

2005

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Recommended Citation

Ryan Eddings *Court Ruling Allows Cable Firms to Restrict Access to their Networks*, 18 Loy. Consumer L. Rev. 120 (2005).

Available at: <http://lawcommons.luc.edu/lclr/vol18/iss1/6>

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have difficulty persuading wholesalers to carry their product. More importantly, part of the impetus behind the laws allowing for the direct shipment of wine from in-state wineries was to foster domestic wine production.³⁰ Legislators might be reluctant to pass a law that could destroy the fledging industry that they previously cultivated.

Each state's decision on whether to allow the direct shipment of out-of-state wine holds significant ramifications for consumers. Consumers have unquestionably benefited from access to a wider range of products that have been made cheaper by passing through a more efficient distribution system. With the Court's decision in *Granholm*, wineries at the very least can now compete for customers on a more level playing field. Ideally, state legislatures can craft legislation that will further the state interests of tax collection and compliance with the drinking age without proscribing the ability of consumers to purchase wine from any winery around the country. Such a compromise would truly be reason to celebrate.

Court Ruling Allows Cable Firms to Restrict Access to their Networks

The broadband cable industry and the Bush administration scored a major victory over the summer when the Supreme Court ruled³¹ that broadband cable service is not a "telecommunications service."³² Though the ruling probably looks like nothing more than an exercise in semantics to the average user of broadband cable networks, the Court's decision will likely have significant ramifications in regards to the quality of broadband service offered and the price the consumer pays for it.

Broadband cable internet service transmits data at a much higher rate of speed than traditional dial-up internet service that uses a standard telephone line.³³ In the United States, there are two primary broadband internet services available to consumers: cable

³⁰ *Dickerson v. Bailey*, 336 F.3d 388, 402 (5th Cir. 2003) (legislative intent of statute permitting in-state direct shipment of wine was to "help the Texas wine industry.").

³¹ *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 2688 (2005).

³² Yuki Noguchi, *Cable Firms Don't Have to Share Networks, Court Rules*, WASHINGTON POST, June 28, 2005, at D01.

³³ *National Cable*, 125 S.Ct. at 2695.

modem service and digital subscriber line (DSL) service.³⁴ Cable modem service sends data between consumers and the internet using a network of television cable lines owned by cable companies.³⁵ DSL service transmits data between consumers and the internet using local telephone lines owned by local telephone companies.³⁶

The Brand X case was born after the Federal Communications Commission ruled in March 2002 that broadband cable internet service was an “information service,” not a “telecommunications service.”³⁷ Important in the FCC’s March 2002 decision was The Communications Act of 1934,³⁸ as amended by The Telecommunications Act of 1996,³⁹ which draws a distinction between an “information service”⁴⁰ and a “telecommunications service.”⁴¹ The distinction is important because telecommunication carriers are regulated as common carriers under the Communications Act.⁴² Under the regulations, a telecommunication carrier must, among other requirements, share its communication lines with its competition.⁴³ This is the same regulation that requires telephone companies to share their telephone lines with other service providers.⁴⁴ On the other hand, carriers that merely provide

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4821-22 (2002).

³⁸ The Communications Act of 1934, 48 Stat. 1064 (1934).

³⁹ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁴⁰ 47 U.S.C. § 153(20) (“The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”).

⁴¹ 47 U.S.C. § 153(46) (“The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”).

⁴² *National Cable*, 125 S.Ct. at 1296.

⁴³ Noguchi, *supra* note 32.

⁴⁴ *Id.*

information services are not subject to the same regulations under the Act.⁴⁵

After the FCC's ruling, multiple parties challenged the decision, some arguing that broadband cable service providers were subject to common carrier regulations, others arguing that the broadband providers were subject to local regulations, and one other party arguing that DSL should likewise be deemed an information service.⁴⁶ The Ninth Circuit ultimately decided that broadband cable service was a telecommunications service and vacated the FCC's ruling.⁴⁷ The Supreme Court then granted certiorari.⁴⁸

In a six-to-three decision, the Supreme Court found that the Ninth Circuit had applied the wrong case law in reaching its opinion.⁴⁹ In its place, the Supreme Court employed a much more deferential standard. Specifically, the Court applied the *Chevron*⁵⁰ framework, which recognizes a presumption that when Congress leaves ambiguity in a statute meant to be implemented by an agency, Congress understood that the ambiguity would be resolved by the agency.⁵¹ It also intended to grant to the agency whatever degree of discretion was required by the ambiguity.⁵² Applying the two-part *Chevron* analysis,⁵³ the Court first found that the FCC's interpretation of the statute was permissible as the statute was ambiguous.⁵⁴ Next, the Court found that the FCC's interpretation was a reasonable one.⁵⁵ Accordingly, the FCC's March 2002 ruling was reinstated,

⁴⁵ *National Cable*, 125 S.Ct. at 1296.

⁴⁶ *Brand X Internet Servs v. FCC*, 345 F.3d 1120, 1127 (9th Cir. 2003).

