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Net Neutrality: Preparing for the Future

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Net Neutrality: Preparing for the Future

By Jennifer Wong*

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I. INTRODUCTION

Network neutrality (also referred to as ‘internet neutrality’ or ‘net neutrality’) is “one of the most recognizable controversies in the policy and law of Internet media”¹ Though there is no single recognized definition of net neutrality at this time, most definitions seem to revolve around the basic premise that Internet connectivity providers should treat all data equally, regardless of its source or destination.² This Comment will present the major issues and arguments in the net neutrality debate and recommend a direction in going forward.

* Jennifer Wong is a third year law student at Pepperdine University School of Law. She graduated from New York University’s Stern School of Business, where she majored in Finance and International Business. She would like to thank her parents for their continued support and encouragement and her friends for putting up with her during the stressful time that is called law school.

¹ Daithí M. Síthigh, *Regulating the Medium: Reactions to Network Neutrality in the European Union and Canada*, 14 NO. 8 J. INTERNET L. 3, 3 (2011).

² See *Net Neutrality*, THE NEW YORK TIMES (Dec. 22, 2010), http://topics.nytimes.com/topics/reference/timestopics/subjects/n/net_neutrality/index.html; Angele A. Gilroy, CONG. RESEARCH SERV., RS22444, NET NEUTRALITY: BACKGROUND AND ISSUES 1 (2008), available at <http://www.fas.org/sgp/crs/misc/RS22444.pdf> (Stating that “[t]here is no single accepted definition of ‘net neutrality’”). Most commentators seem to agree that any definition of net neutrality “should include the general principles that owners of the networks that compose and provide access to the Internet should not control how consumers lawfully use that network; and should not be able to discriminate against content provider access to that network.” *Id.* at 1. Of course, some network management, such as those based on data type, is required to ensure that there is a minimal amount of disruption in services to end users. See Amy Schatz, *Google Launches a Net Neutrality Test*, WALL ST. J. BLOG (Jan. 28, 2009, 3:00 PM), <http://blogs.wsj.com/digits/2009/01/28/google-launches-a-net-neutrality-test/>. For example, networks might prioritize time-sensitive streaming video data packets over less time-sensitive traffic, such as e-mails, so as to avoid video lag. *Id.* While some may contest any network management of data packets, the net neutrality debate mainly focuses on discrimination against sources of data rather than types of data. Angele A. Gilroy, CONG. RESEARCH SERV., RS22444, NET NEUTRALITY: BACKGROUND AND ISSUES 1-2 (2008), available at <http://www.fas.org/sgp/crs/misc/RS22444.pdf>.

II. THE INTERNET

A. How Important is the Internet?

The Internet was born in the late 1960s when researchers at Stanford University and the University of California, Los Angeles (UCLA) connected two computers to send messages to each other.³ Soon after their initial success, the researchers connected four computers together and the stirrings of the digital age began.⁴ Half a century later, 1.9 billion users have plugged themselves into the world wide web, and the Internet has become an essential part of everyday life for people all across the globe.⁵

Since its birth, the Internet has redefined the ways people socialize, do business, and entertain themselves.⁶ An individual no longer has to handwrite mail and send it through the post office to relay messages to loved ones. With a few clicks of a mouse or pushes of a button, people can either type out or scan handwritten notes and send e-mails to friends who receive the message nearly instantaneously. Without leaving their computer, Internet users can order dinner, play games, talk to friends online, or even research information on administrative law. Many online users also use social websites such as Facebook or Twitter to update friends and relatives on their lives, share photos, find jobs, and communicate with others.

³ Barry M. Leiner et al., *A Brief History of the Internet*, INTERNET SOCIETY, <http://www.isoc.org/internet/history/brief.shtml> (last visited Feb. 25, 2011).

⁴ *Id.*

⁵ INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited Feb. 25, 2011).

⁶ See *The Future of Online Socializing*, PEWRESEARCHCENTER PUBLICATIONS (July 2, 2010), <http://pewresearch.org/pubs/1652/social-relations-online-experts-predict-future>. The Boston Consulting Group and Telenor Group conducted a new study in 2009 that found that the Internet plays an important role in rural development by increasing access “to information and essential services, such as banking and government, and enhance[s] lifestyle and entertainment options for people regardless of whether they are in urban or rural areas.” Press Release, Telenor Group, Internet Boosts Economic Growth and Social Welfare (Oct. 7, 2009) (on file with author) available at <http://www.telenor.com/en/news-and-media/press-releases/2009/internet-boosts-economic-growth-social-welfare>.

In addition to enhancing the social relationships and personal lives of the public, the Internet also “plays an important role in the economy, providing jobs, productivity growth, and cost savings.”⁷ A 2009 study by the Boston Consulting Group and Telenor Group found that a “10 percentage point increase in Internet penetration could increase GDP [Gross Domestic Product] by 1 to 2.5 percent, increase new business activities by approximately 1 percent, and boost total government revenues in some countries by as much as 8 to 9 percent.”⁸ Despite its relatively short lifespan, the Internet has revolutionized the world at groundbreaking speed and is of increasing importance because of its influence on the economy and daily lives of everyday Americans. As such, any major action to change how consumers and entities interact with the Internet must be strictly scrutinized.

B. How the Internet Works

To understand net neutrality, one must first gain a basic understanding of how the Internet works. An oversimplified view of the Internet would categorize it into four parts: content providers, internet backbone networks, broadband service providers, and consumers.⁹ The Internet’s backbone is a series of lines, similar to

⁷ Brook Ericson, Comment, “Möbius-Strip Reasoning:” *The Evolution of the FCC’s Net Neutrality Nondiscrimination Principle for Broadband Internet Services and Its Necessary Demise*, 62 ADMIN. L. REV. 1217, 1218 (2010).

⁸ Telenor Press release, *supra* note 6. The Internet also accelerates business productivity which generates income and government revenue. *Id.* Of course, growth is usually more drastic in emerging economies than developed ones, but the information referred to is important in emphasizing how the Internet can improve economic conditions within a country.

⁹ Robert Hahn & Scott Wallsten, *The Economics of Net Neutrality*, THE ECONOMISTS’ VOICE: Vol. 3: Iss. 6 Art. 8, June, 2006, at 2, available at <http://econ.tepper.cmu.edu/e-commerce/Economics%20of%20Net%20Neutrality.pdf>. A content provider is defined as “an organization or individual that creates information, educational or entertainment content for the Internet, CD-ROMs or other software-based products.” PCMAG.COM, http://www.pcmag.com/encyclopedia_term/0,2542,t=Internet+content+provider&i=40275,00.asp (last visited Feb. 25, 2011). Examples of content providers can range from search engines like Google to retail sellers like Amazon or video streaming sites like Hulu. Hahn, *supra* note 9, at 2.

telephone lines, which companies or organizations lay down and maintain.¹⁰ These lines create a giant network of linked computers.¹¹ Most computers connect to the network through an Internet Service Provider (ISP).¹² That ISP, in turn, may connect to other larger networks and so on; thus the Internet is formed.¹³ In essence, the Internet is simply a web of small networks that connect to each other through network access points (NAPs) to form a giant network.¹⁴

Using this web of computers, users can send out data packets that release or request information.¹⁵ The information sent out by these users is broken into tiny bits of data and sent via dynamic routing.¹⁶ “Dynamic routing simply means that there is no preordained path for these packets to take.”¹⁷ In dynamic routing, a router determines the best route for a packet, at that particular time, and sends the information along this path to the next router.¹⁸ This process goes on until the information is delivered.¹⁹

¹⁰ *How Does the Internet Work?*, WISEGEEK, <http://www.wisegeek.com/how-does-the-internet-work.htm> (last visited Feb. 25, 2011). Internet backbone companies include “Level3, AT&T, Sprint, Verizon, and Qwest. . . .” Hahn, *supra* note 9, at 2. These networks have historically been largely unregulated, and oftentimes the companies that operate these networks carry each other’s data for free in return for reciprocation. *Id.*

¹¹ Christopher R. Steffe, Comment, *Why We Need Net Neutrality Legislation Now or: How I Learned to Stop Worrying and Trust the FCC*, 58 DRAKE L. REV. 1149, 1152 (2010). The network is “comprised of an interconnected web of ‘host’ computers, each of which can be accessed from virtually any point on the network.” *Id.*

¹² *The Internet: Computer Network Hierarchy*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/internet/basics/internet-infrastructure1.htm> (last visited Feb. 25, 2011).

¹³ Steffe, *supra* note 11, at 1152.

¹⁴ HOWSTUFFWORKS, *supra* note 12.

¹⁵ Steffe, *supra* note 11, at 1152. A real world example would be the pulling up of a website. In requesting information, the original computer sends out a request to the end computer, and the information is immediately sent back to the original computer and is shown on their screen. *Id.*

¹⁶ *Id.* at 1152-53.

¹⁷ *Id.* at 1153.

¹⁸ *Id.*

¹⁹ *Id.*

C. Network Management

“In the Internet today, there are already multiple forms of discrimination, the vast majority (like SPAM filters) of which are legitimate.”²⁰ “All ISPs employ filtering technologies” in their network management, though to varying degrees.²¹ Many of these ISPs use shallow filtering to direct the route of the data to the right server.²² Others use deep packet inspection, which allows ISPs to peer at the data packet itself and can be used to track user behavior, check for embedded viruses, or in China’s case, censor content.²³ Furthermore, with the various types of services now available to users on the Internet, many ISPs have implemented traffic shaping technologies to manage their network traffic efficiently.²⁴ These filtering systems are essential for ensuring a certain quality of service for end users.²⁵ For example, some services like streaming audio and

²⁰ Daniel L. Brenner & Winston Maxwell, *The Network Neutrality and the Netflix Dispute: Upcoming Challenges for Content Providers in Europe and the United States*, 23 NO. 3 INTELL. PROP. & TECH. L.J. 3, 4 (2011).

²¹ See Saira Nayak, *Filtering and Sniffing After FCC v. Comcast*, THE BALANCING ACT (Apr. 7, 2010), <http://thebalanceact.wordpress.com/2010/04/07/filtering-and-sniffing-after-fcc-v-comcast/>. Some ISPs merely examine addressing information to see where the data is coming from and where it is going. See *id.* Others use deep packet inspection to inspect the actual content being transferred. See *id.*

²² *Id.* Shallow filtering can help ISPs find the most efficient way to send data. See Steffe, *supra* note 11, at 1152-53.

²³ See Nayak, *supra* note 21. But deep packet inspection is what concerns most privacy advocates. *Id.* “This is a more intense process that allows the ISP to literally peer in and scan the payload portion of the packet – to serve ads, or track user behavior. The NSA uses the technology in its terrorism surveillance efforts.” *Id.*

²⁴ See Andrew Seitz, Comment, *It’s a Series of Tubes: Network Neutrality in the United States and How the Current Economic Environment Presents a Unique Opportunity to Invest in the Future of the Internet*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 683, 696-97 (2009). “Traffic shaping is when a broadband provider discriminates against certain types of traffic at certain periods . . . ‘to provide a quality experience for all . . . subscribers.’” *Id.* at 696.

