

A Legal Perspective on “Net Neutrality”: Existing Remedies and Lack of “Ripeness” Makes Regulation Perilous

by Christopher Wolf

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ABSTRACT

The calls for Regulated “Net Neutrality” are supported only by abstract and hypothetical fears that in judicial parlance would be called “unripe.” Current legal remedies already exist for discriminatory and unfair conduct, should it occur. Creating a new regulatory regime now – shifting the decision-making on how the Internet will evolve from the marketplace to government regulators – is ill-advised, especially given the historically unsuccessful Congressional attempts to use the law as a “blunt instrument” to regulate parts of the Internet.

INTRODUCTION AND BACKGROUND

Both Houses of Congress are considering proposals to have the federal government begin regulating the way competitive broadband providers build out, manage and charge for their networks. Proponents of such legislation have used the term “net neutrality” to describe this concept. In fact, the proposals are best described as calls for *regulated* “net neutrality,” involving broad new federal powers to make decisions on and administer the further build-out and management of the Internet infrastructure and with federal court involvement.

The FCC has rejected calls for regulated net neutrality, while properly recognizing the need for Internet openness. In August 2005, the Federal Communications Commission (“FCC”) adopted a policy statement outlining principles to both encourage broadband deployment and preserve and promote the openness on the Internet:

- (1) consumers are entitled to access the lawful Internet content of their choice;
- (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement;
- (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and
- (4) consumers are entitled to competition among network providers, application and service providers, and content providers.¹

When the policy statement was adopted, in lieu of a new regulatory scheme, FCC Chairman Martin explained:

¹ http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf.

Cable and telephone companies have led the way in bringing broadband to millions of Americans. The evidence today is that their internet access consumers have the ability to reach any internet content. Indeed, cable and telephone companies' practices already track well the internet principles we endorse today. I remain confident that the marketplace will continue to ensure that these principles are maintained. I also am confident, therefore, that regulation is not, nor will be, required.²

Importantly, the FCC found no evidence to support increased regulation. Nothing has changed in the few intervening months, except for the intensity of the calls for regulations based solely on unfounded fears.

What is "Net Neutrality"?

There is no established definition for the concept of "net neutrality." In general, however, proposals before Congress would grant the FCC and the courts regulatory and adjudicatory power over a wide range of issues relating to the construction, management and delivery of high-speed Internet services. Such government control over the evolution of the Internet is unprecedented. Indeed, historically, the government's approach has largely been "hands off," allowing competitive forces in the marketplace to create a robust and rapidly evolving Internet infrastructure. Under the current paradigm, consumers have more options for faster connectivity at lower prices than ever before.

What is sparking the push for government regulation of the Internet infrastructure are discussions by broadband providers to implement new and different ways to pay for the roll-out of advanced services. One model has Internet content and e-commerce companies, whose services take up significant broadband capacity, paying for what they use. The concept is similar to large tractor trailers on Interstate highways paying more in taxes for road use because of their greater use of the resource. Some large online companies are balking at this idea and are throwing their support behind "net neutrality" regulations. They favor shifting the burden away from corporations and onto the end user for the build-out of advanced networks while maintaining their respective market dominance. "Net neutrality" regulation

- 2 *Id.*
- 3 Even the most ardent of proponents for regulated "net neutrality" would concede that broadband providers have been free for the better part of a year, if not longer, to discriminate in content made available over the Internet and/or to degrade service if deemed competitively advantageous to do so. Yet, there is no evidence of any such harmful conduct. Moreover, 47 U.S.C. § 230 has for ten years allowed a form of content blocking (of speech deemed to be tortious) and there has been no reported abuse by broadband providers.
- 4 See SaveTheInternet.com, f.a.q. "Isn't the threat to Net Neutrality just hypothetical?", <http://www.savetheinternet.com/=faq>.
- 5 See, e.g., Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. TELECOMM. & HIGH TECH. L. 23 (2004); Bruce Owen and Gregory Rosston, *Local Broadband Access: Primum Non Nocere or Primum Processi? A Property Rights Approach*, Stanford Institute for Economic Policy Research No. 02-37 (July 2003), available at <http://siepr.stanford.edu/paspers/pdf/02-37.pdf>.
- 6 *Reno v. ACLU*, 521 U.S. 844 (1997).

will shackle broadband providers' ability to experiment with new cost-shifting models in favor of consumers, and new ways to finance the speedy build-out of the next generation of Internet services.

