Net Neutrality and the FCC: An Information Policy Primer

by Karl-Rainer Blumenthal

EDITOR'S SUMMARY

Net neutrality, a set of telecommunications industry standards, would deliver equal service levels for all who contribute to and use broadband Internet. The issue has been embroiled in controversy between the Federal Communications Commission (FCC) and Internet service providers, with content providers and users caught in the middle. The core of the dispute is classification under the Communications Act of 1934, to group broadband Internet as a common carrier service regulated by the FCC or to view it as an enhanced information service, ambiguously included in a 1996 amendment to the act. The FCC reinforced a regulatory framework through its Open Internet Order of 2010, stressing equity and transparency under the agency's authority. Service providers have sought to limit the FCC's control and to permit selective limiting, slowing or blocking of service to customers. The FCC's own concessions and subsequent court decisions have trimmed the agency's authority, refueling the drive to reclassify broadband Internet as a utility under the FCC's control, ensuring a telecommunications infrastructure that provides fair and equal Internet access.

KEYWORDS

Internet
information infrastructure
telecommunications industry
government agencies
access to resources
social equity

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Disclaimer: The author has received no formal legal training. The following reading of statutory code and litigation history represents his best faith effort to translate a complex and ongoing legal debate into language appropriate to its treatment as a matter of policy for information science and technology professionals.

The year 2014 has seen an unprecedented volume of public debate concerning the United States government's responsibility to codify and enforce net neutrality – the telecommunications industry standards that protect equal levels of service for all contributors to and end-users of broadband Internet. This debate occurs in the context of repeated attempts by the Federal Communications Commission (FCC) to realize those standards by regulating Internet service providers (ISPs) under broad statutory authority that it derives from the U.S. Code. The nature of that authority has been debated in Congress and litigated in federal courts, providing incrementally more clarity to the boundaries of the FCC's jurisdiction, but leaving the questions of whether and precisely how the U.S. government may enforce Internet service provider (ISP) observance of net neutrality standards still largely unanswered. At the time of writing, the FCC is accepting public comment on a proposed rule change that could alternatively maintain historical standards of net neutrality under new legal frameworks or make concessions to ISPs that proponents of net neutrality characterize as anathema to its core values, in particular enabling ISPs to create a tiered service model through independently negotiated service agreements with Internet content providers and end-users. Rather than acquiesce to the new standards advanced by ISPs and supported by recent court rulings, net neutrality purists suggest that the FCC instead reclassify broadband Internet as "common carrier" service under Title II of the Communications Act, effectively making it a utility with industry-wide

standards in the model of telephony or broadcast television. This article elucidates the disputes that have led to this fulcrum point for the FCC and specifically evaluates the effectiveness of reclassification as an opportunity to settle the net neutrality debate.

Federal agencies, lawmakers, United States Courts, advocacy groups, businesses and journalists refer to the concept interchangeably as *net neutrality*, *Internet neutrality*, *Internet freedom* or the *open Internet*. For consistency, I use the term *net neutrality* throughout this article.

Background: Defining and Enforcing Net Neutrality

Net neutrality has been a fiercely contested concept since the inception and wide adoption of the Internet in the United States. In most general terms it refers to the notion that broadband Internet service should be provided equitably, that Internet service providers (ISPs) not discriminate among content providers and end-users in order to block, slow or otherwise impede the transmission of data and/or information among them. For roughly the last decade, lawmakers, advocacy groups, entrepreneurs, telecommunications companies and legal scholars have attempted to define the core practical measures and, importantly, the federal legal framework for codifying and enforcing this ethos. While no conclusive balance of the competing interests among these communities has been struck, the FCC has produced the most comprehensive national standards and guidance to date. Since 2010, the conversation has been framed by the *Open Internet Order* [1], which sought to codify net neutrality's principles of transparency and equity through the FCC's authority to regulate interstate and international telecommunications under the Communications Act of 1934, as amended by the Telecommunications Act of 1996 [2].

ISPs have consistently challenged this authority in U.S. courts and won significant victories, curtailing the regulatory jurisdiction that the FCC had assumed from various and ambiguous sections of Title 47 of the U.S. Code. An unprecedentedly concentrated debate over whether and/or how the United States government can codify net neutrality has raged in public since the FCC proposed *Protecting and Promoting the Open Internet* [3] as a replacement to the *Open Internet Order* in May 2014. Net neutrality

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advocates charge that the replacement would enable discriminatory ISP practices, shedding new light on the long negotiation over the federal government's responsibility to steward freedom of speech, innovation and entrepreneurship, and an informed citizenry. To succinctly explain the competing perspectives and divergent futures of these essential American institutions vis-à-vis the Internet, this article summarizes the FCC's legal frameworks for enforcing net neutrality, the judicial opinions on those frameworks and the attempts to strengthen them through statutory amendment.