²⁵ See *id.*; Brenner, *supra* note 20, at 4 (“Discrimination that seeks to achieve a valid technical objective, such as protecting the network and guaranteeing a quality of service for all users, are quintessential reasonable

voice over internet protocol (VoIP) are time sensitive, and data packets from those services need to be prioritized over other types of traffic in order to provide a great user experience and minimize lag or distortion.²⁶ On the other hand, users do not usually notice the delay of other non-time sensitive material such as e-mails.²⁷ Though, historically, the Internet operated as a “best-effort network, where high quality of service was not guaranteed,” new applications such as VoIP, gaming, and streaming video, which are “latency intolerant and require a superior [quality of service]”, have made users demand faster and seamless service from their ISPs.²⁸

III. WHAT IS NET NEUTRALITY?

“At its core, the [n]et neutrality movement in the U.S. refers to efforts to keep the Internet open, accessible and ‘neutral’ to all users, application providers and network carriers.”²⁹ Though there is no single universally recognized definition of net neutrality, the basic premise holds that ISPs should not be able to restrict or differentiate services and content that pass through their network.³⁰

network management and do not violate net neutrality.”). Bandwidth usage in the United States is on the rise, and “currently forty-four percent of bandwidth usage is peer-to-peer traffic.” Seitz, *supra* note 24, at 696. During peak congestion, Internet providers must decide between “allowing all users to have a poor experience” or “limiting the usefulness of what they see as inefficient applications.” *Id.* at 697.

²⁶ See Amy Schatz, *Google Launches a Net Neutrality Test*, WALL ST. J. BLOG (Jan. 28, 2009, 3:00 PM), <http://blogs.wsj.com/digits/2009/01/28/google-launches-a-net-neutrality-test/>.

²⁷ See *id.*

²⁸ See *Discrimination/Prioritization/Network Management*, CYBERTELECOM <http://www.cybertelecom.org/ci/neutralnm.htm> (last visited Feb. 27, 2011).

²⁹ Matt Hamblen, *Net Neutrality: A Complex Topic Made Simple*, COMPUTERWORLD (Feb. 15, 2010 5:40 AM), http://www.computerworld.com/s/article/9156578/Net_neutrality_A_complex_topic_made_simple.

³⁰ Sithigh, *supra* note 1, at 3. A lengthier definition that has been codified for the use in other communications media exists in “section 202 of the Communications Act of 1934 (amended by the Telecommunications Act of 1996):” Steffe, *supra* note 11, at 1154.

A. *Why Should I Care?*

The Internet is like the Wild Wild West, where there are few laws and much uncertainty.³¹ Currently, in the United States, there is an uneasy standoff between service providers, content providers, and consumers that has allowed the Internet to stay relatively free from network management techniques that throttle the freedom and openness of the platform. For the past few decades, this standoff has allowed end users to enjoy free content whose access has been largely unregulated by ISPs. However, many net neutrality advocates are fearful of the amount of restrictions companies could impose on the Internet in the years to come.³²

The net neutrality debate involves issues such as “privacy, security, freedom to communicate, innovation, and above all, who controls the internet.”³³ Without government regulation, companies would be able to go through users’ data and extract and read private

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Id. (citations and internal quotation marks omitted).

³¹ See Ryan Single, *Did Google Pre-Emptively Block a 4G iPhone on Verizon?*, WIRED.COM (Feb. 25, 2011 8:00 PM), <http://www.wired.com/epicenter/2011/02/verizon-4g-iphone-block/all/1>.

³² Sarah Kessler, *Net Neutrality: 7 Worst Case Scenarios*, MASHABLE TECH (Aug. 27, 2010), <http://mashable.com/2010/08/27/net-neutrality-worst-case/>. Though historically, Internet service providers have practiced “best-efforts” in bringing the Internet to users, net neutrality advocates fear that, if allowed to implement a “fast lane”/“slow lane” system, these providers “will have an economic incentive to degrade, or at least change investment decisions, regarding best-efforts Internet service in order to motivate content providers to pay for [a] premium service.” Brenner, *supra* note 20, at 5.

³³ Rich Greenfield, *The Net Neutrality Debate: The Basics*, EDUCAUSE REV., VOL. 41 NO. 3, May/June. 2006, at 82, available at <http://www.educause.edu/EDUCAUSE+Review/EDUCAUSEReviewMagazineVolume41/TheNetNeutralityDebateTheBasic/158063>.

information.³⁴ “The ubiquity of the Internet and our entrance into a new, digital age allows for unprecedented collection of personal information on a mind-boggling scale.”³⁵ This encroachment on privacy could possibly lead to widespread inhibition of free thought and the potential abuse of one’s personal data.³⁶

The limiting of both content providers’ access to users and users’ access to content could limit innovation. Companies “such as Amazon, eBay, Google, Intel, Microsoft, Vonage, and Yahoo! have argued that net neutrality is needed to protect innovation from the power of infrastructure companies to favor their own Internet services, and to pick winners and losers by charging higher fees or providing degraded service to the ‘losers.’”³⁷ This could, in turn, lead to free content becoming ad-laden and lower quality.³⁸ To

³⁴ See Ken D. Kumayama, Comment, *A Right to Pseudonymity*, 51 ARIZ. L. REV. 427, 427 (2009).

³⁵ *Id.* at 438.

³⁶ *Id.* at 439-40. “The collection and analysis of personal data has many important uses. For example, personal data analysis is used by private and government entities to: assess customer creditworthiness; detect fraud, abuse, and waste; improve services; promote research; manage personnel; detect criminal activities; and gather and analyze intelligence.” *Id.* at 430. However, such an amount of data on an individual may lead to the inhibition of free thought or the abuse of personal data that results in privacy-related harms like identity theft or the release of trade secrets. See *id.* at 439-40. In addition, use of personal information may impact how one acts online if they know they are being monitored. See *id.* Take for instance self-help books. Several people might be too embarrassed to buy these guides in person, so they order them online. By taking away the anonymity of a person, through increased monitoring, that same individual may feel pressured not to buy it. Similarly, anonymity helps encourage free speech. If people feared that they would be identified online, there is no question that such speech would be severely restricted.

³⁷ Hannibal Travis, *The FCC’s New Theory of the First Amendment*, 51 SANTA CLARA L. REV. 417, 500 (2011). Without internet regulation by the government, ISPs could block or slow down applications like World of Warcraft, streaming video from Youtube, and access to Facebook or Twitter, all in the name of promoting their own content.

³⁸ Marguerite Reardon, *The Skinny on Net Neutrality (FAQ)*, CNET (Sept. 13, 2010, 4:00 AM), http://news.cnet.com/8301-30686_3-20015590-266.html. One example of an ad-laden site is Youtube. Though the quality of the content has not diminished, the site now employs ads on its webpages, before or after videos, or both, and pop-ups at the bottom of the video player while the video is playing. This is a far cry from a few years ago when

illustrate this concept, imagine if Cablevision, a leading telecommunications company, invested in a television streaming site called VisionTV. Cablevision could theoretically block users from accessing Hulu, Crackle, or other television streaming sites in order to boost user statistics at its site and garner greater advertising revenue. The same could happen if they partner with a social networking site and subsequently block Facebook and Twitter. With regulations as they were previous to the Federal Communications Commission's (FCC) December 2011 rules, Cablevision could even charge Facebook or Hulu for the honor of letting its users access those sites.³⁹ If that were to happen, the sites would either increase advertising to offset the new costs or cease offering these services for free. A domino effect would occur that could ultimately lead to the Internet model of business becoming more like television; premium content would require payment and free content would be of lesser quality and ad-laden. Content providers and ISPs would have to be smart in implementing such strategies or risk driving consumers to their competitors. However, if all companies involved in the Internet marketplace started to slowly trend towards this type of model, the Internet as we know it would cease to exist. Even if many users are unaware or do not presently care about these issues, their lives will no doubt be highly impacted by the outcome of the net neutrality debate.

Though this article will not delve into this topic, another hot issue in net neutrality involves wireless broadband and mobile providers. Not only landline based ISPs prioritize and block data and services; many mobile providers do the same.⁴⁰ One example of active interference of information on the part of mobile carriers is when Sprint shut down Catholic Relief Services' text based donation

Youtube only had banner ads. While this example is not necessarily a response to payment demands from ISPs, it is an illustration of what might happen to all content providers if their costs increase dramatically.

³⁹ See Travis, *supra* note 37, at 500.

⁴⁰ See Phil Hornshaw, *FCC Passes New Net Neutrality Rules; Mobile Internet Receives Less Regulation*, APPOLICIOUS (Dec. 22, 2010, 1:30 PM), <http://www.appolicious.com/tech/articles/4489-fcc-passes-new-net-neutrality-rules-mobile-internet-receives-less-regulation>.

fund for Haiti in early 2010.⁴¹ However, many commentators agree that mobile networks must implement some form of company regulated network management because of the limited wireless broadband capacity compared to landline broadband operations.⁴² The number and ability of base stations available to process users' internet activities limit wireless broadband.⁴³ "The more users per station, the less performance for each user."⁴⁴

B. Net Neutrality Legislative Background and Policies

Net neutrality is a concept that carries over from the Federal Telecommunications Act of 1996 (Communications Act), which stipulated that common carriers, like telephone companies, could not play favorites.⁴⁵ "Common carriage prohibits the owner of a network from discriminating against information by halting, slowing, or otherwise tampering with the transfer of any data."⁴⁶ "Title II of the Communications Act applies mandatory common carrier regulation to all providers of a telecommunications service, including rate, nondiscrimination, interconnection, and universal service

⁴¹ John Schwartz, *Catholic Charity and Sprint Tangle Over Texting*, N.Y. TIMES, (Mar. 24, 2010), <http://www.nytimes.com/2010/03/25/technology/25texting.html>.

⁴² Kevin J. O'Brien, *Web's Users Against Its Gatekeepers*, N.Y. TIMES, (May 2, 2010), http://www.nytimes.com/2010/05/03/technology/internet/03neutral.html?ref=net_neutrality. The FCC also agrees with this reasoning, as it left more freedom in network management in the hands of mobile service providers. See Hornshaw, *supra* note 40. In addition to having limited broadband capacity, "mobile broadband providers have a tougher network to maintain and different kinds of traffic, like phone calls versus Internet connections, to juggle. Because it takes more work and in order to keep the network running smoothly, the FCC reasons, mobile providers should have greater ability to regulate traffic." See *id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Network Neutrality*, PUBLIC KNOWLEDGE, <http://www.publicknowledge.org/issues/network-neutrality> (last visited Feb. 25, 2011).

