did not think was good policy or in their interests," as one interviewee put it. In the end, as an official involved in drafting the order explained, "you just have to go ahead and do what you think is going to be right, and I guess it is a peripheral benefit that during the litigation process the rules are very likely to be in place. . . . I think when we looked at it, it was just, these are the rules we think are smart rules to adopt and we'll employ what we think is the best legal foundation for it, recognizing that neither [the Title I nor the Title II] way is perfect." The chairman and his staff knew that they were almost sure to get sued, but it was more important to establish the rules as a matter of policy than to avoid legal risk. As Crawford (2013, 62) noted, "Verizon sued. Someone always sues."

What so clearly distinguishes the FCC from Ofcom is that FCC chairmen have a mandate to pursue this kind of policy-setting and that they are comfortable doing so in light of significant legal uncertainty. Conducting public interest analysis, allowing gray regulatory areas to be refined through case-by-case adjudication, and setting national communications policy are all accepted as being well within the realm of the Commission's discussions, even if the courts at times disagree with the agency about its statutory authority to act. Setting policy is what FCC chairmen come to the agency to do.

Kevin Martin and Julius Genachowski took different approaches to net neutrality, but they were both more willing to intervene in an uncertain legal environment than Ofcom because they both led an agency where it was expected that chairmen would take bold steps to advance their policy agendas. One industry interviewee who had worked at the Commission in the mid-2000s explained how the drive to set policy trumped concerns about legal challenges both while he was there and during the *Open Internet* proceeding:

> I think what happens is that the people that are working on this are just trying to come up with the right policy and it's almost like they just outsource the litigation risk to the lawyers and it happens afterwards. . . . So it's always in the back of the policymaker's mind, but I would say it's not all that different between the open Internet order and, say, the data roaming order . . . or the LNP [local number portability] rules, which are a good example of how we knew we were going to get sued, but it's just, it's a good answer for consumers and you do it and you let the lawyers clean up the mess, essentially. You'll take their advice to make sure that you don't overreach, so you don't create risk where there isn't some, but you're stuck with the statute at the end of the day.

The combination of the inevitability of litigation and the expectation that FCC chairmen will pursue communications policy broadly, far beyond the confines of competition analysis, gives chairmen the freedom to make regulatory decisions whose value lies more in the direction they set than in their statutory longevity. As the former staffer who had worked on the LNP rules remarked about the *Open Internet* rules, "[S]ay they get overturned in the D.C. Circuit or wherever. There is value in having the policy said, because then you've narrowed the universe of contested issues to just the jurisdictional question. You've taken a step forward on the policy, maybe you failed on the jurisdiction, but at least you've gotten some rough consensus about what the policy should be." Those involved in drafting the *Open Internet Order* similarly recognized the value of rulemaking regardless of legal challenges; they explained how "in essence the rules are just about the default that you've created" and that "contending stakeholders benefit from having someone lay down a marker." FCC chairmen act in light of legal uncertainty (or near-guaranteed legal challenges) because they realize that setting a policy direction can have a long-lasting impact regardless of what happens in court.

The interaction between litigiousness, uncertainty, and the agency's remit at the FCC was in substantial contrast to Ofcom, where policymaking was eschewed and litigation was a more recent and intense phenomenon. That is the subject of the next section.

9.2.2 Ofcom

Unlike the FCC, where challenges to regulatory decisions have been so common for so long as to have few moderating effects on chairmen's agendas, a high incidence of appeal of Ofcom's decisions is a much more recent phenomenon. Ofcom is obviously a much newer agency, but beyond its relative youth are a number of factors that have contributed to the increased incidence of appeal: the legal framework, the competitiveness of the marketplace, and the increasingly international nature of telecommunications firms operating in the UK. Because the uptick in litigiousness is recent and has coincided with agency budget cuts, it has caused Ofcom to become more conservative in regulating. This trend had a noted effect on the agency's approach to net neutrality.