⁴⁷ *Brand X*, 345 F.3d at 1132.

⁴⁸ *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 654 (2004).

⁴⁹ *National Cable*, 125 S.Ct. at 2701.

⁵⁰ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁵¹ *National Cable*, 125 S.Ct. at 2700.

⁵² *Id.*

⁵³ *Chevron*, 467 U.S. at 843-45 (The first step determines if the statute's plain terms "directly address the precise question at issue." If the statute is ambiguous on this point, the court will defer to the agency's interpretation, so long as the interpretation is "a reasonable policy choice for the agency to make.").

⁵⁴ *National Cable*, 125 S.Ct. at 2704.

⁵⁵ *Id.* at 2705.

effectively freeing broadband cable providers from being forced to grant access to their broadband networks to independent providers.

After the opinion was released, consumer groups lamented the Court's decision and made dire predictions that the ruling would harm consumers. The non-partisan media policy group, Free Press, stated that the Court's decision was a "grave error" and noted that since the FCC's March 2002, the United States fell from third to sixteenth in the world for broadband adoption.⁵⁶ In addition, Americans now pay ten to twenty percent more for broadband access on a per megabit basis than consumers in Japan or Korea.⁵⁷

Ben Scott, policy director for Free Press, said that the decision might be "the trigger that reverses a century of communications policy and undermines the bedrock principle of democratic media, which is nondiscriminatory access for all."⁵⁸ Other commentators predict that the ruling will lead to a situation in the United States where each community has only one or two broadband providers: the phone company and the cable company.⁵⁹ There is fear that in this situation, each company's "business interests inevitably will lead to discrimination of content."⁶⁰ Consumers may have had their first experience with such interests when consumers of a certain "voice over internet protocol" service complained that they were unable to complete their calls because their broadband service provider was blocking the internet phone service.⁶¹

On the other hand, the cable companies and their supporters took a more optimistic perspective on the future of broadband internet access. Rob Stoddard, Senior Vice President of the National Cable & Telecommunications Association noted that "the rapid deployment of cable's high-speed Internet access service has been driven largely by the light regulatory touch applied to the service by Congress and the FCC."⁶² His comments were echoed by others in

⁵⁶ Press Release, Free Press, *Brand X: Statement of Consumer Groups on Supreme Court's Decision*, June 27, 2005.

⁵⁷ *Id.*

⁵⁸ Noguchi, *supra* note 32.

⁵⁹ Dan Gillmor, *Brand X Judgment Threatens Free Flow of Information*, THE FINANCIAL TIMES, July 13, 2005, available at 2005 WLNR 10936253.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Rob Stoddard, Letter to the Editor, *Brand X Decision Was a Win for Consumers*, ROCKY MOUNTAIN NEWS, July 23, 2005, at 2C, available at 2005

the industry.⁶³

According to the cable companies, the Court's ruling will actually foster greater growth and innovation within broadband technology, both of which will benefit consumers.⁶⁴ The nature and technology involved in a broadband network requires frequent and costly upgrades.⁶⁵ If cable firms are forced to make these initial investments and then share the constructed network with freeriding competitors who never had to build a network, the cable firms will have little incentive to invest in their own networks.⁶⁶ Without this investment, broadband innovation will come to a halt.⁶⁷ The Court's decision frees the cable firms of the need to share their lines, and, in theory, should promote investment into broadband networks.

Furthermore, the cable companies note that competition has been maintained as consumers currently have multiple options when choosing a broadband internet service, including DSL, as well as terrestrial and satellite-based wireless broadband services.⁶⁸ While this may be true, there is evidence that as many as 60 percent of broadband consumers purchase their internet service from the company that is already providing the cable service to their home.⁶⁹

Whether the decision, and the FCC's underlying interpretation, fosters broadband development in the way its supporters claim will not be known for some time. But it is clear that for the time being, consumers will have a more limited selection when choosing a cable broadband internet service provider. And experience has taught us that when competition is prevented,

WLNR 11561961.

⁶³ Jeff Smith, *Worry Lines Court Ruling Could Spur or Squelch Broadband Competition*, ROCKY MOUNTAIN NEWS, July 11, 2005, at 1B, available at 2005 WLNR 11346300 ("Steve Davis, Qwest senior vice president of public policy, believes that cable modem service has grown faster than the DSL Internet service offered by the Bells because it's been 'completely unregulated . . . while we've been very, very tightly regulated.'").

⁶⁴ Miguel Helft, *Dismal US Broadband Usage Wasn't Helped by Court Ruling*, SAN JOSE MERCURY NEWS, July 6, 2005, at A2, available at 2005 WLNR 10586623.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *National Cable*, 125 S.Ct. at 2696.

⁶⁹ Hope Yen, *High Court Will Hear Internet Cable Cases*, PHILADELPHIA INQUIRER, December 4, 2004, at D03, available at 2004 WLNR 13343201.