⁴⁶ *What Is Net Neutrality?*, ACLU, <http://www.aclu.org/net-neutrality> (last visited Feb. 27, 2011).

obligations.”⁴⁷ However, in 2002, the FCC declared that cable Internet service was “neither a ‘telecommunications service’ covered by Title II of the Communications Act nor a ‘cable service’ covered by Title VI” and reclassified it as an information service.⁴⁸ As such, the Commission moved broadband services from Title II of the Communications Act to Title I, under which the FCC only has ancillary jurisdiction.⁴⁹

In 2005, “after receiving a formal complaint from Vonage . . . that an unknown service provider was blocking its Voice over IP services,” the FCC pursued its first enforcement of net neutrality principles.⁵⁰ It identified Madison River as the company responsible and resolved the issue with a consent decree, “whereby Madison River agreed to no longer block traffic going to Voice over IP providers in addition to making a voluntary payment to the U.S. Treasury in the amount of \$15,000.”⁵¹

Also in 2005, the FCC issued its Broadband Policy Statement (Internet Policy Statement) in an attempt to ensure that the Internet

⁴⁷ Lynn R. Charytan et al., *The Year in Broadband Policy: Making Sense of the National Broadband Plan and Its Implications for Industry and Policy Makers*, at 275, 301 (PLI Intell. Prop., Course Handbook Ser. No. 23373, 2010), available at Westlaw 1030 PLI/Pat 275.

⁴⁸ *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 645, 649 (D.C. Cir. 2010). Information services are not subject to “common carrier regulations, however the Commission does, through the common law doctrine of ‘ancillary authority,’ retain the ability to use its Title I authority to adopt measures that are ‘reasonably ancillary to the effective performance of the Commission’s various responsibilities.’” Charytan, *supra* note 47, at 301. Reclassifying cable modem services allowed it to be free from many of the “competition and consumer protection restrictions placed on the legacy telephone networks.” *Id.* “The FCC reasoned that it was in the public interest to subject cable modem service to a ‘minimal regulatory environment that promotes investment and innovation in a competitive market,’ while minimizing regulatory uncertainty and regulatory costs.” *Id.* at 301-02.

⁴⁹ *See id.*

⁵⁰ NETWORK

NEUTRALITY,

<http://www.unc.edu/courses/2010spring/law/357c/001/NetNeutrality/Relevant%20Legal%20History.html> (last visited Feb. 25, 2011).

⁵¹ *Id.* Though this case created no formal precedent because of the settlement, it was a milestone in net neutrality because it was the FCC’s first action towards enforcing it. *See id.*

would operate in a neutral manner.⁵² The four principles adopted to enforce this goal were as follows:

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to access the lawful Internet content of their choice.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to connect their choice of legal devices that do not harm the network.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to competition among network providers, application and service providers, and content providers.⁵³

In 2009, the FCC added two more principles: the nondiscrimination principle that ISPs must not discriminate against any content or application and the transparency principle that requires ISPs disclose all their policies to customers.⁵⁴ Furthermore,

⁵² Marlene H. Dortch, *Policy Statement*, FEDERAL COMMUNICATIONS COMMISSION, (Aug 5, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

⁵³ *Id.* (citations and internal quotation marks omitted).

⁵⁴ See Nate Anderson, *FCC Proposes Network Neutrality Rules (and Big Exemptions)*, ARS TECHNICA (Oct. 22, 2009, 12:26 PM), <http://arstechnica.com/tech-policy/news/2009/10/fcc-proposes-network-neutrality-rules-and-big-exemptions.ars>. The exact wording for the two proposals is as follows:

- A provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner

in an effort to compromise with ISPs, the FCC added in several exceptions to their new guidelines under the guise of “reasonable network management.”⁵⁵ “Network management is reasonable if it is used.”⁵⁶

- To manage congestion on networks
- To address harmful traffic (viruses, spam)
- To block unlawful content (child porn)
- To block unlawful transfers of content (copyright infringement)
- For "other reasonable network management practices"⁵⁷

However, both the 2005 and 2009 principles were never processed “through any formal rulemaking procedures that would make them formal FCC rules.”⁵⁸ They remain just principles and guidelines for ISPs.⁵⁹ Despite the fact that these statements of policy are merely principles and not rules, the FCC tried to enforce their validity on ISPs.⁶⁰ For years, ISPs, for the most part, adhered to the

-
- A provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this rulemaking.

Id. (citations and internal quotation marks omitted).

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ *Id.* (citations and internal quotation marks omitted).

⁵⁸ Chloe Albanesius, *Court: FCC Had No Right to Regulate Comcast*, PCMAG.COM (Apr. 6, 2010, 1:25 PM), <http://www.pcmag.com/article2/0,2817,2362320,00.asp>.

⁵⁹ *See id.*

⁶⁰ *See id.* It is interesting to note that “the agency also has conditioned the approval of several mergers on compliance with the 2005 Policy Statement.” Helgi C. Walker et al., *Communications Law 2010*, at 321, 366 (PLI Intell. Prop., Course Handbook Ser. No. 23373, 2010), available at Westlaw 1030 PLI/Pat 321.

For example, the FCC made its consent to the combination of AT&T Inc. (“AT&T”) and BellSouth Corporation (“BellSouth”) in 2007 contingent upon the companies’ “voluntary commitment” to: (1) conduct business consistent with the Policy Statement; and (2)

principles set forth by the FCC. However, in 2007, Comcast Corp. (Comcast) decided to challenge these principles on the grounds that they had no weight.⁶¹ This landmark case will be discussed in detail in the next section.

Since 2006, there have been a number of legislative proposals introduced in Congress dealing with network neutrality.⁶² First was the Communications Opportunity, Promotion, and Enhancement Act of 2006 that focused primarily on video franchising and granted the FCC power to enforce its 2005 Broadband Policy Statement.⁶³ That same year, the Internet Freedom and Nondiscrimination Act of 2006 was presented to Congress.⁶⁴ This bill proposed regulating the Internet “under the Clayton Act’s antitrust laws rather than under telecommunication laws.”⁶⁵ The Communications, Consumer’s Choice, and Broadband Deployment Act of 2006 tried to make global reforms to the Telecommunications Act.⁶⁶ Also in 2006, the Consumer Competition and Broadband Promotion Act proposed several requirements on broadband network operators, including giving certain information on their broadband service to the public, and non-discrimination as to content or services other than by “price-tiering” speeds.⁶⁷ The Net Neutrality Act of 2006 prohibited “a broadband network provider from blocking, impairing, degrading or

maintain a neutral network and neutral routing in its wireline broadband Internet access service by refraining from providing or selling to Internet content, application, or service providers any service that privileges, degrades, or prioritizes packets based on source, ownership, or destination. Two telecommunications mergers in 2005 likewise were subject to adherence to the Policy Statement.

Id. (citations and internal quotation marks omitted).

⁶¹ Albanesi, *supra* note 58.

⁶² See R. Michael Senkowski et al., *Net Neutrality Primer*, 17-19 (Wiley Rein & Fielding LLP., 2006) available at www.wrf.com/docs/publications/12598.pdf.

⁶³ *Id.*

⁶⁴ *Id.* at 19-20.

⁶⁵ *Id.* at 18.

⁶⁶ *Id.* at 20-21.

⁶⁷ See R. Michael Senkowski et al., *Net Neutrality Primer*, 21 (Wiley Rein & Fielding LLP., 2006) available at www.wrf.com/docs/publications/12598.pdf.

discriminating against the ability of any person to use a broadband connection to access the Internet.”⁶⁸ The Internet Non-Discrimination Act of 2006 was also introduced that year, and proposed prohibiting “broadband network operators from favoring certain content over others or charging companies for faster delivery of their content to consumers over the Internet.”⁶⁹ The Internet Freedom Preservation Act was similarly introduced to Congress in 2006 and redrafted for 2007, 2008, and 2009.⁷⁰ Each respective Congress has killed these numerous proposals or passed them off to

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* The 2006 Internet Freedom Preservation Act was substantially similar to the Consumer Competition and Broadband Promotion Act. Senkowski, *supra* note 62, at 21. The 2007 Act called for “not interfering with, or discriminating against, the ability of any person to use broadband service in a lawful manner.” *S.215: The Internet Freedom Preservation Act*, PUBLIC KNOWLEDGE, <http://www.publicknowledge.org/node/817> (last visited Aug. 31, 2011). The Act also allowed “providers to engage in activities in furtherance of certain management and business-related practices, such as protecting network security and offering consumer protection services such as parental controls.” *Id.* Furthermore, it gave the FCC responsibility for enforcing complaints and the power to conduct reports on the broadband market. *See id.* The 2008 Act, reintroduced by Representative Edward Markey in 2009, wanted to:

- (1) maintain the freedom to use broadband telecommunications networks, including the Internet, without unreasonable interference from or discrimination by network operators;
- (2) enable the United States to preserve its global leadership in online commerce and technological innovation;
- (3) promote the open and interconnected nature of broadband networks that enable consumers to reach, and service providers to offer, content, applications, and services of their choosing; and
- (4) guard against unreasonable discriminatory favoritism for, or degradation of, content by network operators based upon its source, ownership, or destination on the Internet.

See H.R. 5353: The Internet Freedom Preservation Act of 2008, PUBLIC KNOWLEDGE, <http://www.publicknowledge.org/bill/110-hr5353> (last visited Sept. 28, 2011). (citations and internal quotation marks omitted). Furthermore, it required the FCC to commence a proceeding to assess whether network providers were “unreasonably interfering with the ability of consumers to access, use, send, receive, or offer content, applications, or services of their choice” and adding “charges for quality of service to certain Internet applications and service providers.” *Id.*

congressional committees.⁷¹ Later, the paper will discuss more recent legislation from this year.

On April 6, 2010, the D.C. Circuit held that the FCC did not have regulatory or ancillary authority over “Comcast’s unreasonable network management practices because it failed to tie that authority to any express statutory delegation by Congress.”⁷² In response to the court’s decision, Julius Genachowski, chairman of the FCC, proposed a “Third Way” policy.⁷³ He stated that there are “two primary options that have been debated since the *Comcast* decision.”⁷⁴ The first option is for the FCC to continue “relying on Title I ‘ancillary’ authority, and try to anchor actions like reforming universal service and preserving an open Internet by **indirectly** drawing on provisions in Title II of the Communications Act (e.g., sections 201, 202, and 254) that give the Commission direct authority over entities providing ‘telecommunications services.’”⁷⁵ The second option is for the FCC to reclassify Internet communications as a telecommunications service, which would give the FCC direct authority over the Internet under Title II of the Communications Act of 1934.⁷⁶ Genachowski maintains reservations about both approaches because the first option would have a high risk of failure in court, and the second option would impose regulations too extensive to be conducive to the current broadband scene.⁷⁷ Under Genachowski’s “Third Way,” the FCC would be allowed to

⁷¹ See Senkowski, *supra* note 62, at 21.