Judicialization of UK Telecommunications

Ofcom faces a substantially higher standard of judicial review than other economic regulators in the UK, a standard that is arguably higher than what the FCC faces under the doctrine of *Chevron* deference. In transposing the 2002 EU Framework Directive, which required that "Member States shall ensure that the merits of the case are duly taken into account" (OJL 108/40, 2002) in the context of judicial review, the UK established the grounds for merits-based appeals of all Ofcom decisions to the Competition Appeal Tribunal (CAT) (c. 21, s. 192-197). Unlike a traditional judicial review in Britain wherein the court is confined to scrutinizing the process by which a regulator made its decision, the CAT can challenge any aspect of an Ofcom ruling, including, for example, "whether each of sometimes more than a hundred variables in a model used by Ofcom to reach its decision was correct" (DCMS 2011b, 6). In effect, the CAT can act as a duplicate regulator, with the ability to take an Ofcom decision and "look at it again and decide anew," as one industry interviewee characterized it – "a second regulator making the decision from first principles." The CAT can receive new input that was not previously available to Ofcom and can supplant Ofcom's decisions with its own (National Audit Office 2010). While judges may vacate FCC rules,

their power to tweak or supplant the regulator's decisions with their own is far less than in the UK.

The fact that appellants can essentially receive a full re-hearing of every decision that Ofcom makes has been widely linked to the increasing incidence of appeal. The UK government has emphasized that the frequency, cost, and resource-intensiveness of appeals have been on the rise since 2007 (DCMS 2011b). Figure 9 is reproduced from a 2011 consultation impact assessment and demonstrates the rising costs associated with appeals.

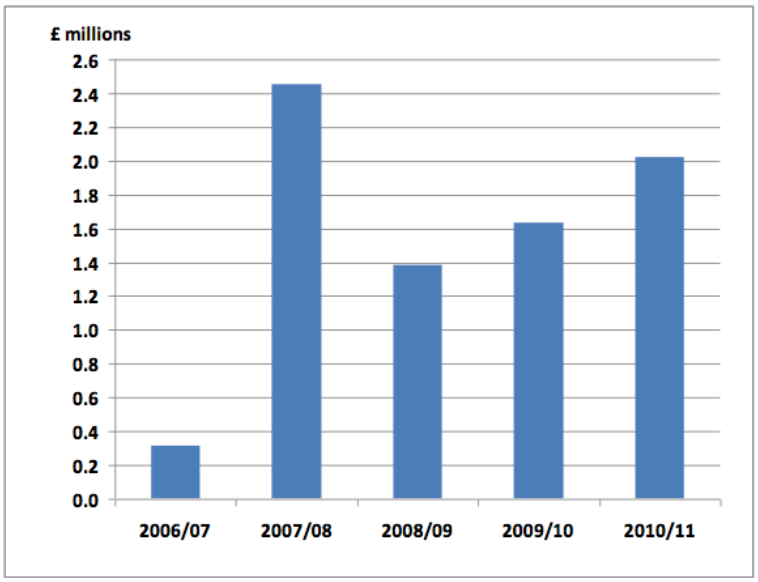

Figure 9. Ofcom's appeals costs, 2006-2011.
Reproduced from DCMS (2011b).

As one former Ofcom official noted, "the incentives on litigation are higher – much, much, much higher – under the current regime than they were under the previous regime," before the Communications Act 2003 was passed.

The change in the legal framework was accompanied by a number of other market developments that further increased litigiousness. As telecommunications markets became more competitive – in part thanks to Ofcom's early interventions discussed in Chapter 6 – firms began to realize that the costs of litigation could be low compared to the potential

savings they could garner by reversing Ofcom decisions that advantaged their competitors. Interviewees from both Ofcom and industry were unabashed in describing this trend. One former Ofcom official explained that the companies had "nothing to lose and huge amounts to gain through appeals," while an industry executive noted that "the amounts of money at stake are so large relative to the costs of litigation, that people tend to revert to a strategy that says, 'well, it's worth a roll,' because unless the chances are completely hopeless, you won't be wasting your time." As the firms' margins were shaved thinner and thinner by new entrants into the market, they turned to litigation as a competitive tactic. Another former Ofcom official who was involved in the TSR described the effects of the competitive structure on the orientation of telecommunications firms towards litigation:

> One of the side effects of making the industry highly competitive and operating on very, very tight margins, is that people are looking for extra money everywhere. And it's kind of, "I've looked down the back of the sofa, I've shaken the piggy bank, you know, can we not get something out of BT or whoever it might be through bringing some really complicated dispute?" And so the art of crafting disputes and appeals against regulatory decisions so that you – the costs of mounting disputes or appeals is very low. The benefit can be enormous. Even getting the Competition Appeal Tribunal to agree to shave one pence per minute off a termination rate is worth millions and millions and millions. So why wouldn't you do it? So we kind of created a rather bizarre incentive structure, in my view, which means there will be more litigation.