Determining the Role of the FCC

The Communications Act of 1934, a New Deal law that empowered the new independent federal agency to implement and enforce broadcast, telephone and other wire communications standards, initiated the FCC's regulatory authority in this arena. Given the need to update federal law and the FCC's statutory mandate to emerging telecommunications technologies like broadband Internet, congress amended the Act in 1996. This amended Act retained the FCC's historical regulatory jurisdiction over Title II common carrier data services, like telephone and broadcast communications, and Title III cable communications services, like cable television, but added ambiguous language concerning new Title I "enhanced" information services, such as broadband Internet.

Whether and how the FCC could implement and enforce regulations upon ISPs as these newly codified Title I information service providers was a question left open after legal challenges to two attempted FCC enforcement procedures. In 2010 the U.S. Court of Appeals for the District of Columbia Circuit vacated [4] an FCC order to Comcast Corporation that the latter disclose details about its blocking of certain peer-to-peer networking applications as part of its adjudication of a dispute initiated by advocacy

groups. Finding that the U.S. Code granted the FCC "express and expansive authority to regulate" Title II common carrier services and Title III cable services, but no specific "statutorily mandated responsibilities" over Title I information services, the court ruled that adjudicating a dispute between Comcast and the complainants was outside of the FCC's jurisdiction.

In 2013, however, the U.S. Supreme Court ruled [5] in the FCC's favor on the case brought against it by the cities of Arlington and San Antonio, Texas, over the commission's interpretation of enforcement procedures pertaining to satellite broadcasting. In its 6-3 ruling, the court upheld the decision of the U.S. Court of Appeals for the Fifth Circuit that the commission, like other federal agencies, had broad freedom to interpret the bounds of its regulatory jurisdiction where those bounds are left ambiguous by lack of specificity in the statutory mandate provided by Congress.

In keeping with the license effectively granted it by the Supreme Court, the FCC had by this time built its legal framework for regulatory authority over broadband Internet services from the foundation laid by Section 706 of the Telecommunications Act of 1996, which reads, in part:

> The Commission…shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans…by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

and

> [T]he Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

The term *advanced telecommunications* used in Section 706 is explicitly defined within the Code as including broadband Internet.

Operating under this perceived, congressionally mandated statutory authority, the FCC issued Report and Order 10-201, "In the Matter of Preserving the Open Internet: Broadband Industry Practices," commonly known as the *Open Internet Order*, in December 2010 [1]. The order describes the history and principles of net neutrality, extolling its norms and *de facto* rules for stewarding innovation and entrepreneurship, free speech and an informed citizenry online. It furthermore documents explicit financial incentives for ISPs to hinder these pursuits by arbitrarily blocking or degrading services, and so briefly outlined the rules, implementation and enforcement procedures that it devised to protect net neutrality under authority specifically derived from Section 706.

Shortly thereafter, the FCC exercised this authority to again protect net neutrality norms against the financial incentives of Comcast in particular. In a January 2011 memorandum opinion and order [6], the FCC approved the proposed merger of Comcast and NBC Universal with the strict provision that Comcast not discriminatorily act to slow Internet traffic.

Such wielding of regulatory authority drew new challenges, both in the courts as well as on the floors of Congress. Less than a month after the FCC released its order on the Comcast/NBC Universal merger, Rep. Greg Walden (R-OR) introduced an amendment to H.R. 1, the Disaster Relief Appropriations Act, which would prohibit the FCC from using federal funds to enforce the provisions of the *Open Internet Order* [7]. This, he described though, was only a "stopgap measure" to prevent gross regulatory overreach until the House and Senate could pass a joint resolution rejecting and effectively nullifying the order's rules. Rep. Walden's amendment and the greater appropriations bill passed the House, the bill passed the Senate, but nothing ultimately reached the president's desk by the end of the congressional term. The joint resolution of which Mr. Walden spoke passed the House in April 2011. And while it had 42 Republican co-sponsors in the Senate, Sen. Kay Bailey Hutchison's complementary bill was debated but ultimately failed to pass a procedural vote to continue its consideration in that chamber.