⁷² Susan Crawford, “*Ancillary Jurisdiction*” Has to be Ancillary to Something, SUSAN CRAWFORD BLOG (Apr. 6, 2010), <http://scrawford.net/blog/ancillary-jurisdiction-has-to-be-ancillary-to-something/1336/>.

⁷³ Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, BROADBAND.GOV (May 6, 2010), <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* “Title II, for example, includes measures that, if implemented for broadband, would fail to reflect the long-standing bipartisan consensus that the Internet should remain unregulated and that broadband networks should have only those rules necessary to promote essential goals, such as protecting consumers and fair competition.” *Id.*

recognize the transmission component of broadband as a Title II telecommunications service; apply only a few Title II provisions (sections 201, 202, 208, 222, 254, and 255) to broadband; and renounce several sections of the Communications Act of 1934 as unnecessary or inappropriate to broadband and put in place boundaries to “guard against regulatory overreach.”⁷⁸ Despite this proposal, the FCC soon abandoned the plan when they formally implemented a new set of policies on net neutrality on December 21, 2010 that were based on Title I ancillary authority.

C. Net Neutrality in the Courts

1. Brand X

In 2005, the Supreme Court decided *National Cable & Telecommunications Ass'n v. Brand X Internet Services (Brand X)*.⁷⁹ Brand X, an ISP, wanted the FCC to reclassify broadband as a telecommunication service in order to apply common carrier obligations to private cable companies.⁸⁰ However, the Supreme Court upheld the categorization of cable Internet providers as

⁷⁸ Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, BROADBAND.GOV (May 6, 2010), <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html>. The proposal seeks to accomplish the following:

Recognize the transmission component of broadband access service—and only this component—as a telecommunications service; [a]pply only a handful of provisions of Title II (Sections 201, 202, 208, 222, 254, and 255) that, prior to the *Comcast* decision, were widely believed to be within the Commission’s purview for broadband; [s]imultaneously renounce—that is, forbear from—application of the many sections of the Communications Act that are unnecessary and inappropriate for broadband access service; and [p]ut in place up-front forbearance and meaningful boundaries to guard against regulatory overreach.

Id. (citations and internal quotation marks omitted).

⁷⁹ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

⁸⁰ *Network Neutrality*, *supra* note 50.

“‘information service[s]’ and not ‘telecommunications service[s]’ for purposes of determining whether or not to apply ‘common carrier’ obligations under Title II of the Communications Act of 1934.”⁸¹ In reaching this decision, the Court applied the *Chevron* doctrine, which “prescribes broad judicial deference to agency constructions of ambiguous statutes.”⁸² First, in examining if Congress had spoken directly on the question at issue, the *Brand X* court found that the “meaning of what an ISP ‘offer[s]’ was ambiguous” with regard to the statute’s term “telecommunications services.”⁸³ Because of this ambiguity,⁸⁴ the FCC’s conclusion that “ISPs offer internet access to their customers and do not offer ‘a transparent ability (from the end user’s perspective) to transmit information,’” made it reasonable for them to classify broadband services as an information service.⁸⁵ Therefore, *Brand X*’s request to reclassify cable modem broadband services as a common carrier was denied.⁸⁶

2. Comcast Corp. v. FCC

In 2007, subscribers to Comcast, the United States’ second-largest Internet provider, complained that the company was actively interfering with some of their attempts to share files online.⁸⁷ After

⁸¹ *Id.* Essentially, this decision solidified the FCC’s reclassification of cable Internet services as information services.

⁸² Note, *How Chevron Step One Limits Permissible Agency Interpretations: Brand X and the FCC’s Broadband Reclassification*, 124 Harv. L. Rev. 1016, 1023 (2011). The *Chevron* analysis in reviewing an agency’s interpretation of a statute includes two steps: 1) the court employs “‘traditional tools of statutory construction’ to determine whether ‘Congress has directly spoken to the precise question at issue,’” and 2) “[i]f Congress has done so, then the inquiry ends and Congress’s prescription prevails. If, however, the statute is ‘silent or ambiguous with respect to the specific issue,’ then the court asks at *Chevron* step two ‘whether the agency’s answer is based on a permissible construction of the statute.’” *Id.*

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *See id.* at 1024-25.

⁸⁶ *See id.*

⁸⁷ Peter Svensson, *Comcast Blocks Some Internet Traffic*, MSNBC.COM, <http://www.msnbc.msn.com/id/21376597/> (last updated Oct. 19, 2007, 9:36:11 AM).

several confirmed stories of Comcast preventing BitTorrent users from seeding files (allowing users to download the complete files directly from the seeder's computer via the popular peer-to-peer file sharing program), the Free Press filed a complaint against Comcast with the FCC.⁸⁸ The Associated Press launched its own investigation into the rumors and found that there were unusual difficulties during legitimate transfers of the King James Bible over BitTorrent.⁸⁹ The Associated Press found that Comcast was not blocking information packets per se, but rather sending packets that instructed the user's

⁸⁸ See Steffe, *supra* note 11, at 1163-64. "Free Press is a national, nonpartisan, nonprofit organization working to reform the media. Through education, organizing and advocacy, [they] promote diverse and independent media ownership, strong public media, quality journalism and universal access to communications." *About Us*, FREE PRESS, http://www.freepress.net/about_us (last visited Dec. 20, 2011).

Free Press filed a complaint against Comcast with the FCC, requesting the Commission declare that an Internet service provider violates the [Commission's] Internet Policy Statement when it intentionally degrades a targeted Internet application. Free Press also filed a request that the FCC render a declaratory ruling "to clarify that an Internet service provider violates the FCC's Internet Policy Statement when it intentionally degrades a targeted Internet application. Vuze, Inc., filed a separate petition for rulemaking with the FCC, requesting the Commission adopt reasonable rules that would prevent the network operators from engaging in practices that discriminate against particular Internet applications, content or technologies. With these three petitions in mind, the FCC invited public input, and the response was overwhelming. Over twenty thousand Americans confirmed what the AP had suspected: Comcast was degrading the Internet connections of its users, and these Americans demanded the FCC take immediate action to put an abrupt end to this harmful practice.

See Steffe, *supra* note 11, at 1163-64. (citations and internal quotation marks omitted).

⁸⁹ *Id.* at 1163. The Associated Press also tried to download the same file from three other Internet providers: Time Warner Cable, Cablevision Corp., and AT&T. *Id.* "Substantiating the accusations of Comcast users countrywide, the AP discovered unusual difficulties transferring the King James Bible through connections provided by Comcast, but had little trouble transferring through connections provided by its competitors." *Id.* (citations omitted).

computer to disconnect.⁹⁰ “In response to the AP investigation, Comcast denied it was blocking some traffic but admitted it was ‘delaying’ peer-to-peer traffic utilized by its users.”⁹¹ In 2008, FCC Chairman Kevin Martin began an investigation into the complaints against Comcast’s active interference with Internet traffic.⁹² The FCC’s investigation showed that Comcast was restricting large file downloads all the time; not just when network resources were scarce.⁹³ After its investigation, the FCC issued an order “stating that it had the jurisdiction to regulate Comcast’s network management practices.”⁹⁴ Comcast complied with the order, but petitioned for review of the order with the D.C. Circuit, arguing that the FCC had failed to justify its basis for exercising jurisdiction over ISP network management practices.⁹⁵

In *American Library Ass'n v. FCC*, the Court created a two-part test in deciding whether or not the FCC had ancillary jurisdiction.⁹⁶ The test’s two requirements are as follows: “(1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁹⁷ Comcast conceded that the first part of the test was met, and so the central issue of *Comcast v. FCC* was the second requirement.⁹⁸

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Anne Broache, *FCC: We’ll Investigate Comcast-BitTorrent Flap*, CNET NEWS (Jan. 8, 2008, 3:34 PM), http://news.cnet.com/8301-10784_3-9845889-7.html.

⁹³ Nayak, *supra* note 21. Comcast had previously “defended its actions, stating that it had a right to slow access in instances when network resources are scarce, because applications like BitTorrent consume large amounts of bandwidth.” *Id.*

⁹⁴ *Id.*

⁹⁵ See Michael A. Sink, *D.C. Circuit Strikes Down FCC’s Comcast Order Regulating Network Management*, DIGESTIBLE LAW (Apr. 16, 2010), <http://www.digestiblelaw.com/blog.aspx?entry=678>; Steffe, *supra* note 11, at 1171.

⁹⁶ *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (citing *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005)).

⁹⁷ *Id.*

⁹⁸ *Id.*

Though aware that it had no statutory authority over ISPs' network management practices, the FCC argued that it had ancillary jurisdiction over such practices under Title I of the Communications Act of 1934.⁹⁹ This ancillary authority allows the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."¹⁰⁰ However, the Commission may only exercise this ancillary authority if their action relates to the "effective performance of its statutorily mandated responsibilities."¹⁰¹ The FCC claimed several sections of the Communication Act of 1934 delegated to them regulatory authority over ISP network management practices, but the Court ultimately struck down all of the FCC's arguments.¹⁰² As a result, the D.C. Circuit ruled that the FCC did not have power over broadband network management practices because it "failed to tie that authority to any express statutory delegation by Congress."¹⁰³ The Court held that the FCC relied on statements of policy that do not, by themselves, create "statutorily mandated responsibilities."¹⁰⁴ This decision posed a significant barrier to future FCC decisions regarding

⁹⁹ *Id.* at 645.

¹⁰⁰ 47 U.S.C. § 154(i) (2006).

¹⁰¹ Comcast, 600 F.3d at 646.

¹⁰² See Steffe, *supra* note 11, 1170-74. Section 230(b) of the Act states that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services' and 'to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet.'" *Id.* at 1171 (quoting 47 U.S.C. § 230(b)). Section 151 of the act "calls for the establishment of 'a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.'" *Id.* (quoting 47 U.S.C. § 151). The FCC claimed that Comcast's network management practices went against the objectives in these sections. *Id.* However, the Court rejected their arguments because it claimed that these sections were merely statements of policy and thus could not delegate regulatory authority to the FCC. *Id.* "After halting the FCC's reliance on policy statements in section 230(b) and section 151, the court then examined a second series of statutory provisions on which the FCC relied—express delegations of authority found in sections 706, 256, 257, 201, and 623 of the Telecommunications Act of 1996." *Id.* at 1172.

¹⁰³ See Crawford, *supra* note 72.