No Problem Exists nor is Threatened

Unlike most legislative and regulatory proposals, there is no current problem with network services that requires legislative action. "Net Neutrality" literally is a solution looking for a problem. The call for regulation is based solely on hypothetical harms, and exaggerated fears.³

Every major broadband provider subscribes to the FCC's principles of non-discrimination and non-degradation, meaning that no Internet content ever will be blocked and no Internet access ever will be degraded for some self-interested competitive reason.

Significantly, the major proponent of "neutrality" regulations tacitly acknowledges that its concern for U.S. online users is based almost solely on non-existent problems.⁴ It cites four specific examples of "censorship." Yet two of the four happened in Canada, not the U.S. A third involved a trademark dispute involving one organization's attempt to promote itself by using another's trademarked name.

While the fourth example did involve a 2004 attempt by a small U.S. broadband provider to degrade the service of a non-affiliated competitor, what is completely ignored is that the F.C.C. acted immediately to stop this practice. Not only did the FCC effectively protect consumers, but a clear warning shot went out to broadband providers that similar actions would be treated severely. Since 2004, not a broadband other provider has attempted anything similar.

Thus, from a policy perspective, there is no actual or threatened problem to be addressed legislatively. And most agree that a new legal regime to deal with speculative and exaggerated problems is bad government. This is especially the case when it comes to the Internet, whose success has, to a very significant degree, been the result of *un*-regulation. Moreover, given the difficulties in regulating the Internet infrastructure, turning over the process to the government,

and by extension private litigators, inevitably will result in far more harm than any perceived good.

The many policy reasons against this legislation have been set forth by economists, academics, and consumer advocates.⁵ This paper provides a legal perspective on the concept of regulated “net neutrality.”

ANALYSIS

The Law is a Blunt Instrument

Regulation of the Internet would be an exceedingly difficult task. As Congress well knows, crafting narrowly tailored laws is immensely difficult. The adverse unintended consequences of legislating in this area is an important consideration when evaluating the calls for regulation.

When Congress attempted to broadly censor the Internet with the Communications Decency Act, 47 U.S.C. §§ 223 *et seq.*, the Supreme Court struck down that law as violative of the First Amendment.⁶ The Court found that the “unintended consequences” of legal regulation in the name of protecting children – the restrictions on adults having access to perfectly legal content – was too great a price to pay. Similarly, the high court invalidated as overly broad the Child Online Protection Act, 47 U.S.C. § 231 in *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (remanded to determine whether technological filtering is a less restrictive means of protecting children). Legal regulation of the Internet, even for the noblest of purposes – such as shielding children from indecent materials – has proven to be an immensely difficult challenge.

Even when there is an actual harm that exists, for which a legal remedy seems desirable, the Supreme Court has instructed us that the law is a blunt instrument, to be carefully used, if at all.

From a legal perspective, the pending federal legislation is both unnecessary and potentially harmful. The most prudent course is to promote broadband infrastructure development and innovation by encouraging network diversity, including enhanced services, and allow proven existing legal frameworks to address any unlawful anticompetitive practices, if they should ever arise. A premature rush to legislate may lead to damaging unintended consequences.

Just as Courts Avoid Resolving Hypothetical Conflicts, So Should Congress

Currently, there is no demonstrated need for legislation mandating a strict Internet service regime. The concerns propounded by advocates of federal regulation “net neutrality” – blocked end-user access, content censorship – have not occurred. In fact, these predicted behaviors are counter intuitive given the wide array of Internet service providers in the market. If one company were to engage in such activities it surely would lose business to another service provider offering unaltered services and content.