Chapter 6 explained how Ofcom's major intervention to spur competition among broadband providers amplified ISPs' incentives to manage peer-to-peer traffic as a way to reduce costs in a highly price-competitive market. But peer-to-peer management was just one cost-saving behavior that competition incentivized; litigation was clearly another.

The uptick in litigation was also partly attributable to changes in the relationship between Ofcom and the industry. When Ofcom was still a new creation, one former official explained, it "had a tremendous amount of goodwill. The reason you got less court cases is because people didn't really want to mess with it." Over time, however, it became a "known quantity" where "you know you can bring a court case and keep it shut up for 18 months." At the same time, the key firms offering telecommunications services in Britain were becoming more international. This meant that they were both more accustomed to litigating in other countries

and less likely to have concerns about the perception that by challenging the national regulator they were also challenging the interests of the nation. Both the fixed and mobile broadband markets saw entry from major foreign firms, including Telefónica, Orange, Deutsche Telekom, and Tiscali, while British firms expanded their presence overseas. Because they were all operating in an international context, the regulatory culture had shifted from one where "people used to . . . defer to government without anybody having to kind of say it too explicitly" to one where "no one cares what the British government wants," as one industry executive explained. If challenging the state in court had ever given them pause, the increasingly competitive and international nature of the market pushed firms in the opposite direction, emboldening them to use the threat of a lawsuit to their benefit. One former government official illustrated this brash use of legal threats:

> [A]ll the evidence seems to suggest that this has had a – some would say even a pernicious effect – on policymaking and regulation . . . the ability not only of operators to appeal against every decision that Ofcom ever makes, but also the way that they're up front about doing it. You know, like they'll say to the minister, "of course, if you do want to go down this road, then we'll be seeing you in court," you know, quite openly.

The "pernicious" effects of increased litigiousness were universally observed by interviewees from industry, government, and Ofcom: the agency became "conservative and slow." The time and resources dedicated to appeals had begun to hamstring the agency. Ofcom CEO Ed Richards questioned whether the UK had "ambled somnolently into a world where regulators are expected to make timely decisions to promote competition, but find it ever increasingly difficult to do so" (Richards 2010). The government was clearly alarmed: it launched three separate consultations in the span of four years on the subject of reforming the appeals system (the last of these was ongoing at this writing, with no legislative changes resulting from the previous two) (BIS 2010; BIS 2013; DCMS 2011c). In the 2011 consultation, the government warned against "a 'gridlock' of continuous overlapping appeals and market reviews" (DCMS 2011b, 8) and declared that "the resource allocated to defending market decisions before the CAT is unsustainable" (DCMS 2011c, 15). Notably, even if Ofcom's decisions were upheld by the CAT – which they were in the majority of cases (DCMS 2011b) – the agency still bore

the costs of the appeals process. The perceived problem was not necessarily with the regulatory outcome, but with the costliness of achieving it.

With litigation consuming increasing staff time and budget even as the agency's overall resources were being cut for austerity purposes, Ofcom increasingly sought ways to limit its litigation risk so as to avoid further appeals. One former Ofcom official explained that as a consequence of the combined effects of budget cuts and increased litigiousness, Ofcom would "develop absolutely bullet-proof procedures for taking, you know, uncontroversial decisions . . . but will shy away from some of the more difficult, contested territory where it may not have to act." One government official further elaborated the quandary in which the regulator found itself:

> [I]t's quite difficult for Ofcom to make these big bang decisions. It means that the decisions have to iron-plated in order that they can't be appealed or that all bases are covered. At the same time, by iron-plating them, you end up with sort of a 400-page document where perhaps 30 pages would have done. And you have 400 pages of text that can be appealed . . . it's all rather chicken and egg, clearly . . . . I think it's the view of a number of people in government if not the government's formal position . . . that the system is gamed, the system is dysfunctional, and is leading to both regulatory log-jam and the sort of cartelization of certain aspects of the market because that's an inevitable consequence of an appeals system that means it's highly beneficial for the status quo to be maintained. So as a consequence of this, I think Ofcom has concentrated on slightly more winnable consumer issues. And that's why people say they're not brave anymore, they don't take these big bang positions.