¹⁰⁴ Comcast, 600 F.3d at 644.

the Internet because it destroyed the foundation for which the FCC had been exercising its power over the Internet.¹⁰⁵

D. Current Regulatory Framework

Over the past two decades, the government has played the part of the toothless tiger in regulating the Internet. The FCC's six broadband principles that championed allowing consumers to access the lawful Internet content of their choice, "run applications and use services of their choice," "connect their choice of legal devices that do not harm the network," entitled consumers to "competition among network providers, application and service providers, and content providers," required transparency from network providers, and also advocated for nondiscrimination on networks, were held to be merely guidelines and policy statements that the FCC had no authority to enforce.¹⁰⁶ In *Comcast*, the D.C. Circuit went even further in declaring that the FCC had no authority in policing the network management of ISPs under their claimed Title I ancillary authority.¹⁰⁷

¹⁰⁵ See Crawford, *supra* note 72. This decision essentially ruled that the FCC can no longer rely on just "Title I's 'necessary and proper' clause to give it jurisdiction" over a company's network management practices. *Id.* Previous to this decision, the "FCC had said that the 'necessary and proper' clause, by itself, gave it authority" over broadband communications. *Id.* Now, the FCC must establish a link between the FCC's actions and some "express statutory delegation of authority" by Congress, making it harder for them to regulate ISP network management practices. *Id.*

¹⁰⁶ Dortch, *supra* note 52. See Albanesi, *supra* note 58.

¹⁰⁷ Albanesi, *supra* note 58. "The FCC's authority is outlined in the Communications Act of 1934." *Id.*

The commission is charged with regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service . . . at reasonable charges.

Id. (internal quotation marks omitted). In addition, the FCC has ancillary authority to "perform any and all acts, make such rules and regulations, and issue such orders, not consistent with this chapter, as may be necessary in the execution of its functions." *Id.* However, the Court found that overseeing the management of private networks was not a statutorily mandated responsibility given by Congress. *Id.*

These were severe blows to the FCC's ability to advocate and enforce net neutrality on the Internet.

In December 2010, eight months after the *Comcast* decision, the FCC voted and passed, for the first time, to establish formal regulations governing the Internet.¹⁰⁸ This time around, "the Commission [drew] on a variety of cable, broadcast, interconnection, wireless, and deregulation provisions of the Communications Act to tether its claim to Title I 'ancillary' authority over the Internet."¹⁰⁹ Despite the fact that the D.C. Court had said that the FCC could not rely on ancillary jurisdiction under Title I to regulate ISPs' network management practices, "the FCC's office of general counsel said the FCC has authority to promote advanced telecommunications services and encourage broadband deployment--factors that underpin its authority to create the rules."¹¹⁰

The new formal regulations require transparency from Internet providers, restricts them from blocking content, and includes a nondiscrimination principle.¹¹¹ Transparency requires that ISPs

¹⁰⁸ Jared Moya, *FCC Approves Net Neutrality Legislation!*, ZEROPAID (Dec. 21, 2010), <http://www.zeropaid.com/news/91647/fcc-enacts-net-neutrality-legislation/>.

¹⁰⁹ Paul Glist, *FCC Adopts Net Neutrality Rules; Relies on Title I Ancillary Jurisdiction*, BROADBAND LAW ADVISOR (Dec. 21, 2010), <http://www.broadbandlawadvisor.com/2010/12/articles/accessibility-persons-with-dis/fcc-adopts-net-neutrality-rules-relies-on-title-i-ancillary-jurisdiction/>.

¹¹⁰ Phil Goldstein, *FCC Approves 'Net Neutrality' Rules*, FIERCE GOVERNMENT (Dec. 21, 2010 11:46 PM), <http://www.fiercegovernmentit.com/story/fcc-approves-net-neutrality-rules/2010-12-21>. "The primary legal argument now rests on a provision of the Communications Act dealing with 'advanced telecommunications incentives.' Added in 1996, the provision -- section 706 of the act -- states that the FCC 'shall encourage' the deployment of "advanced communications capabilities." James Gattuso, *Net Neutrality and the Courts: The FCC's Shaky Legal Case for Internet Regulation*, THE HERITAGE FOUNDATION (Feb. 10, 2011), <http://www.heritage.org/research/commentary/2011/02/net-neutrality-and-the-courts-the-fccs-shaky-legal-case-for-internet-regulation>.

¹¹¹ See Moya, *supra* note 108. The exact rules are as follows:

Rule 1: Transparency

A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for

disclose information regarding “network management practices, performance, and commercial terms of its broadband Internet access services” to consumers.¹¹² The no-blocking principle states that ISPs cannot block “lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”¹¹³ Lastly, the unreasonable discrimination doctrine prevents ISPs from unreasonably discriminating “in transmitting lawful network traffic.”¹¹⁴

This new framework is an obvious compromise on the part of the FCC, as it allows companies to use tiered charges in providing Internet access and does not extend all of the new regulations to

consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

Rule 2: No Blocking

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider’s voice or video telephony services, subject to reasonable network needs.

Rule 3: No Unreasonable Discrimination

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer’s broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.

Id. “These rules apply only to ‘broadband Internet access service.’ So-called ‘specialized’ or ‘managed’ services (not defined in the rules) are exempt so long as their creation is not to evade the protections of the rules.” Brenner, *supra* note 20, at 3.

¹¹² See Moya, *supra* note 108.

¹¹³ See *id.* However, “wireless providers are not forbidden from blocking devices; nor are they forbidden from blocking apps that do not compete with the providers’ voice or video telephony services.” Brenner, *supra* note 20, at 3.

¹¹⁴ See Moya, *supra* note 108.

wireless networks.¹¹⁵ While ISPs will no longer be able to slow down certain traffic, they will be able to charge consumers for how much bandwidth they use.¹¹⁶ Reactions to the compromise have been mixed.¹¹⁷ Some have decried the new regulations as too ambiguous and vague with too many loopholes.¹¹⁸ Others went as far as accusing Genachowski of catering to corporate interests.¹¹⁹ In addition, Energy and Commerce Communications and Technology Subcommittee Chairman Greg Walden decried the FCC's move as one that would have serious repercussions on the telecommunications industry.¹²⁰ He claimed that, in this instance, "the FCC's underlying theory of authority would allow the commission to regulate any interstate communication service on barely more than a whim and without any additional input from Congress."¹²¹ Opponents of net neutrality also argued that these regulations would hurt investment

¹¹⁵ Sam Gustin, *FCC Passes Compromise Net Neutrality Rules*, WIRED.COM (Dec. 21, 2010, 1:58 PM), <http://www.wired.com/epicenter/2010/12/fcc-order/>.

¹¹⁶ Amy Schatz & Shayndi Race, *Internet Gets New Rules of the Road*, WALL ST. J. (Dec. 22, 2010), <http://online.wsj.com/article/SB10001424052748703581204576033513990668654.html/>.

¹¹⁷ *Id.*

¹¹⁸ See Grant Gross, *FCC Approves Compromise Net Neutrality Rules*, MACWORLD, (Dec. 21, 2010, 10:30 AM) http://www.macworld.com/article/156590/2010/12/fcc_net_neutrality.html. "Pro-net neutrality advocates [have] lambasted the plan as 'fake' net neutrality." Ryan Singel, *FCC Net Neutrality Rules Slammed From All Sides*, WIRED.COM (Dec. 20, 2010, 7:40 PM), <http://www.wired.com/epicenter/2010/12/fcc-rule/>. Democrats, "along with public interest and free speech groups, slammed the rules as woefully inadequate to protect the public from the predations of an industry keen on turning the internet into a cyber-version of cable TV, with tiers and premium packages affordable by the wealthy." *Id.*

¹¹⁹ Ryan Singel, *FCC Net Neutrality Rules Slammed From All Sides*, WIRED.COM (Dec. 20, 2010, 7:40 PM), <http://www.wired.com/epicenter/2010/12/fcc-rule/>.

¹²⁰ See Julianna Gruenwald, *House Debates Amendment to Block Net Neutrality Funding*, NATIONALJOURNAL (Feb. 17, 2011, 1:42 PM), <http://techdailydose.nationaljournal.com/2011/02/house-debates-amendment-to-blo.php>.

¹²¹ *Id.*

and innovation in broadband.¹²² Furthermore, critics on both sides of the net neutrality debate have “ripped the action as unnecessary and legally dubious.”¹²³ However, some commentators have been pleased. David L. Cohen, Comcast’s executive vice president, stated “[w]hile we look forward to reviewing the final order, the rules as described generally appear intended to strike a workable balance between the needs of the marketplace for certainty and everyone’s desire that internet openness be preserved.”¹²⁴ AT&T also released a statement expressing some satisfaction with the rules.¹²⁵

Genachowski has defended his rules by declaring that they are strong and balanced.¹²⁶ Furthermore, he is adamant in his belief that Internet investors and consumers need consistent rules going forward to help Internet growth and innovation.¹²⁷

“We are told by some ... [sic] not to try to fix what isn’t broken, and that rules of the road protecting Internet freedom would discourage innovation and investment,” he said. “We have heard from so many entrepreneurs, engineers, venture capitalists, CEOs and others working daily to invent and distribute new Internet products and thereby maintain U.S. leadership in innovation. Their message has been clear: the next decade of innovation in this sector is at risk without sensible rules of the road.”¹²⁸

¹²² Gross, *supra* note 118. “Republican representatives expressed fear that the new rulings would kill jobs and hinder industry innovation.” Molly McHugh, *House Votes to Block Net Neutrality Bill*, DIGITAL TRENDS (Feb. 18, 2011), <http://www.digitaltrends.com/computing/house-votes-to-block-net-neutrality-bill/>.

¹²³ Gross, *supra* note 118.

¹²⁴ Gustin, *supra* note 115.

¹²⁵ Schatz, *supra* note 116. “AT&T Inc. said the rules were ‘not ideal’ but would bring some market certainty so that investment and job creation can go forward.” *Id.*

¹²⁶ *Id.*

¹²⁷ *See Id.*

¹²⁸ Gross, *supra* note 118.

Unfortunately, this win for the FCC may be short-lived.¹²⁹ On February 17, 2011, less than two months after the FCC's new plan was created, the House of Representatives shot it down.¹³⁰ The House of Representatives passed "an amendment to an annual spending bill that prohibits the FCC from using funds to implement the controversial Internet rules the agency adopted in December but have not yet gone into effect."¹³¹ Republicans from both houses of Congress also have moved to repeal the rules by introducing a joint resolution of disapproval under the Congressional Review Act.¹³² In addition, in April, the House of Representatives voted to "overturn the net neutrality rules created by the FCC in December."¹³³ However, this is unlikely to pass the Senate and President Obama has threatened to veto legislation overturning the rules.¹³⁴

In addition to earning the animosity of Congress, the FCC's new rules on net neutrality are already being challenged in court by several companies including Verizon.¹³⁵ Of course this was expected, as the authority the FCC is staking its new regulations on is

¹²⁹ McHugh, *supra* note 122.

¹³⁰ *Id.*

¹³¹ Josh Long, *Senators Fight to Protect FCC's Net Neutrality Rules*, VISION2MOBILE (Feb. 23, 2011), <http://www.vision2mobile.com/news/2011/02/senators-fight-to-protect-fcc-s-net-neutrality-ru.aspx>.