Courts regularly are confronted with theoretical conflicts that have not yet occurred. As a matter of prudence, the Judicial Branch will not rule on such cases as they are not “ripe” for review. As explained by the Supreme Court, “[a] claim is not ripe for adjudication if it rests upon *contingent future events that may not occur as anticipated, or indeed may not occur at all.*”⁷

One reason courts refrain from addressing speculative harm is that it is difficult, if not impossible, to fashion appropriate remedies in the abstract, without harming the parties and the public interest. In lawmaking, too, there is a substantial risk of harming the companies making the investment in and responsible for the Internet infrastructure, and of harming the public interest in the rapid build-out of the next-generation Internet. Without knowing what constitutes a bulls-eye, it is difficult if not impossible to aim relief. The courts know this to be the case when they are presented with hypotheticals and, in the case of regulated “net neutrality,” Congress should exercise similar restraint.

Legal Remedies for the Speculative Harms Already Exist

If the hypothetical fears of those calling for regulated “net neutrality” actually do come to pass in some fashion, there are legal remedies already available under *existing* laws and legal doctrine.

Unfair competition law, including antitrust law, as well as common law tort theories all are available to those who believe the business arrangements of broadband providers are acting to restrict content or impair delivery unfairly. Moreover, even some pushing for regulated net neutrality regulations maintain that Title I of the Communications Act of 1934 gives the FCC power to take regulatory action if presented with unfair business tactics by broadband providers.

7 *Texas v. United States*, 523 U.S. 296 (1998) (citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985))(emphasis supplied).

8 *United States v. Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000), available at <http://www.usdoj.gov/atr/cases/f4400/4469.htm>.

9 15 U.S.C. § 45.

State common law business torts available to aggrieved parties include fraudulent misrepresentation, interference with contractual relations, and unfair competition.

The efficacy of the federal antitrust laws, particularly the Sherman Act, to halt anticompetitive behavior and protect consumers was demonstrated in the successful prosecution of Microsoft Corporation.⁸ In this well-publicized case, Microsoft was found to have unlawfully maintained its monopoly by using anticompetitive means. In addition, Microsoft violated the Sherman Act by using impermissible tying methods to use its market power from the Windows platform to force consumers to acquire a separate product, Internet Explorer. Microsoft ultimately settled with the government, engaging in significant corrective action and submitting to years of supervision, including a recent extension of this supervision into 2009. **The Microsoft precedent allows putative plaintiffs with a ready tool to act against broadband providers believed to be abusing a dominant market position. This specter of a similar antitrust action serves as a significant deterrent against, as well as remedy for, any practices that will harm consumers by Internet service providers seeking to offer diverse broadband and network services.**

Another avenue for meaningful control of anticompetitive behavior is through the Federal Trade Commission ("FTC"). The FTC may prosecute "unfair methods of competition" and "unfair or deceptive acts or practices."⁹ The Supreme Court has interpreted the FTC's mandate widely, as "broad power. . .with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."¹⁰ The FTC has rulemaking authority with respect to antitrust practices and,¹¹ in practice, has been an eager and able regulator. The FTC has proven particularly adept at the prosecution of civil antitrust cases in emerging industries and the study and advancement of antitrust analysis.¹² This existing regulatory body already provides consumers meaningful protection from the practices of which "net neutrality" advocates worry.¹³ An added rigid regulatory regime will only cost broadband developers time and resources that could be focused on improving services.

Finally, as noted, even some proponents of regulated "net neutrality" have asserted that the FCC retains jurisdiction to regulate broadband under Title I of the Communications Act

¹⁰ *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966).

¹¹ 15 U.S.C. § 57a.

¹² James B. Speta, *Modeling an Antitrust Regulator for Telecoms: Theory and Practice* at 24 (Preliminary Draft January 8, 2006) available at www.cerna.ensmp.fr/cerna_regulation/Documents/Antitrust2006/Speta.pdf.

¹³ See also CAL. BUS. & PROF. CODE § 17200 which prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." California courts have applied this statute broadly and it provides meaningful protection to consumers.

¹⁴ 47 U.S.C. § 151 *et seq.*

¹⁵ *Nat'l Cable & Telecomms. Assn. v. Brand X Internet Services*, 545 U.S. 8 (2005); see generally *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (granting the FCC "ancillary jurisdiction" over matters "reasonably related to its core jurisdiction").

of 1934 (as amended).¹⁴ Although broadband is classified as an "information service provider," thus not subject to the FCC's Title II jurisdiction, there is an argument that "the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications."¹⁵ This jurisdiction could allow the FCC to intervene if any broadband service provider engages in a practice that is deemed harmful to consumers.