In contrast to the innovative steps it had taken early on, the agency felt increasingly constrained by the need to spend time and resources fighting appeals and increasingly averse to taking any action that would risk further appeal. Thus, in addition to reputational pressures, litigiousness was yet another factor that caused Ofcom to both recede from high-profile intervention and focus more attention on consumer protection. Regulating the relationship between businesses and consumers, rather than amongst businesses (as would have been required in the net neutrality case), was perceived as less risky.

Effects of Litigiousness on Ofcom's Approach to Net Neutrality

In this climate, the issue of net neutrality was not one that was apt to spur the regulator to take bold action. A number of interviewees felt that, had Ofcom taken a more regulatory approach to the issue, an appeal would have been inevitable. "I don't see how they see they can make a decision on net neutrality that wouldn't be challenged by each and every player in the market" was how one described the situation. Another explained that to build a case for intervention Ofcom "would have to show examples of detriment because of blocking" and that "this would be something they would definitely get appealed on, so I just don't think they would be able to make that case."

As discussed in Chapter 8, neither the effects of regulation nor the consequences of failing to intervene to prevent discrimination were fully understood or quantifiable when Ofcom was formally considering its approach to net neutrality. The agency was already predisposed to avoid tackling issues involving ambiguity or any perception of policy-setting. The legal pressures added an impetus to either intervene on the basis of overwhelming supporting evidence, or not at all. The regulator clearly decided that the justification for regulating in support of nondiscrimination failed this test. The fear was not that Ofcom would be overturned by the CAT, but that it would be forced to face the CAT based on the industry's opportunistic exploitation of perceived evidentiary weaknesses.

While the FCC intervened with full knowledge that a court challenge would ensue and a degree of ambivalence about being overturned, Ofcom allowed the threat of litigation to constrain its decision-making. One former Ofcom official observed that at the agency, "the only way to actually know if you're actually going to win is if people don't want to fight you in the first place." Over the course of its short existence, Ofcom transitioned from a bold, risk-taking regulator to a more conservative, cautious one, grounding its definition of success in avoiding challenges from the industry rather than using regulation to revolutionize it. No regulatory agency wants to find itself in court, but whereas litigious culture did little to deter the FCC chairmen from pursuing their goals with respect to net neutrality, it did much to

shape Ofcom's approach to the issue. The combination of litigation risk with internal and external pressures to recede from policymaking and focus on consumer protection served as a potent mix of influences to deter Ofcom from intervening ex ante, even in the face of pervasive discriminatory traffic management.

9.2.3 Judicial Review and the Regulatory Life Cycle

Notably, the experiences of the FCC and Ofcom illustrate an interesting twist on Bernstein's seminal "life cycle" model of regulatory behavior (1955). As explained in Chapter 3, in Bernstein's life cycle agencies begin with a pioneering willingness to antagonize the regulated industry, move into a capture phase where their processes become highly judicialized, and settle into an ossified old age where they do little more than maintain the status quo. What this model misses are the effects of the novelty of certain forms of adversarialism – namely, litigation – and how those effects change as novelty transitions into desensitization. Compared to the FCC, Ofcom is clearly an agency in its youth, dealing with judicial antagonism as a new phenomenon with the potential to substantially re-shape its character as a regulator. For the FCC, litigation has been a mainstay for so long that its threat no longer affects the policy course that the chairman aims to set. Thus, while the age of an agency may be important for understanding its behavior, the correlation between age and the will to regulate may not be as Bernstein suggests. Newfound litigiousness can cause an agency to adjust to avoid clashing with the industry, but once the agency has grown accustomed to the inevitability of litigation, legal threats from the industry may have little effect.

9.3 Interest Groups

Comparing the US and UK experiences with net neutrality regulation sheds light not only on the applicability of Bernstein's conception of industry capture, but of regulatory theories based on interest group influence more broadly. As discussed in Chapter 3, scholars have elaborated a diversity of theories to explain regulatory results as a function of interest group

influence, focusing on the political salience of particular groups (Peltzman 1976), the relative concentration or diffusion of regulation's costs and benefits (Wilson 1975; Wilson 1980), and the extent to which some groups are more efficiently organized than others (Baldwin and McCrudden 1987; Becker 1983; Rothstein 2004). Despite their differences, one common assumption among these and other theories of interest group regulation is that at least one salient group will seek regulation to begin with. In the case of net neutrality regulation, however, some of the key differences between the US and the UK relate to the presence and intensity of interests advocating for regulatory intervention. As this section demonstrates, this more fundamental question about interest groups – whether they participate and actively make demands of the regulator – explains much about regulation in this comparative context.

