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Post-Brand X *Regulation of the Internet: A Legal Perspective on Net Neutrality*

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Overview

- What is “net neutrality”?
- Background – the statutory and regulatory framework
- FCC actions on net neutrality
- Pending net neutrality legislation
- Foreign regulator actions on net neutrality
- Policy issues
- Conclusion

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What is "net neutrality"?

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- Net neutrality is a loaded term and means different things to different people
- Proponents have defined net neutrality partially in terms of consumer freedoms, especially freedoms relating to access to content and the use of applications and devices
- Proponents also define net neutrality as including the obligation of network operators to treat all Internet traffic equally
- Opponents object to the term "net neutrality" and favor "net regulation," "net neutering," etc.

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Background

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- Under Section 202(a) of the Communications Act of 1934, as amended, providers of traditional telecommunications services in the United States may not "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . or . . . make or give any undue or unreasonable preference to any particular person, class of persons, or locality . . . ."
- Traditionally, the provision of pure network capacity was subject to common carrier regulation while the provision of value-added services was not
  - *Computer II*: "basic" vs. "enhanced" services
  - Telecommunications Act of 1996: "telecommunications" vs. "information" services
- In 1998, the FCC classified DSL service as a "telecommunications" service

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Background (continued)

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- In a 2002 *Declaratory Ruling*, the FCC found that cable modem service is not a "telecommunications service" under the Communications Act but instead is an "information service"
- The Supreme Court upheld the FCC's decision in *National Cable & Telecommunications Association v. Brand X* (2005)
- Less than two months after the *Brand X* decision, the FCC released a *Report and Order* in which it found that DSL service also is not a "telecommunications service"
- This decision means that the non-discrimination provision of Section 202(a) does not apply to providers of broadband Internet access
- FCC has authority to regulate information services under Title I of the Act
- Current telecommunications law does not necessarily require net neutrality, but antitrust laws may provide some *ex post* remedies

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FCC actions on net neutrality

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- In March 2005, the FCC entered into a consent decree with Madison River Communications concerning that rural carrier's alleged blocking of ports used for Voice over Internet Protocol applications
  - Few details about the alleged port blocking are publicly available
  - The consent decree resulted in a "voluntary" payment of US $15,000 to settle the allegations with no admission of guilt on the part of Madison River
  - The decision creates no binding precedent
- The *Madison River* decision is widely cited as an example of why net neutrality regulation is needed

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FCC actions on net neutrality (continued)

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- The same day that it reclassified DSL as an information service, the FCC released a non-binding *Policy Statement* that was the first official declaration of net neutrality principles
- In the *Policy Statement*, the FCC articulated the following set of consumer freedoms:
  - Consumers are entitled to access the lawful Internet content of their choice
  - Consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement
  - Consumers are entitled to connect their choice of legal devices that do not harm the network
  - Consumers are entitled to competition among network providers, application and service providers, and content providers

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FCC actions on net neutrality (continued)

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- On December 29, 2006, the FCC announced that it had approved the merger of AT&T Inc. and BellSouth Corporation into the new AT&T
- In order to win approval by the two Democratic commissioners of the merger, the new AT&T made certain "voluntary" commitments concerning net neutrality, including:
  - AT&T will conduct business in accordance with the FCC's *Policy Statement* on net neutrality for a period of 30 months following the closing of the merger
  - AT&T will maintain a neutral network and neutral routing in its wireline broadband Internet access, meaning that it will not provide or sell to Internet, content, application, or service providers (including AT&T affiliates) any service that privileges, degrades, or prioritizes any packet transmitted over this network based on its source, ownership, or destination
  - The second commitment above will sunset on the earlier of two years from the date on which the merger closes, or the effective date of any legislation that addresses the privileging, degradation, or prioritization of Internet traffic
  - Obligations apply only from customer premises to IEP nearest customer

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Pending net neutrality legislation