¹³² Mark Hachman, *GOP Leaders Issue Disapproval Resolution Over Net Neutrality*, PCMAGAZINE (Feb. 16, 2011, 7:39 PM), <http://www.pcmag.com/article2/0,2817,2380486,00.asp>. "The joint resolution of disapproval, part of the Congressional Review Act, would need to pass with a majority in both chambers, then survive a veto from President Obama, so the passage of the bill is unlikely." *Id.*

¹³³ Ryan Singel, *House Votes to Undo Net Neutrality Rules*, WIRED (April 8, 2011, 5:41 PM), <http://www.wired.com/epicenter/2011/04/house-net-neutrality-vote/>.

¹³⁴ *See id.*

¹³⁵ Amy Schatz, *Verizon Appeals Net Regulations*, WALL ST. J. (Jan. 21, 2011), <http://online.wsj.com/article/SB10001424052748704747904576094354292080580.html>. Verizon appealed the new regulations in the U.S. Court of Appeals for the D.C. Circuit, the same court that struck down the FCC's ancillary authority over broadband in *Comcast*. *Id.*

founded on shaky legal grounds at best.¹³⁶ The FCC's new authority is "cobbled together" from various provisions of the 1996 Telecommunications Act.¹³⁷ While the December FCC decision has finally implemented a formal regulatory framework for the lawless 'electronic frontier,' it is unclear whether or not these rules will continue to exist in the near future. With the new policy being attacked in both Congress and the courts, it is doubtful that this new framework will become a permanent fixture in administrative law.

IV. THE DEBATE

Though the net neutrality debate revolves around the premise that all sources of data should be treated equally, it is obvious that the dispute is argued on many levels by advocates who share different concerns.¹³⁸ For example, most proponents of net neutrality claim that the government should prevent ISPs from restricting or favoring certain content.¹³⁹ However, other proponents of net neutrality might not care who regulates the Internet as long as there are adequate safeguards to prevent abuse and unreasonable discrimination. Some opponents of net neutrality argue that government regulations on the Internet are unnecessary because market forces will prevent abuse.¹⁴⁰ Others could care less about free market forces sustaining the

¹³⁶ See Singel, *FCC Net Neutrality Rules Slammed From All Sides*, *supra* note 119.

¹³⁷ *Id.*

¹³⁸ See Andy Oram, *Net Neutrality: It All Depends on What You Fear*, FORBES 1 (Sept. 2, 2010, 6:00 PM), <http://www.forbes.com/2010/09/02/internet-google-verizon-technology-net-neutrality.html>.

Behind the principles on both sides lie three sets of fears that lend network neutrality its force--fears over competition, censorship and creativity. In other words, debate is raging simultaneously on three different levels that sometimes get mixed up. On each level, each side holds different views of what's at stake. And while the levels do blend at times, one needs to distinguish them to understand the feelings brought by each participant.

Id. (citations and internal quotation marks omitted). The three main arguments referred to are based on competition, censorship and creativity. *Id.*

¹³⁹ Síthigh, *supra* note 1, at 3.

¹⁴⁰ *Id.*

Internet, but decry restrictions on the lawful operations of private companies.¹⁴¹ From these examples, it is clear that the net neutrality debate is being argued simultaneously on different levels.¹⁴² It is important to note, before reading further, that while this Comment mentions the general arguments of net neutrality advocates and opponents, these views might not be shared by all commentators on the same side of the debate, and thus might conflict with one another.

A. If It Ain't Broke, Don't Fix It

1. Looking to the Past to See How to Proceed in the Future

One of the major issues argued today is the preservation of current Internet architecture.¹⁴³ Internet government regulation opponents argue that the Internet has operated just fine for nearly half a century without government interference in the U.S. and that the fast and innovative development the medium has experienced in the last few decades is based on the freedom it enjoys and the openness of the platform.¹⁴⁴ “This argument extrapolates past experience to future development.”¹⁴⁵ Furthermore, these opponents claim “such action goes against the long standing policy to keep the Internet as free as possible from regulation.”¹⁴⁶ They also contend that the

¹⁴¹ *Id.*

¹⁴² See Oram, *supra* note 138.

¹⁴³ *Who Are the Main Players and What Are Their Arguments*, DIPLO (Sept 5, 2010, 8:07 PM), <http://discuss.diplomacy.edu/nn/who-are-the-main-players-and-what-are-their-arguments/>.

¹⁴⁴ See Robert M. McDowell, *The FCC's Threat to Internet Freedom*, WALL ST. J. (Dec. 19, 2010), <http://online.wsj.com/article/SB10001424052748703395204576023452250748540.html>. Application innovation could be stifled, “if, for example, network providers are restricted in the way they manage their networks or are limited in their ability to offer new service packages or formats.” Angele A. Gilroy, CONG. RESEARCH SERV., RS22444, NET NEUTRALITY: BACKGROUND AND ISSUES 5 (2008), available at <http://www.fas.org/sgp/crs/misc/RS22444.pdf>.

¹⁴⁵ *Who Are the Main Players and What Are Their Arguments*, *supra* note 143.

¹⁴⁶ Angele A. Gilroy, CONG. RESEARCH SERV., RS22444, NET NEUTRALITY: BACKGROUND AND ISSUES 5 (2008), available at <http://www.fas.org/sgp/crs/misc/RS22444.pdf>.

Internet's "nature as a diffuse and dynamic global network of networks defies top-down authority."¹⁴⁷

Advocates of net neutrality respond, "the Internet, like everything else, has changed. What worked 20 years ago may not work today or tomorrow."¹⁴⁸ Over the last ten years, "the on-ramp to the Internet has changed. Hundreds, maybe thousands, of dial-up providers have been replaced in the U.S. by a handful of broadband providers with local duopolies."¹⁴⁹ This has changed the amount of competition in the market, giving greater power and market share to ISP oligopolies and diminishing the influence of "buyer power." In addition, "[t]he [I]nternet has changed with the rapid rise of online services like YouTube, Netflix and Skype which consume large amounts of bandwidth, slowing down internet service for others."¹⁵⁰

Regulation proponents claim that increased costs and problems associated with the high consumption of bandwidth could spur major changes in how the ISPs manage and charge for their network. To combat diminishing revenues in broadband infrastructure, communications operators are already seeking new business models, "and they may in the future be experimenting with new wholesale service offerings to content providers that would guarantee the content provider enhanced quality of service over the Internet."¹⁵¹ Furthermore, these conglomerates are also losing money to the Internet on another front, cable.¹⁵² "Time Warner Cable lost more than 100,000 subscribers of premium channels such as HBO and Cinemax in the last quarter of 2010, while Netflix gained 3 million

¹⁴⁷ McDowell, *supra* note 144.

¹⁴⁸ *Who Are the Main Players and What Are Their Arguments*, *supra* note 143.

¹⁴⁹ Nick Bilton, *More on the Net Neutrality Debate*, N.Y. TIMES BLOG (Aug. 12, 2010, 1:19 PM), <http://bits.blogs.nytimes.com/2010/08/12/inside-the-net-neutrality-debate/>.

¹⁵⁰ Rachel Alexander, *Misnamed "Net Neutrality" Favors Some Over Others*, MICHNEWS (Jan. 18, 2011 12:54 PM), http://www.michnews.com/Guest_Commentary/ra011811.shtml.

¹⁵¹ Brenner, *supra* note 20, at 4.

¹⁵² See Debra Legg, *3 Million Reasons You Should Care About Net Neutrality*, 9TO5TO9 (Feb. 2, 2011), <http://debralegg.com/2011/02/02/3-million-reasons-you-should-care-about-net-neutrality/>.

subscribers.”¹⁵³ Internet alternatives like Netflix and Hulu allow customers access to television media at almost no extra cost.¹⁵⁴ Several cable companies are also the providers of Internet services; as a result, net neutrality proponents are weary that these companies will solve their cable television revenue woes by charging more for broadband.¹⁵⁵ Therefore, net neutrality advocates insist that in these changing times it is necessary to have a regulatory framework in order to preserve the current state of the Internet by prohibiting discrimination and censorship.¹⁵⁶

2. Don't Be Such a Debbie Downer

Opponents of government regulations on the Internet also claim that net neutrality activists are trying to solve a problem that does not exist.¹⁵⁷ They maintain that scenarios given to support net neutrality are merely future hypotheticals.¹⁵⁸ ISPs, like Comcast or RoadRunner, could hypothetically start charging content providers, like Hulu or Youtube, to use their network to stream video to end users. ISPs could hypothetically censor political candidates or views to support their own politics. The list goes on and on. These opponents dismiss the concerns that the hypotheticals pose and call

¹⁵³ *Id.* Furthermore, “the recent NBC-Comcast merger would result in cable costs escalating faster than they have been – and they already have more than doubled since 1995.” *Id.*

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

¹⁵⁶ *See* Brenner, *supra* note 20, at 4.

¹⁵⁷ *See* K.C. Jones, *Network Neutrality Critics Say if Net Ain't Broke, Don't Fix It*, INFORMATIONWEEK (Jan. 11, 2007, 12:47 PM), <http://www.informationweek.com/news/internet/showArticle.jhtml?articleID=196900184>; Kenneth Corbin, *Blackburn: FCC Headed for 'Congressional Hurricane'*, DATAMATION (Jan. 18, 2011), <http://itmanagement.earthweb.com/secu/article.php/3921046/Blackburn-FCC-Headed-for-Congressional-Hurricane.htm>.

¹⁵⁸ *See* Jones, *supra* note 157. “Rep. Marsha Blackburn (R-Tenn.), a member of the House Energy and Commerce Committee, said she would work to topple any FCC-led Net neutrality order. ‘This is a hysterical reaction by the FCC to a hypothetical problem.’” Kim Hart, *FCC to Move on Net Neutrality*, POLITICO (Dec. 1, 2010, 3:42 PM), <http://www.politico.com/news/stories/1210/45785.html>.

net neutrality a product of “Washington's instinct to hyper-regulate.”¹⁵⁹

Conversely, proponents of net neutrality say that “the real purpose of writing about hypotheticals and net neutrality is that we want to be talking about the issues at stake and educating people around us.”¹⁶⁰ Furthermore, they argue that, in the last few years, ISPs have acted in ways that are making these hypothetical situations look more and more realistic.¹⁶¹ In Canada, “[s]tories about Bell Canada's discrimination against peer-to-peer (P2P) file sharing, Telus's blocking of access to a union's website and Videotron's CEO, Robert Depatie's pleading for a transmission tariff on Internet content have all contributed to making the issue of net neutrality” a hot topic.¹⁶² Then, in 2007, Comcast, the second largest Internet provider in the U.S., attempted to throttle the bandwidth of users who used a popular peer-to-peer application called BitTorrent.¹⁶³ Verizon, a wireless network provider, denied Naral, a pro-choice group, access to their network for a text-message program, because it claimed the right to block “controversial or unsavory” messages.¹⁶⁴

¹⁵⁹ See Corbin, *supra* note 157.