9.3.1 Profile of Net Neutrality as a Regulatory Issue

Early in its life as a regulatory topic in the US, net neutrality became a contentious, high-profile issue in which stakeholders of many kinds became deeply involved and invested. The legislative debate in 2006 spawned a massive grassroots mobilization that involved dozens of rallies, delivered millions of petition signatures to Congress, and fueled the years of heated debate that followed (MoveOn.org 2013). Nothing of the kind took place in the UK, where net neutrality was initially viewed as an American problem resulting from lack of infrastructure competition (Atherton 2010; Sky 2010; TalkTalk Group 2010b) and where a "noisy debate" (TalkTalk Group 2010a, 9) never subsequently developed. As one former Ofcom official explained, net neutrality "really came to our attention very much driven by, wow, there's some really interesting developments going on in the US and it seems to have triggered a whole tsunami of lobbying and quite a lot of very interesting technical and academic analysis of the issues, but no comparable drivers in the UK."

Between 2006 and 2010, more than 10 times as many articles about net neutrality appeared in the mainstream press in the US as they did in the UK (Powell and Cooper 2011). More than 100,000 comments were filed with the FCC during the *Open Internet* proceeding

(Genachowski 2010c) while fewer than 100 were filed during Ofcom's consultation on net neutrality (Ofcom 2010f). There are many factors other than the intensity of each country's respective debate that contributed to the disparity between these figures, but they are illustrative of the differences in the profile of the issue among stakeholders and the public in the two countries.

Both public interest advocates and Internet applications companies were heavily involved in advocating for neutrality legislation and regulation in the US. Telecommunications, and net neutrality in particular, became a top lobbying priority for Google and other Internet firms as the debate developed (OpenSecrets.org 2013). Although their net neutrality lobbying budgets remained a fraction of those of the ISPs (Allison 2009), net neutrality was one of several issues that spurred growth in lobbying spending among Internet application providers in the mid-to-late 2000s.

Public interest advocates seized on the net neutrality issue in its early stages and played a critical role in urging a regulatory outcome that included strong nondiscrimination safeguards. The Electronic Frontier Foundation provided the most rigorous early proof of Comcast's use of the TCP reset solution (Eckersley, Von Lohmann, and Schoen 2007) and the *Comcast* proceeding that followed was initiated, sustained, and the outcome substantially negotiated by Free Press with help from other advocacy groups and Vuze, a small peer-to-peer service provider. Analysis of regulatory and mass media discourses shows that within the US net neutrality debate, arguments first made by public interest groups later appeared in the FCC's own pronouncements, demonstrating the spread of the groups' influence (Powell and Cooper 2011). These groups often joined forces with major Internet applications providers in their advocacy efforts (Erickson 2010).

There was no comparable coalition actively seeking regulatory or legislative intervention to safeguard nondiscrimination in the UK. Skype and Yahoo were the strongest private sector advocates for regulatory intervention (Sherwood 2010; Skype 2010), but they had little

support from others. As alluded to in Chapter 7, the BBC leveraged its public presence to advocate for open Internet principles, but its influence over Ofcom's decision-making is generally complicated by its unique position as a public service broadcaster. A handful of advocacy organizations, consumer groups, and academics followed the net neutrality debate, but when compared to other digital rights issues, their advocacy around net neutrality was minimal (Powell and Cooper 2011). Several interviewees noted that there had been no incident or regulatory proposal in the UK akin to the Madison River VoIP blocking in the US or the HADOPI copyright enforcement law in France to galvanize a critical mass of activists around the net neutrality issue. One industry executive noted the absence of any sizable constituency to advocate for intervention:

> I mean, we have no kind of public interest groups. We don't fund public interest groups. So there's not lobbying dollars behind the case. Google doesn't seem to be that interested in really making an issue of it. So there's no one on the other side really saying . . . I mean there are Internet activists and so on in the UK, but they don't seem to be picking this issue as a huge issue.

