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The Continuing Battle Over Net Neutrality

By Mike Crawford*

History

One of the most debated issues throughout the last twenty years is the issue over net neutrality and how the Internet should be regulated. The term net neutrality was first used in 2003 by University of Virginia Professor Tim Wu in his paper entitled, *Network Neutrality, Broadband Discrimination*.¹ Wu argued that “[g]overnment regulation in such contexts invariably tries to help ensure that the short-term interests of the owner do not prevent the best products or applications becoming available to end-users.”² Following the paper’s publication, the debate of net neutrality ensued.

The crux of the debate is centered around public-sector access to the benefits of the Internet and private sector profits. In 2005, the Federal Communications Commission (FCC) released a policy promising to incorporate the following four principles with respect to ongoing policy making: (1) Consumers are entitled to access 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.³

In 2007, Comcast and Cox Communications were sued for using secret technology that limited peer-to-peer applications.⁴ Peer-to-peer applications (P2P) are described as computer systems that are connected to each other through the Internet, which allows files to be directly shared

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¹ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. on Telecomm. & High Tech. L. 141 (2003).

² *Id.* at 142.

³ Tyler Bettilyon, *Network Neutrality: A History of Common Carrier Laws 1884-2018*, MEDIUM, Dec. 12, 2017, <https://medium.com/@TebbaVonMathenstien/network-neutrality-a-history-of-common-carrier-laws-1884-2018-2b592f22ed2e>.

⁴ Ryan Singel, *Comcast Sued Over Bittorrent Blocking-Updated*, WIRED, Nov. 11, 2007, <https://www.wired.com/2007/11/comcast-sued-ov/>.

without the use of a central server.⁵ Popular P2P applications include BitTorrent, Skype, Adobe, and Limewire. The FCC attempted to stop Comcast and Cox Communications to halt this practice. However, Comcast appealed and won the decision in 2010.⁶ In December 2010, the FCC passed a series of new regulations, but these regulations were seen as “weak and full of loopholes.”⁷ The FCC attempted to “compel broadband providers to treat all Internet traffic the same regardless of source.”⁸

In 2011, Verizon Wireless sued the FCC arguing that the FCC did not have the authority to enforce the new 2010 rules.⁹ The D.C. Court of Appeals ruled that the FCC did not have the authority to impose the order because the FCC had classified broadband providers under Title I of the Communications Act of 1934.¹⁰ This classification was significant because if broadband providers are under Title I of the Communications Act of 1934, they are exempt from Title II’s common carrier requirements.¹¹ Common carriers are required “to serve upon reasonable request without unreasonable discrimination at a just and reasonable price and with adequate care.”¹² Common carriers must (1) serve everyone who wants to use the service and (2) charge everyone the same price for the same service.¹³

In response to public outcry, the FCC passed the 2015 Open Internet Order in which “it reclassified broadband service as a telecommunications service, subject to common carrier regulation under Title II of the Communications Act.”¹⁴ The D.C. Court of Appeals fully upheld the new Open Internet rules, backing the principle of net neutrality.

⁵ Per Christensson, TechTerms (2006), <https://techterms.com/definition/p2p>.

⁶ Tyler Bettilyon, *Network Neutrality: A History of Common Carrier Laws 1884-2018*, MEDIUM, Dec. 12, 2017, <https://medium.com/@TebbaVonMathenstien/network-neutrality-a-history-of-common-carrier-laws-1884-2018-2b592f22ed2e>.

⁷ *Id.*

⁸ *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

⁹ *Id.*

¹⁰ *Id.* at 631.

¹¹ *Id.*

¹² David Weinberger, *Getting Straight About Common Carriers and Title II*, TING, Oct. 11, 2017, <https://ting.com/blog/getting-straight-about-common-carriers-and-title-ii/>.

¹³ *Id.*

¹⁴ *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016); *See, Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015).