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- In January 2007, Senators Dorgan (D) and Snowe (R) jointly introduced the "Internet Freedom Preservation Act"
- The bill is essentially identical to legislation introduced last session
- If this bill were to become law, broadband service providers would be subject to the following requirements relating to "customer freedoms":
  - Service providers may not block, interfere with, discriminate against, impair or degrade the ability of any person to use a broadband service to access, use, send, post, receive, or offer any lawful content, application, or service made available via the Internet
  - They also may not prevent or obstruct a user from attaching or using any device to the network of such broadband service provider, only if such service does not physically damage or substantially degrade the use of such network by other subscribers
  - Finally, service providers must provide and make available to each user information about such user's access to the Internet, and the speed, nature, and limitation of such user's broadband service

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Pending net neutrality legislation (continued) Paul Hastings

- Broadband service providers would also be required to enable any content, application, or service made available via the Internet to be offered, provided, or posted on a basis that—
  - is reasonable and nondiscriminatory, including with respect to quality of service, access, speed, and bandwidth
  - is at least equivalent to the access, speed, quality of service, and bandwidth that such broadband service provider offers to affiliated content, applications, or services made available via the public Internet into the network of such broadband service provider, and
  - Does not impose a charge on the basis of the type of content, applications, or services made available via the Internet into the network of such broadband service provider

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Pending net neutrality legislation (continued) Paul Hastings

- Broadband service providers would be required to only prioritize content, applications, or services accessed by a user that is made available via the Internet within the network of such broadband service provider based on the type of content, applications, or services and the level of service purchased by the user, without charge for such prioritizations
- Broadband service providers would be prohibited from installing or utilizing network features, functions, or capabilities that impede or hinder compliance with its net neutrality obligations
- The legislation is likely to pass the Senate Commerce Committee, but proponents do not appear to have enough votes (60) needed to overcome a likely filibuster
- Companion legislation expected to be introduced in the House
- May pass House due to procedural differences, but unlikely to become law

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Foreign regulator actions on net neutrality

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- In October 2005, the Japanese Ministry of Internal Affairs and Communications ("MIC") established a Study Group on a Framework for Competition Rules to Address the Transition to IP-Based Networks
- The study group released a report in September 2006, which addresses net neutrality, among other issues
- The report cites the following key principles in ensuring that the network is neutral from an end-user perspective:
  - IP-based networks should be accessible to users and easy to use, allowing ready access to content and application layers
  - IP-based networks should be accessible and available to any terminal that meets the relevant technical standards, and should support terminal-to-terminal (or "end-to-end") telecommunications; and
  - Users should be provided with equality of access to telecommunications and platform layers at a reasonable price
- Note that the Study Group defines the term "users" as including not only end users, but also content providers and other related companies that conduct business using IP-based networks
- Canada and other countries also are studying net neutrality

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Policy issues

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- To what extent is it desirable for the companies also controlling the network to become vertically integrated in such a way as to give them control over content?
  - “Where you stand depends on where you sit”
  - If the markets for content and broadband Internet access are both competitive, vertical integration theoretically should not pose a threat to competition
  - If one views the market as less than fully competitive, the threat could be significant
- How much flexibility should carriers have in developing new pricing tools to recover their investment?
  - Statements by incumbent carriers that eBay, Google, etc. are “stealing” bandwidth are neither helpful to an intelligent debate nor particularly accurate
  - However, it is not clear that access tiering would result in higher charges to end users—it depends on whether the Internet access market is competitive
- To what extent should free speech concerns be a factor?
- Should a different analysis apply to rural and low-income areas?

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Conclusion

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- The debate on net neutrality, particularly in the United States, has become so heated that intelligent discussions on the issue are rare
- It remains to be seen whether a century-old statutory framework can (or should) be adapted to cover the Internet, or whether a new approach is warranted
- Before any action is taken, policymakers should move beyond slogans and take a close look at the perceived threats to competition and the extent to which *ex ante* regulation is warranted
- As the U.S. Congress and foreign regulators address the issue, changes could be in store for both carriers and content providers

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Conclusion

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Questions??

Thank you!

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