This void gave Ofcom a powerful role in framing the debate, allowing it to set up the arguments to which a tiny cadre of neutrality advocates responded. Within such a structure, advocates often employed not only the terms but also the arguments put forth by Ofcom, and correspondingly refrained from demanding strong intervention. The most striking example of this pertained to Ofcom's often-repeated view that the combination of competition and transparency would keep discrimination in check and give consumers the ability to switch ISPs if discrimination got out of control. The Open Rights Group (ORG), the most active advocacy organization on the neutrality issue, essentially parroted Ofcom's argument:

> Thankfully in the UK there is currently a healthy amount of competition and choice this [sic] is currently preventing any company from trying to drop Net Neutrality. . . . There is a small amount of traffic shaping happening in relation to ports used by P2P software by some network providers, this should be made more explicate [sic] to the customers when they sign up. (Open Rights Group 2010)

ORG not only accepted Ofcom's framing of the issue in competition terms, but it also agreed with Ofcom that instances of discrimination against particular applications could be rectified through transparency. While this view was certainly not universal among the handful of

interested advocates, it is revealing of the influence that Ofcom's framing had on the debate in the absence of a sizable constituency demanding stronger safeguards. The kind of discrimination that ORG implicitly endorsed is precisely what pro-neutrality groups and companies argued against in the US.

9.3.2 Emotional Investment

Beyond the differences in press exposure, lobbying expenditure, and advocacy constituency, perhaps the most significant difference in character between the US and UK debates was the intensity of the emotions involved. While the US debate could arguably be characterized as the most intensely emotional telecommunications policy debate of the 21st century, the issue was treated with ambivalence in the UK.

United States

Many interviewees observed that the level of emotion and personal investment that numerous stakeholders exhibited in the US net neutrality debate was atypically high. The public rhetoric was heated from the very beginning, with the CEO of AT&T claiming that applications providers would like to "use my pipes free, but I ain't going to let them do that" (O'Connell 2005) and stakeholders on either side launching slogan-oriented campaigns to "Save the Internet" or conversely to keep the government's "Hands off the Internet." From there, the issue became (in the words of interviewees) "noisy," "polarizing," "political," "overheated," "infected," and full of "extraordinary hostile partisan venom." It was a debate "where people were not willing to say the other side has a point" – a religious debate, in essence. And as one policy executive noted, in "[r]eligious debates you're never going to convince anyone. 'My religion is better than yours.' Then we go to war." By telecommunications policy standards, the rhetoric was vicious.

Comcast's behavior after it was accused of blocking peer-to-peer file transfers was a particularly potent catalyst for heightened rancor. Company spokespeople initially denied that the ISP was blocking or throttling any traffic (Svensson 2007; Wein 2007). Comcast then

changed its Terms of Service and issued new, more detailed disclosures (Casserly, Wallach, Alvarez, Waz, et al. 2008), but continued to insist that it was only "delaying" peer-to-peer downloads and uploads, not blocking them (Albanesius 2007; Casserly, Wallach, Alvarez, Waz, et al. 2008; Cohen 2008). Interviewees recalled that the company "wasn't very transparent," was "really not being forthright," and "dug a hole for themselves by not being more forthright from the beginning." The company's behavior clearly angered public interest advocates and Chairman Martin, all of whom took Comcast to task for both shifting its story and continually insisting that it was not blocking traffic (Martin 2008b; Sohn et al. 2008). One interviewee noted that, "[i]t was a really easy sound bite for the commissioners and for the public interest groups that were pushing. The hallmark of whether something is reasonable is whether it's disclosed, whether it's transparent. And they [Comcast] didn't have that argument." Another explained that Comcast's behavior "bred a lack of trust, both to the public and the FCC," further incensing stakeholders who were already embroiled in a hostile regulatory fight.

As the debate wore on, stakeholders became increasingly invested at a personal level in achieving their desired outcomes. By many interviewees' accounts, net neutrality was a more emotional issue than any other telecommunications policy issue in recent memory. "[T]here was a surprising amount of emotion behind it," one former FCC staffer explained, recalling that "I remember sitting in a lot of meetings thinking, 'Wow, these people are really pissed off.'" Speaking to the religiosity of the debate, another former staffer observed that "there was more emotion in the debate than logic in some ways."

It is difficult to identify the precise causes of this dynamic, but interviewees honed in on the fact that for stakeholders of many different kinds, the way that the Internet functions is utterly central to their lives, their work, and their businesses. Net neutrality therefore went to the very core of their personal and organizational motivations. One policy executive from an Internet application company explained how the substance of the issue got to the foundational interests of the businesses on both sides:

> [A] carrier that blocks your innovation process goes straight at what makes you go. So there's something very personal about that. Likewise, I think for the network operators, their world view is . . . "we're doing the heavy lifting to get the Internet to all of America," and I think there's something about the fact that government would micromanage that heavy lift that is sort of the analog to what I'm feeling about the innovation process. . . . And so in both cases you're going really at the core function, the core values of what the ISPs as well as what the Internet guys do.