However, in December of 2017, the FCC voted to repeal the Open Internet Order with the Restoring Internet Freedom Order. The Restoring Internet Freedom Order was subsequently approved in 2018. Specifically, the approved proposal allows internet providers to block or slow down access to online content and providers to prioritize their content.¹⁵

Following the approval, states have decided to act themselves. First, twenty states, including California, filed a brief contending that the 2018 Restoring Internet Freedom Order should be vacated as unlawful.¹⁶ In addition, thirty state legislatures have introduced bills requiring Internet Service Providers (ISPs) to maintain net neutrality.¹⁷ California, Washington, Vermont, and Oregon have passed laws, and many more states will attempt to follow suit in 2019.¹⁸

California Law

Recently, on September 30, 2018, California's governor approved and signed California SB-822. This bill "establishes net neutrality requirements by prohibiting internet services providers from taking certain actions that interfere with consumers' ability to lawfully access internet content, including intentionally blocking content, speeding up or slowing down traffic, engaging in paid-prioritization, requiring consideration from edge providers for access to an ISP's end users, and selectively zero-rating certain content."¹⁹

¹⁵ See, *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018); See, Seth Fiegerman, *Trump's FCC votes to repeal net neutrality*, CNN BUSINESS, Dec. 14, 2017, <https://money.cnn.com/2017/12/14/technology/fcc-net-neutrality-vote/index.html?iid=EL>; Paul Elias, *DOJ's lawsuit may delay California's new net neutrality law*, FOX BUSINESS, <https://www.foxbusiness.com/features/dojs-lawsuit-may-delay-californias-new-net-neutrality-law>.

¹⁶ Brief of Petitioner, *Mozilla v. FCC*, No. 18-1051 (D.C. Cir. August 27, 2018).

¹⁷ Ernesto Falcon, *California's Net Neutrality Law: What's Happened, What's Next*, EFF, Oct. 1, 2018, <https://www.eff.org/deeplinks/2018/10/californias-net-neutrality-law-whats-happened-whats-next>.

¹⁸ *Id.*

¹⁹ S.B. 822, 2017-2018 Leg., Reg Sess. (Ca. 2018).

California holds significant nationwide influence over the issue of net neutrality. For instance, California is the largest economy in the United States and the home of Silicon Valley. California senator Scott Wiener, who co-authored the recent bill, stated that “what California does definitely impact the national conversation.” He added that “a free and open internet is a cornerstone of 21st century life.”²⁰ Therefore, the California law would be seen as a blueprint for other states’ net neutrality laws.²¹

Trump Administration Response

In the hours following the signing of California’s bill, the Trump administration filed a lawsuit seeking preliminary injunction. The Department of Justice (DOJ) says the California law is “preempted by federal law and therefore violates the Supremacy Clause of the United States Constitution.”²² The DOJ’s argument centers around the federal government’s right to regulate interstate commerce. In their complaint, the DOJ states that if state and local jurisdictions were allowed to create their own laws with respect to net neutrality, ISPs generally would not be able to comply with the purposes and objectives of the federal law.²³ In addition, the DOJ argues that the legal validity of California’s SB-822 cannot be adjudicated in the District Court of the Eastern District of California, but rather must be adjudicated in the lawsuit currently pending in the D.C. Circuit.²⁴ In other words, the DOJ is saying that this lawsuit cannot decide the legality of California’s law until the D.C. Circuit case is decided.

Outcome

²⁰ Heather Kelly, *California just passed its net neutrality law*. The DOJ is already suing, CNN BUSINESS, Sept. 30, 2018, <https://money.cnn.com/2018/09/30/technology/california-net-neutrality-law/index.html>; *California’s Jerry Brown signs tough net-neutrality bill, prompting Justice Department lawsuit*, FOX NEWS, <https://www.foxnews.com/politics/californias-jerry-brown-signs-tough-net-neutrality-bill-prompting-justice-department-lawsuit>.

²¹ *Id.*

²² Complaint for Declaratory and Injunctive Relief at 1, *United States v. State of Cal.*, No. 18-1539 (Cal. Ct. App. Sept. 30, 2018).

²³ *Id.* at 10.

²⁴ Memorandum in Support of Motion for Preliminary Injunction at 16, *United States v. State of Cal.*, No. 18-1539 (Cal. Ct. App. September 30, 2018).

What are the possible effects of this current legal battle over net neutrality? There are advocates and dissenters on both sides of the argument. If the DOJ wins and the California law is deemed preempted by federal law, the FCC's current order will stay in effect allowing ISPs the ability to control how the Internet is viewed. Some people believe that this will ultimately harm consumers because it may restrict consumers' access and use of the information on the Internet. Contrastingly, if the court rules that California's law is not preempted, states will be able to use California's law as a blueprint with respect to their own net neutrality laws. Some people believe that allowing states to create their own net neutrality laws will create a fractured and unworkable system because the Internet crosses state and national lines. However, there is one thing that people on both sides of the debate can agree on: the question regarding net neutrality needs to be answered sooner rather than later.

Edited by Carter Gage