¹⁶⁰ Matthew McCurley, *The Lawbringer: Net Neutrality and MMOs*, JOYSTIQ (Jan. 14, 2011 4:00 PM), <http://wow.joystiq.com/2011/01/14/the-lawbringer-net-neutrality-and-mmos/>.

¹⁶¹ See Alex Guindon & Danielle Dennie, *Net Neutrality and What It Means for Libraries*, NET NEUTRALITY CANADA, <http://www.netneutralitycanada.ca/net-neutrality-and-what-it-means-for-libraries.php> (last visited Feb. 27, 2011).

This is not about protecting the Internet against imaginary dangers. We're seeing the breaks and cracks emerge, and they threaten to change the Internet's fundamental architecture of openness. [...] This is about preserving and maintaining something profoundly successful and ensuring that it's not distorted or undermined. If we wait too long to preserve a free and open Internet, it will be too late.

Julian Sanchez, *Eye of Neutrality, Toe of Frog*, CATO@LIBERTY (Sept. 21, 2009), <http://www.cato-at-liberty.org/eye-of-neutrality-toe-of-frog/>. (citations and internal quotation marks omitted).

¹⁶² Guindon, *supra* note 161.

¹⁶³ See Steffe, *supra* note 11, at 1162-64.

¹⁶⁴ Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES (Sept. 27, 2007), <http://www.nytimes.com/2007/09/27/us/27verizon.html>.

Though claiming it was a glitch, America Online (AOL) has also supposedly blocked e-mails that mentioned “‘www.dearaol.com’, an advocacy campaign opposing the company’s pay-to-send e-mail scheme.”¹⁶⁵ These are only a few examples of net censorship and discrimination that have occurred over the last few years. Looking at these past cases, is it unreasonable to expect that more instances and harsher forms of discrimination will come about if these practices become the norm?

3. There Are Enough Safeguards in Place

Many opponents of regulation also believe that current laws and free market forces already amply protect consumers from the hypothetical doomsday scenarios posed by net neutrality advocates.¹⁶⁶ Unhappy customers can choose to move to a competitor, which in turn decreases company profits.¹⁶⁷ Therefore, the argument posits that profit-driven ISPs will only employ strategies that will help them retain customers and maximize earnings.¹⁶⁸ Others similarly agree that free market forces are

¹⁶⁵ Caroline Fredrickson, *Perspective: Net Neutrality Or Net Censorship*, CNET (July 24, 2006, 9:35 AM), http://news.cnet.com/Net-neutrality-or-Net-censorship/2010-1028_3-6097579.html.

¹⁶⁶ See McDowell, *supra* note 144. “Such legislation is not needed, they claim, as major Internet access providers have stated publicly that they are committed to upholding the FCC’s four policy principles.” Gilroy, *supra* note 146, at 5.

¹⁶⁷ See Susie K. Riley, *Reader Forum: Net Neutrality – All About the Consumer*, RCRWIRELESS (Oct. 4, 2010, 6:00 AM), <http://www.rcrwireless.com/ARTICLE/20101004/READERFORUM/100919956/reader-forum-net-neutrality-8211-all-about-the-consumer>. A popular economic theory called Porter’s Five Forces provides a framework to analyze business strategies and marketplaces. Porter’s theory identifies five competitive forces that work together to shape business industries: competition in the industry, threat of new entrants into the industry, supplier power, buyer power, and threat of substitute products. QUICKMBA, <http://www.quickmba.com/strategy/porter.shtml> (last visited Feb. 27, 2011). Competition in an industry will drive prices down by allowing buyers more power through their choices. *See id.*

¹⁶⁸ *See id.*; Julian Sanchez, *Eye of Neutrality, Toe of Frog*, CATO@LIBERTY (Sept. 21, 2009), <http://www.cato-at-liberty.org/eye-of-neutrality-toe-of-frog/> (“In a really competitive broadband market, after all, we can expect deviations from neutrality that benefit consumers to be adopted while those

sufficient to keep ISPs in line, but believe that the FCC should look “at ways to increase competition [rather] than adopt regulations that amount to resigning themselves to a broadband duopoly.”¹⁶⁹ Despite some differences, these opponents of net regulation declare that there is no sufficient reason for government regulation on the Internet.¹⁷⁰

As seen in the previous section, it is obvious that current laws are not enough to protect consumers from the fears that plague net neutrality advocates. Furthermore, the *Comcast* decision severely limits the scope of the FCC’s power over the industry, leaving the Internet even more lawless than before.¹⁷¹ In addition, net neutrality proponents claim that, “[e]xperiments in deregulation of energy, telecommunications and the financial sector during the 1990s and 2000s all produced catastrophic market collapses.”¹⁷² In addition, buyer power in the ISP market is limited, as the market is mainly dominated by a few providers.¹⁷³ “US consumers are generally faced with a wireline duopoly between the local cable operator and the local telephone company.”¹⁷⁴ Therefore, consumers do not have as

that don't are punished by the market.”). Famed economist, Adam Smith, expounded this theory of self-interest in his famous passage:

A man will be more likely to prevail if he can interest their self-love in his favour, and show that it is for their own advantage to do for him what he requires of them... It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity, but to their self-love, and never talk to them of our own necessities but of their advantages.

Adam Smith Laissez Faire – Invisible Hand, ECONOMICTHEORIES.ORG, <http://www.economictheories.org/2008/08/adam-smith-laissez-faire-invisible-hand.html>, (last visited Feb. 28, 2011).

¹⁶⁹ Sanchez, *supra* note 168.

¹⁷⁰ See Riley, *supra* note 167; Sanchez, *supra* note 168.

¹⁷¹ See Crawford, *supra* note 72.

¹⁷² Kevin Werbach, *Network Neutrality and the False Choice Between Competition and Regulation*, WHARTON MAGAZINE (Sept. 3, 2010 10:19 AM), <http://www.whartonmagazine.com/blog/2010/09/network-neutrality-and-the-false-choice-between-competition-and-regulation-2/#>.

¹⁷³ ISP-PLANET, www.isp-planet.com/research/rankings/usa.htm (last visited Feb. 27, 2011).

¹⁷⁴ Brenner, *supra* note 20, at 6. “Where competition is less vibrant, the argument for regulation may be sounder.” *Id.*

much protection as they would in a competitive market. This increase in supplier power would give ISPs greater free reign in implementing what policies they want and creating supplier-centric norms in the industry.

In addition, Kevin Werbach, an associate professor at the University of Pennsylvania's Wharton School of Business, states that, though the idea that regulation is inefficient compared to free market forces that "discipline the behavior of firms" has great intuitive appeal, "the practice [has] never quite conformed to the theory."¹⁷⁵ Furthermore, he claims that the Internet network market is more prone towards concentration and involves high-entry barriers like massive fixed costs in infrastructure.¹⁷⁶ These barriers reduce the amount of competition in the market.¹⁷⁷ Therefore, armed with the arguments that net neutrality discrimination is presently occurring, free-market economics do not always work in the real world and that the ISP oligopoly puts too much power in the hands of private companies at the expense of the consumer, net neutrality proponents refute the premise that market forces and current laws are sufficient.

¹⁷⁵ Werbach, *supra* note 172.

¹⁷⁶ *Id.*

There's a more fundamental problem: network markets naturally tend toward concentration. Networks generate positive externalities, known as network effects: if most of my friends are on Facebook, I'm likely to choose Facebook when joining a social networking service, even if others may have objectively better functionality. This reinforces what venture capitalists call "the 10x rule:" a new service must be 10 times better than the old one, or users won't switch. *Id.*

¹⁷⁷ *See id.* Though he does concede that in some scenarios, regulation of oligopolies might be unnecessary, he also acknowledges that, "seeking competition as a justification to eliminate regulation may therefore be a false hope in these markets." *Id.*

B. Effect on Lawful Content and Free Speech

1. Free Speech Censorship

Censorship is the issue that brings out the most heated arguments between net neutrality commentators. It is also one of net neutrality's most powerful rallying cries.¹⁷⁸ Network neutrality proponents worry that Internet providers will use network management practices to further their own agendas in both politics and business.¹⁷⁹ Advocates of net neutrality are afraid that these agendas will infringe on First Amendment free speech rights.¹⁸⁰ Senator Al Franken, has this to say:

If we learned that the government was planning to limit our First Amendment rights, we'd be outraged. After all, our right to be heard is fundamental to our democracy. Well, our free speech rights are under assault -- not from the government but from corporations seeking to control the flow of information in America.¹⁸¹

In an extreme example, picture Comcast, the nation's second largest ISP, throwing its weight behind one political candidate. Hypothetically, the company could choose to block or slow down any material opposing its message or candidate, thereby inhibiting Americans' access to information that would influence their choices.¹⁸² Much more realistically, private companies could charge

¹⁷⁸ Oram, *supra* note 138.

¹⁷⁹ *See id.* "Proponents construct a scenario somewhat like this: large corporations invest in media outlets. A broadcaster flush with cash buys faster access. Busy consumers visit the messenger's site for fast-breaking news because they find that it loads faster, and end up making it their home page." *Id.*

¹⁸⁰ *See id.*

¹⁸¹ Al Franken, *Net Neutrality Is Foremost Free Speech Issue of Our Time*, CNN (Aug. 5, 2010), http://articles.cnn.com/2010-08-05/opinion/franken.net.neutrality_1_net-neutrality-television-networks-cable?_s=PM:OPINION.

¹⁸² Not only will network operators be able to limit access to websites that are of use to opposing candidates, but they will also be able to influence the raising of campaign donations online, "disseminating candidate information, and mobilizing volunteers." Jon M. Peha, *The Benefits and Risks of Mandating*

content providers for faster access to users or vice versa, thereby disenfranchising small, independent content providers by making their material more costly, slower, and more unattractive to users. This would hinder the message of the smaller content creators from reaching a broad number of users. In this scenario, ISPs could also play favorites by charging media outlets whose message they favor less than other content providers, skewing the delicate balance of market, and giving a competitive edge to "favorites." Given these possible future situations, net neutrality advocates cry for more regulations on the Internet to protect the freedom of speech and unhindered flow of information that Americans now enjoy.

"[O]pponents of network neutrality also raise the specter of censorship. To them, every instance of government regulation gives it an excuse for controlling corporate behavior."¹⁸³ They contend that broadband providers have invested large sums of money in their networks and should be free to manage their investments as they see fit.¹⁸⁴ In addition, these advocates argue that:

[S]trict new FCC regulations might infringe on the ability of content providers to speak "how" they wish by preventing them from paying for better service; might prevent innovations by ISPs that would better facilitate free speech; could amount to "forced" speech; and might impact the delivery of high-bandwidth services such as video programming by laying a path toward government regulation of bandwidth use.¹⁸⁵

Network Neutrality, and the Quest for a Balanced Policy, DPACKET.ORG (Dec. 19, 2007), <https://www.dpacket.org/articles/benefits-and-risks-mandating-network-neutrality-and-quest-balanced-policy>. In addition, they can limit access to content that they do not support, are affiliated with, or approve of. *See id.*

¹⁸³ Oram, *supra* note 138.