This feeling that the regulatory outcome could have a foundational impact was at least as strong, if not more so, among individuals and public interest advocates. The following exchange from an interview with a former FCC staff member who was heavily involved in the *Open Internet* proceeding reveals the unique position that the Internet occupied in some stakeholders' lives and how the importance that the Internet held for them personally stoked the unprecedented emotionality of the debate:

> Respondent: There were some people for whom I think this was a very emotional issue. Yeah, I had people actually in tears in some of the meetings I had, which surprised me.
>
> Interviewer: Really?
>
> Respondent: Yeah, it's interesting, I thought about it at the time, because people don't come in here and talk about intercarrier compensation and break down crying – at least they haven't yet, we'll see when we get closer to the order on that, maybe that will happen. But I think there's the sense that the Internet is really this wonderful thing, I think people feel like it's part of them, it's part of us, there's a special connection to it that people don't typically have to special access or certain spectrum issues, and so when there's the possibility for changes that could affect it in ways people perceive to be negative – although I think there's a questionable basis sometimes for that perception – my sense is that it becomes very personal. They feel that there's some part of them or something that they're tightly enmeshed with is harmed or is in jeopardy of being affected. Very strong emotions, yeah.

The strength of people's personal connections to the Internet elevated the emotional importance of net neutrality and helped compel the regulator to act, in utter contrast to the UK.

United Kingdom

In comparison to the US, the net neutrality discussion in the UK was largely devoid of emotion – and even of demonstrated interest, in some respects. The British public never took interest in the issue on any significant scale. One former Ofcom official observed that "[p]eople didn't seem to be that agitated about it" when the agency issued its discussion document. One reason for this is that it was not viewed as being part of broader social policy or digital rights, and even the consumer protection aspects of the issue were not the ones of typical concern for consumers, as the former official explained:

> [C]onsumers felt here that they have a relatively good terms [sic] of broadband services and good quality. The one thing that has created a lot of consumer dissatisfaction here . . . is the inaccuracy of broadband speeds that are advertised or actually delivered. That is related to net neutrality to some extent. So there was a lot of consumer concern but it was a consumer issue, it wasn't a citizen issue. There was no sense that this was important for democracy or free speech or something like that, or not to that extent.

A narrow consumer or commercial issue such as broadband speeds advertising was capable of piquing the interest of the public, but there was no compulsion to get exercised over the broader policy questions inherent in net neutrality regulation. Again here, Ofcom's framing of the issue matched (and perhaps guided) the broader public's understanding of it. For example, in 2008, Ofcom CEO Ed Richards characterized the US net neutrality debate as follows:

> The question of paying more for better services, whether traffic prioritisation, higher speeds or higher usage limits, has also been caught up in the net neutrality debate in the US. In part this reflects a slightly atavistic sense that the internet ought to be free and egalitarian in all respects. (Richards 2008)

Characterizing concerns about discrimination as backwards-looking, principles-based worries reveals an inherently functionalist view of the Internet's value. The regulator as much as members of the general public did not accept the idea that deciding the questions of whether and how discrimination should occur would have a fundamental impact on society. Instead, the Internet was viewed as a technical implement wherein decisions about its functional intricacies would perhaps benefit from technocratic oversight, but need not be of broader societal concern.

Some interviewees placed the ambivalence over net neutrality in the context of more generalized apathy for activism in the UK compared to the US. One interviewee linked the lack of public outcry over net neutrality to "the psyche of the country," claiming that Britons "queue and complain formally and properly, but they don't get upset." Another characterized it as cultural:

> We're just not that "arsed" in this country. "Here, come on, join!" "Aw, I can't be arsed, I'm watching TV." Again it's about vested interests – is it really going to impinge on my life? Not really. When it does, maybe I'll moan about it, or I won't do anything. It's just cultural.

Identifying the links between British culture or psyche and public engagement on net neutrality is beyond the bounds of this thesis, but these observations help to explain the disparate treatment of the net neutrality issue between the two countries. The FCC was not only a regulator tasked with setting broad social policy, it was also confronted with a coalition of interests making passionate arguments about society's broad interest in safeguarding nondiscrimination. In a context where no group made similar demands and where the Internet was viewed as a commercial good much like any other, Ofcom felt no comparable impulse to act.

