



It's Back: Status and Forecast on Policy and Regulation of the Open Internet or Net Neutrality

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Net Neutrality/Open Internet

- The First Amendment of the Internet.
- principle of treating all internet connections equally.
- With no net neutrality, internet service providers (ISPs) can discriminate against websites or services and regulate access.
- ISPs can charge for speeding up services, slowing down competitors, or blocking access.
- Net neutrality is the principle that companies that connect us to the Internet cannot interfere.

Emily Green (2020, June 15). Net neutrality pros and cons. <https://nordvpn.com/blog/net-neutrality-pros-and-cons/>



Net Neutrality Pros

- Level playing field. No one receives special treatment.
- Freedom of expression, no blocking or censoring data.
- No exclusion, available to all.
- No additional costs for content or faster streaming.



Net Neutrality Cons

- No one is paying for the data.
- Illicit content is widely available.
- No new infrastructure, no one pays for data consumed.
- Tiresome regulations, FCC must monitor the ISPs' compliance.



History

- 1996—Telecommunications Act—bipartisan Congress opts that internet remain “unfettered by Federal or State regulation”. FCC has authority to pre-empt state law; broadband is “interstate” in nature.
- 2002—FCC categorizes broadband internet as “information service”, free from public utility regulation.
- 2005—FCC’s first attempt to enforce NN in Madison River; FCC takes greater regulatory control
- 2005—U.S. Supreme Ct (Brand X) upholds “information service” classification
- 2005—Comcast begins blocking peer-to-peer networking; denies responsibility; later admits interference of peer-to-peer connections

David Kravets, Comcast Discloses Throttling Practices--BitTorrent Targeted, WIRED (Sept. 19, 2008), <https://www.wired.com/2008/09/comcast-disclos-2/>.



History

- 2006—Comcast challenges Bush-era FCC effort to penalize throttling
- 2008—FCC enjoins peer-to-peer practice in an order, finds Comcast’s “selective interference” dampens “development of technologies” “that maximize user control over information received and interfering with “running applications” that they choose, versus those selected by Comcast.
- 2010—FCC passes Open Internet Order—a simple net neutrality order prohibiting blocking, throttling and unreasonable discrimination.
- 2010—Verizon sues over first Open Internet Order. Both IPS’s win.
 - Ct. of Appeals (D.C.) invalidates FCC order as FCC not empowered to regulate Comcast under Title I ancillary authority
- After D.C. Circuit decision, FCC reclassifies broadband as a “telecommunications service”

Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010); Verizon v. F.C.C., No. 11-1355, 2014 WL 113946, at 30 (D.C. Cir. Jan. 14, 2014).

CHAIRMAN JULIUS GENACHOWSKI, FED. COMM’NS COMM’N, THE THIRD WAY: A NARROWLY TAILORED BROADBAND FRAMEWORK 4 (May 6, 2010), <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html>.



History

- 2014—decision against Open Internet Order of 2010. FCC violated statute by regulating broadband as “common carriers”
- 2015—FCC’s Open Internet Order placing freedom of internet constraints; reclassifies broadband as “telecommunications service” under Title II
- 2016, 2017—D.C. Circuit upholds FCC’s authority; Sup Ct denies certiorari
- 2017, effect 2018—FCC repeals net neutrality; adopts limited regulation agenda; despite public outcry
- 2018—SB 822—California passes net neutrality law—prohibit blocking, prioritizing and zero-rating—restores most neutrality protections. NY, Montana, Vermont took slightly different legislative approach.

2017 CA S.B. 460; 39 FCC Order, WC Docket No. 17-108 (Aug. 11, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DA-17-761A1.pdf



History

- 2018—Within an hour of SB 822 being signed into law, Justice Dept. sues Calif. to block new law

Makena Kelly, *Broadband industry groups sue California over net neutrality bill*, THE VERGE (Oct. 3, 2018), <https://www.theverge.com/2018/10/3/17933804/net-neutrality-california-bill-broadband-isp-sb822>.

Tony Romm and Brian Fung, *The Trump administration is suing California to quash its new net neutrality law*, Washington Post (Sep. 30, 2018), <https://www.washingtonpost.com/technology/2018/10/01/trump-administration-is-suing-california-quash-its-new-net-neutrality-law/>

See Kelly, *supra* note.