The most effective rebuke of the specific rules and the greater legal framework for the *Open Internet Order* came in a January 2014 decision of

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the U.S. Court of Appeals for the District of Columbia Circuit. As it had in *Comcast*, the court ruled in *Verizon v. Federal Communications Commission* [8] to vacate portions of an FCC order that it deemed fell outside its regulatory jurisdiction. This time, the court rejected the anti-blocking and antidiscrimination provisions of the *Open Internet Order* on the grounds that they limited ISPs' statutorily protected right to negotiate independent service agreements to the point that ISPs were treated as *de facto* Title II common carriers, rather than Title I information service providers.

Reaction to the court's ruling, which effectively left net neutrality without a formal federal advocate, was opportunistic on the part of ISPs and their allies and polemical on the part of net neutrality proponents. In the following month, Comcast announced a deal with Internet content provider Netflix that ensures a quality and a rate of service for the latter in exchange for an individually negotiated fee, directly violating the provisions of the now-vacated order and further, net neutrality proponents argue, proving violation of the terms of the Comcast/NBC Universal merger. In the meantime, legal scholars warned that the *Verizon* ruling essentially enabled monopolization of Internet services, which reignited interest in reclassifying broadband Internet as a utility in the model of other Title II common carrier services.

Remaining Legal Frameworks for Net Neutrality

Protecting and Promoting the Open Internet – the rules FCC devised in response to the *Verizon* ruling and subsequent outpouring of opinion in the early months of 2014 – provide a framework that it contends will protect against systemic abuse while enabling ISPs to continue negotiating independent service agreements with content providers and end-users of the kind typified by the Comcast/Netflix agreement. Accordingly, it does not propose reclassifying broadband Internet as a Title II common carrier service, though it awaited public comment until September 2014 on this and other alternative bases for rulemaking. Net neutrality advocates continue to encourage the public to comment specifically that broadband Internet be so reclassified, which would conceivably provide the FCC ample authority to impose industry-wide standards of service. However, the Commission's near-capitulation on this strategy reflects the increasingly clear position of the U.S. courts that broadband Internet is in fact a Title I enhanced information service.

Were the FCC to issue an order after September 2014 that reclassifies broadband Internet as a Title II common carrier service, it is altogether likely that the order would be challenged by ISPs and vacated by the courts, which view the distinction between the service types as a settled matter of public law. It is not, after all, the responsibility nor the privilege of federal agencies to write, amend nor repeal laws. Reclassifying broadband Internet as a Title II common carrier service under Title 47 of the U.S. Code requires that Congress pass and the President enact a new amendment to the Communications Act of 1934, one which reflects the attitude toward broadband Internet's role as a utility that was missing from the Telecommunications Act of 1996.

Both Democrats and Republicans have attempted to amend the Act. Early efforts in the House and Senate [9, 10, 11], however, sought and ultimately failed only to codify the same regulatory enforcement responsibility and capabilities of the FCC for Titles IV and V of the Act that the commission has already assumed for itself in its interpretation of Section 706 and expressed through the *Open Internet Order*. Only the Internet Freedom, Broadband Promotion, and Consumer Protection Act of 2011[12] sought to amend Title II. This bill, introduced even as Republicans in the House and Senate prepared to legislate against the provisions of the *Open Internet Order*, proposed to codify net neutrality by adding to the title a section, called "Internet Freedom and Broadband Promotion," that includes the same substantive provisions and enforcement mechanisms

described in the order. Still, the bill suffered the same fate as all of its predecessors: it was quickly referred to committee and effectively tabled, never to reach the floor for debate.

Conclusion

The Internet Freedom, Broadband Promotion, and Consumer Protection Act of 2011 describes broadband Internet as "the most important two-way communications infrastructure of our time" and "as essential to our national economy as roads and electricity." This conception is notably absent from the language currently distinguishing enhanced information services like broadband Internet from services historically treated as utilities, such as telephony, in the U.S. Code. While an open public comment period on a proposed FCC rule is an attractive opportunity for advocates of net neutrality to express their view that the FCC treat broadband Internet as such a utility, it is therefore nonetheless in the Code itself that this new reality need be expressed. Only then will net neutrality have the weight of congressionally mandated statutory authority that the FCC needs to compel ISPs and federal courts alike to abide by its principles.

Acknowledgement

I wish to thank Kristene Unsworth, Ph.D., for her critical early advice on the scope and direction of this research. ■

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