9.4 Conclusion

The last two chapters demonstrate the most salient factors that differentiate the telecommunications regulation paradigms in the US and the UK. The US regulatory environment was characterized by individual reputational ambitions, accustomization to litigation, and an emotional public debate spurred on by a powerful coalition of Internet companies and public interest advocates. The combination of these forces created an environment in which regulatory intervention was viewed as appropriate and even necessary. In the UK, the reputational pressures on Ofcom as an organization, conservatism induced by increasing litigation, and the absence of interest groups demanding action contributed to regulatory forbearance. These factors took clear precedence over the presence or absence of discrimination and competition.

These explanations for regulatory activity fail to provide support for many of the earliest and most thoroughly developed theories of regulation based on external forces: interest groups, legislatures, the executive branch, and the courts. The net neutrality regulatory arenas in the US and UK show few signs of regulatory "capture" insofar as it was originally conceived, with regulatory agencies producing regulation to the benefit of the industries they oversee (Stigler 1971). The FCC's actions were widely perceived to be against the interests of the broadband industry and Ofcom did not produce regulation for any industry sector. Moreover Ofcom's inaction was largely a result of its own instinctive dedication to competition principles – the agency itself originated the arguments used to rationalize its decision not to intervene. Thus this thesis adds empirical support to the sizable literature that questions the validity of the capture theory (Derthick and Quirk 1985; Noll and Owen 1983; Posner 1974; Wilson 1980).

The comparison between the US and the UK provides an important lesson in light of other theories that link particular interest group characteristics to regulatory outcomes. More fundamental than the groups' political salience, ability to efficiently organize, or breadth of represented interests (Becker 1983; Moe 1987; Peltzman 1976; Wilson 1975; Wilson 1980) is their impetus to act. If neither the public nor any sizable industry sector nor advocacy organizations are moved enough by a particular policy question to petition the regulator to take action, there is little reason for an agency to act on its own initiative. In Ofcom's case, this reticence was reinforced by a climate of limited budgets, skepticism about its policy role, and litigation-induced conservatism.

The two cases studied here also do not comport neatly with prominent theories of regulation based on political actors: the "bureaucratic view" that agencies act autonomously outside the bounds of oversight from other branches of government (Gilardi 2005; Majone 1999; Niskanen 1971; Thatcher 2002a), the theory of congressional dominance of agency behavior (McCubbins and Schwartz 1984; Weingast and Moran 1983), and president-centered theories

of agency control (Moe 1985; Moe 1987b; Moe and Wilson 1994). The FCC and Ofcom both showed clear streaks of independence from the political system, but also influences from it. For example, Kevin Martin's aggressive response to the accusations against Comcast were met with consternation in both the legislative and executive branches, while Parliamentarians at times questioned Ofcom's corporate style of operation. At other times, however, the agencies' actions were in obvious alignment with the preferences of the President or Prime Minister: Chairman Genachowski's pursuit of industry-wide regulation and Ofcom's acceptance of its role as a technocratic policy implementer, for example. What consistently explains the agencies' actions over the time period studied is the role of reputation within each agency, not the ability of other political actors to control the agencies' actions.

Finally, the case of traffic management regulation shows the importance of a regulatory agency's life cycle stage in understanding the effects of external forces. Legal scholars have theorized that increases in judicial review cause agencies to become conservative, rulemaking processes to become ossified, and informal means of regulating to proliferate (McGarity 1992; Melnick 1992; Pierce 1995; Seidenfeld 1997). These effects appear much more prominently in the UK than in the US, although not for lack of litigation in the US. Instead, while the FCC's accustomization to litigation muted the extent to which litigation risk affected its decision-making, for Ofcom litigation risk was a newer and therefore highly influential phenomenon. There may indeed be a regulatory "life cycle" (Bernstein 1955), but in the case of traffic management, a later stage of the cycle implies an emboldened regulator, not the opposite. More broadly, the FCC's behavior reflects its greater de facto independence from all branches of government (Maggetti 2007). Although both agencies were endowed with significant formal independence by statute, the FCC's ability to take more political risks reflects the increased control it has accrued over its own agenda over a longer lifetime.

Although these findings provide little direct support for some of the most well-studied theories of regulation based on external forces, the relevant theoretical landscape is far broader, as discussed in Chapters 2 and 3. The next chapter generalizes the analysis of the

findings in this thesis and interprets them in light of these broader theoretical foundations and the hypotheses offered at the outset of this study.