Fred Campbell, *State Net Neutrality Regulations Are An Exercise In Futility*, FORBES (Aug. 13, 2018) <https://www.forbes.com/sites/fredcampbell/2018/08/13/state-net-neutrality-regulations-are-an-exercise-in-futility/#485669684742>



History

- 2018—34 states introduced NN bills; 5 enacted legislation by Jan. 2019 (CA, NJ, OR, VT, WA)
- 2019—(*Mozilla vs. FCC*) Ct. of Appeals (D.C.) upholds federal elimination of NN under FCC's 2018 Order in part, vacated it in part, and remanded it in part.
 - Vacates portion of repeals order—concludes that since FCC has no power to control broadband companies as telecommunications companies (& charging fees), it also has no authority to prevent states from protecting its own citizens/economy.
- 2021—Dist. Judge (Calif. Eastern Dist) rules in favor of Calif.
- 2021—Justice Dept. withdraws from case

Mozilla Corp., et al. v. FCC and United States of America. 940 F.3d 1 (D.C. Cir. 2019)



Net Neutrality, One More Time

- July 9, 2021, President Joe Biden signs an executive order that called for FCC to adopt Net Neutrality rules similar to those during the Obama Administration.
- Among reforms would be an expansion of broadband connectivity, supporting 5G execution, and strengthen various consumer protections.
- But, NN in U.S. faces delays, potential obstructions.



Partisanship

- 2-2 partisan deadlock. Less contentious than Gigi Sohn, Rosenworcel was confirmed by the Senate on Dec. 7th, 2021.
- Democrats would only gain a majority position if a fifth nominee, Sohn or another, was approved.
 - Republicans have argued Sohn would show bias against conservative content given her past criticisms of Fox News.
- One hurdle—the unreliability of Sens. Manchin and Sinema. In past Sinema also joined Republicans over FCC matters including net neutrality.



Under Pai

- For the past several years, FCC operated under FCC Chairman Ajit Pai who carried out a broad regulation roll-back.
- Opponents warned Pai was destroying the internet
- However, marginalization of the U.S. population is equally bothersome. Biden wants to improve rural internet access as well as access for poorer Americans.
- Pai's moves were perpetuated by pro-market philosophies embedded in today's pro-business climate. Hence market mentality prevails.



Under Pai

- FCC Rolled back net neutrality rules on December 13th, 2017; took effect June 11th, 2018.
- Industry also influenced FCC to state it never had the authority to create the rules in the first place.

Cecilia Kang. (Dec. 16, 2017). FCC Repeals Net Neutrality Rules. New York Times. <https://www.nytimes.com/2017/12/14/technology/>; Nicolás Rivero. (2021, Feb. 25). California's net neutrality law is broadband' worst nightmare. QC.com. <https://qz.com/1976944/california-put-the-us-back-on-track-for-nationwide-net-neutrality/>



Under Pai

- Argued repeal was good for consumers and would fuel innovation.
- As a “telecommunications service” restored Federal Trade Commission’s oversight over internet services.
- Some 24 state attorney generals sued the FCC over its new net neutrality rules.



Net Neutrality at the State-level

- Various states responded by imposing neutrality rules at the local level.
- SB 822: California enacts strictest state NN law.
- U.S. District Court, California, decision Feb. 2021 allowed Calif. to enforce its own net neutrality rules.

Stephanie Weiner and Austin Bonner (2018, Oct. 2). HWG Client Advisory: California Enacts the Nation's Strictest Net Neutrality Law, Defying the FCC. Washington: Harris, Wiltshire & Grannis . <https://www.hwglaw.com/hwg-client-advisory-california-enacts-the-nations-strictest-net-neutrality-law-defying-the-fcc/>

California Internet Consumer Protection and Net Neutrality Act of 2018 .



Net Neutrality

- The Biden FCC will very likely enact an Open Internet Order, similar to that during the Obama Administration
- ISPs such as Comcast, Verizon, AT&T will undoubtedly oppose
- We will be back to the same situation we saw after 2015
- Uncertainty. Is this any way to operate the internet?

(December 21, 2021 Tuesday). Is Net Neutrality Coming Back? Biden Waits On Confirmation Of Last FCC Commissioner. Newstex Blogs International Business Times News. <https://advance-lexis-com.ezproxy.indstate.edu/api/document?collection=news&id=urn:contentItem:64BW-K171-JCMN-Y2KM-00000-00&context=1516831>.



Net Neutrality Conclusions

- Research shows that most Americans as well as many in Congress, across both parties, favor net neutrality
- Partisan politics at White House, FCC and Congress leads to rollercoaster of actions every 4-8 years
- One solution may be to r-draft the 1996 Telecommunications Act for lucidity and stability in classifying internet services. FCC has interpreted these as both information and telecommunication services. Both appear reasonable. (Grainger, 2020)

Katherine Grainger, Note: Net Neutrality: A Stated Approach, 71 Hastings L.J. 475, 477 (2020).



Net Neutrality Conclusions

- State net neutrality solves the problem, in part, but may lead to a patchwork of standards & confusion. Some argue this exists anyway at international level and California in fact is larger than many countries. Nonetheless, difficult to implement.
- Within present milieu, state net neutrality laws may be the best solution right now. California may serve as the model. A more unified and permanent federal solution (Congressional Legislation) may be the ideal overall solution. How likely is this?



Net Neutrality



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