In March 2005, for example, the FCC stepped in when Madison River Communications blocked Vonage's VoIP service to its local phone customers. This unique example of a broadband provider abusing its power shows that the FCC is not prepared to abdicate its role as a consumer protection and competition watchdog.

Harmful Unintended Consequences that May Arise from Federal Regulation of the Internet

The regulated "net neutrality" proposals invite harmful unintended consequences. It is impossible to predict in the abstract what specific problems need addressing. This is the "absence of a bull's-eye" phenomenon. Therefore, any eventual laws will by necessity be broad in concept. "Non-discrimination in content" sounds attractive but may precipitate regulatory and judicial consideration of wholly unmeritorious complaints. It also may discourage innovative new services.

Among the innovative new services being discussed are:

- Video monitoring services that allow parents to securely and reliably monitor remote children and elderly parents via a Web cam over the Internet;
- Telemedicine services that allow patients to remain at home with reliable monitoring of their medical conditions by remote medical personnel; and
- On-demand HDTV programming, delivered at lightning speeds.

Such services may never be offered, if providers are deterred by fears of claims of “discrimination” when they partner with content or service providers.

And it is not hard to imagine frivolous lawsuits over alleged “discrimination” in content:

- Most broadband providers offer filtering software to ensure kid-friendly surfing. Given the legal difficulties with writing Internet-related laws involving content, it seems likely that federal “net neutrality” regulations would allow a purveyor of adult content to sue broadband providers for equal access.
- The Website company Myspace.com, that recently took down 20,000 offensive and hate-filled sites, could be sued. In the recent take-downs, the vast majority of site operators were committing no crime but the content was deemed offensive. Myspace.com has been applauded for the self-regulation done in an effort to create a safer Internet. Yet under the federal “neutrality” regulations, it is quite possible that a litigant could sue if Myspace.com were in a partnership with a broadband provider.
- A company that uses malicious software to plant pop-up ads on an unsuspecting consumer’s computer may conceivably bring an action if an Internet service provider “discriminates” against it by filtering or blocking those programs.

Thus, the law will be available to self-interested competitors and others – as never before – to slow down innovative Internet competitors with legal challenges. And regardless of the outcome, it is a certainty that neutrality regulations will result in broadband providers (and therefore consumers) paying for significant new legal expenses for compliance, lobbying and litigation.

Broad regulation also means, for the first time, we will have the government and private litigators setting the rules on caching, collocation, packet prioritization and reassembly and other aspects of managing Internet traffic. Even peer-to-peer agreements would be subject to review and litigation. These are incredibly complex technical decisions made in managing networks that industry heretofore always has performed – and performed well – without government interference.

Will heavy content providers who use the services of Akamai and others to cache content geographically for faster delivery to parts of the country be subject to lawsuits? Who knows?

And not knowing is part of the problem of unintended consequences.

Congress is being urged by those clamoring for regulated “net neutrality” to embark upon a new era of regulation which may indeed result in “regulation through litigation” given the broad, general mandates of the legislation and the availability of administrative and federal court litigation. For the first time in the history of the Internet, innovation and creativity may first have to be put on trial rather than put at the disposal of consumers.

CONCLUSION

As proponents of legislation use the term “net neutrality”, it refers to a rigid regulatory regime that ultimately could allow the federal government (and self-interested litigation parties) to get in the way of new technologies and new services on the Internet. Current proposals could prevent broadband providers from offering enhanced levels of service for specialized applications such as telemedicine, or to offer their own branded or co-branded products or services – arrangements that will help pay for the build-out of the next generation of Internet “pipes.” This is especially the case in the area of “network neutrality” where it is impossible to draft legislation dealing with such a technologically complex medium with specificity and without having adverse unintended effects.

There is no current demonstrated need for the proposed legislation and the precipitating fears that networks someday may be degraded or that there will be discrimination against content on the Internet are hypothetical at best. Consumers will be best served if Congress respects the judgment of the FCC not to promulgate rigid rules governing the Internet and allow the proven existing legal framework to protect consumers. The Internet should be allowed to grow and thrive based on the very principles of network diversity under which this significant medium has developed up until now.