¹⁸⁴ Supporting this line of reasoning, is the common practice of selling better quality products or services at a premium. Many believe that the same principle should be applied towards Internet bandwidth. Why should consumers not pay for better quality service, such as faster Internet speeds? What makes the Internet so special that this common business practice cannot be applied in this industry?

¹⁸⁵ Sara Jerome, *Net Neutrality Fight Turns to First Amendment*, NATIONAL JOURNAL (Dec. 28, 2009), http://nationaljournal.com/njonline/net-neutrality-fight-turns-to-first-amendment-20091228?mrefid=site_search.

Furthermore, regulation opponents dismiss the concerns of net neutrality proponent advocates as hypotheses and guesswork.¹⁸⁶ Moreover, they attack the new December FCC regulations that allow blocking of unlawful content.¹⁸⁷ In the regulations, what exactly is lawful content was not specified and is therefore ambiguous as to interpretation.¹⁸⁸ Additionally, the new regulations did not indicate who is to decide what is lawful or unlawful.¹⁸⁹ Understandably, these ambiguities, lead some opponents of government regulation to fear that the government will interpret this term in a broad way that censors free speech and grey-area lawful content on the Internet.¹⁹⁰

2. Lawful Content

As discussed above, the definition of “lawful content” has not been decided.¹⁹¹ However, even if it is clear what lawful content refers to, given today’s technology in deep packet inspection filtering systems, “the likely reality . . . is that if a broadband provider were to

¹⁸⁶ See Jones, *supra* note 157. “Net neutrality -- better named net regulation -- is trying to solve a problem that doesn't exist.” *Id.*

¹⁸⁷ See Jackie Martinez, *FCC's New Net Neutrality Rules*, POPLABS BLOG (Dec. 20, 2010, 5:39 PM), <http://blog.poplabs.com/2010/12/fcc%E2%80%99s-new-net-neutrality-rules/>.

¹⁸⁸ *Id.*

¹⁸⁹ See *id.*

¹⁹⁰ See Michelle Moore, *Net Neutrality-Government Control Doesn't Equal a Better Experience*, A Traditional Life Lived (Oct. 27, 2009), <http://www.atraditionallifelived.com/2009/10/net-neutrality-government-control.html>.

The danger is that such authority over the Internet might today be used for good, but "it could just as easily be invoked tomorrow for any other Internet regulation that the FCC dreams up (including things we won't like). For example, it doesn't take much imagination to envision a future FCC 'Internet Decency Statement'... And it's also too easy to imagine an FCC 'Internet Lawful Use Policy,' created at the behest of the same entertainment lobby that has long been pressing the FCC to impose DRM on TV and radio, with ISPs required or encouraged to filter or otherwise monitor their users to ensure compliance."

Anderson, *supra* note 54.

¹⁹¹ See Martinez, *supra* note 187.

decide to take action affecting particular traffic because of copyright concerns, it would not be able to determine whether each piece of this traffic was infringing.”¹⁹² As a result, it is likely that some clearly lawful content would be illegally interrupted or blocked as it traversed over ISP networks.¹⁹³ Obviously, many broadband and content providers “argue that this type of flexibility is necessary to protect the networks and prevent widespread copyright piracy.”¹⁹⁴ However, analogizing this problem to Blackstone’s Formulation that “better that ten guilty persons escape than that one innocent suffer,” does the end of preventing the proliferation of illegal content justify possible censorship of free speech and lawful content?¹⁹⁵

In addition to restricting lawful content, many net neutrality advocates are worried about what increased inspection and monitoring will do to the privacy of lawful content.¹⁹⁶ “Combining [deep packet inspection] with content identification software designed to identify particular copyrighted audio or video works might allow broadband providers to identify and filter out infringing

¹⁹² Howard Walthall, *The Net Neutrality Debate*, 3 No. 1 LANDSLIDE 21, 23 (2010). “Content identification technology is itself in a fairly early stage of development,” and the current systems in place are built to go through “relatively static repositories of data” or to “monitor smaller private networks.” *Id.* “It could be immensely more difficult and expensive for a broadband provider to implement such a system to review Internet traffic arriving across multiple network access points in real time without significantly slowing down the traffic itself.” *Id.*

The initial decision might have to be made on other grounds, for example, the type (e.g., peer-to-peer) and source of the traffic, as well as evidence (typically provided by content owners) that the source in question had historically been associated with a significant amount of infringing content. Given these looser parameters, it would be at least possible, if not likely, that some lawful content could be included within the traffic affected. *Id.*

¹⁹³ *See id.*

¹⁹⁴ *Id.*

¹⁹⁵ Pierce Harlan, *Blackstone’s Formulation is Universally Respected, Except When it Comes to Rape*, THE SPEARHEAD (Feb. 23, 2011), <http://www.the-spearhead.com/2011/02/23/blackstones-formulation-is-universally-respected-except-when-it-comes-to-rape/>.

¹⁹⁶ *See* Walthall, *supra* note 192, at 23.

content flowing through their networks.”¹⁹⁷ However, net neutrality proponents decry this intrusion into the contents of data packets as an invasion of privacy, similar to the “Post Office opening and reading people’s mail.”¹⁹⁸ The knowledge of some person reading intimate, personal information sent over the Internet that can be traced back to you may lead to the inhibition of free thought, as it erodes online anonymity.¹⁹⁹ Furthermore, increased liberties in content inspecting could lead to privacy-related harms like identity theft or the release of trade secrets.²⁰⁰

C. Innovation and Industry Growth

“Neutrality advocates present the Internet as an ever-churning sea that turns up wild and beautiful new species in turn: Amazon and Yahoo and Google and Second Life and Facebook and Twitter In their formulation, the stifling of competition and censorship brings an end to generativity.”²⁰¹ As such, government regulation is needed to prevent this suffocation of innovation.²⁰² Neutrality opponents, on the other hand, fight net neutrality on two different levels: content innovation and industry growth.²⁰³ They claim that government regulations on private ISPs will stifle investments in the industry and destroy the flexible, open platform that has generated explosive growth and innovation over the last few decades.²⁰⁴

¹⁹⁷ *See id.*

¹⁹⁸ *Id.*

¹⁹⁹ *See Kumayama, supra* note 34, at 439-40.

²⁰⁰ *See id.*

²⁰¹ Oram, *supra* note 138, at 2.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

Opponents of network neutrality have no beef with innovation, but they believe it is driven by very different factors. They worry about innovation at the lowest levels of the network. Where will the investment in new lines come from, and the willingness to try new protocols that can deliver a better experiences such as interactive video? *Id.*

1. Industry Growth

“When government does not act, corporations will. And unlike government agencies which have a legal responsibility to protect consumers, the only thing corporations care about ... is their bottom line.”²⁰⁵ Net neutrality advocates, fear ISPs “will become gatekeepers and use their market power to the disadvantage of Internet users and competing content and application providers.”²⁰⁶ If private companies were allowed free reign over their network management practices, they could charge content providers varying tolls for faster access to their network and consumers.²⁰⁷ This would create an “environment where companies could block competitor web sites and services, or even carve out faster bandwidth for their own services.”²⁰⁸ Pro-regulation advocates insist that the government is merely trying to level the playing field, ensuring open access to all, in its quest for regulatory authority over the Internet.²⁰⁹ They contend that open access does not stifle innovation, but rather is a catalyst for new ideas and growth.²¹⁰ Furthermore, they cite examples like Hulu, Amazon, and Facebook that thrived because, “at the time, there were no restrictions on what services users could access.”²¹¹ Moreover, they claim it is important for the Internet to

²⁰⁵ Bruce McQuain, *Net Neutrality – For It, Or Against It? The Politics of Net Neutrality Are Getting Even More Complex*, WASHINGTON EXAMINER BLOG (Sept. 27, 2010, 12:00 AM), <http://washingtonexaminer.com/blogs/examiner-opinion-zone/net-neutrality-it-or-against-it-politics-net-neutrality-are-getting-even>. (quoting Senator Al Franken).

²⁰⁶ Gilroy, *supra* note 146, at 6.

²⁰⁷ Normal Tech News, *Network Neutrality: Pros and Cons*, NORMAL TECH NEWS (Sept. 14, 2010), <http://normaltechnews.blogspot.com/2010/09/network-neutrality-pros-and-cons.html>.

²⁰⁸ *See id.*

²⁰⁹ *See* Mike Fratto, *Think Net Neutrality Will Kill Innovation and Jobs? Think Again*, NETWORK COMPUTING (Dec. 20, 2010), <http://www.networkcomputing.com/data-networking-management/think-net-neutraity-will-kill-innovation-and-jobs-think-again.php>.

²¹⁰ *See id.*

²¹¹ *See id.* “After all, it was equal access to the customer that enabled companies like Yahoo! and Google to outrace established giants, from AT&T to Microsoft, and become giants themselves.” Stephen Baker, *Net Neutrality: The Innovation Issue*, BUSINESSWEEK (June 12, 2006), http://www.businessweek.com/the_thread/blogspotting/archives/2006/06/net_neutr

remain a level playing field so that innovative startups can compete equally with gargantuan incumbents who have relatively limitless funds.²¹² Greatly simplified, in a tiered-pricing network that splits the Internet into “fast lanes” and “slow lanes,” more money means faster and greater access to users.²¹³ A good example of this business framework is advertising, where small startups may only have enough capital to advertise in print or in low-cost and low-viewership spaces on television. In comparison to big companies, like Budweiser, who spend millions on Super Bowl commercials, these small companies would only be able to reach a small number of consumers, thereby inhibiting their growth.²¹⁴ Granted, ISPs will probably not charge millions for fast access to users, but the premise is the same.

Opponents respond by claiming that regulations would stunt growth and investment in the stagnating broadband network

ality.html. Part of the attraction for individuals to start small Internet companies was the fact that the Internet provided a low cost, equal access medium they could use to reach a large number of consumers. See Fratto, *supra* note 209. Without this access to a level playing field, it is unlikely that small startup companies in the future will experience the same level of growth as Amazon or Google. See *id.*

²¹² Albert Wenger, *Net Neutrality Is Critical For Innovation*, BUSINESS INSIDER (Aug. 12, 2010, 10:49 AM), <http://www.businessinsider.com/net-neutrality-wenger-2010-8>. “Imagine . . . an Internet in which Google can pay Verizon and others to deliver Youtube videos faster than video content from other sites, including that of your favorite startup. Given Youtube’s existing scale and Google’s ability to cross subsidize, this would forever cement Youtube as the source of Internet video.” *Id.* By dividing the Internet into “fast lanes” and “slow lanes” activists fear that innovation will be stifled, “as only the select few who can pay the freight on the ‘fast lane will be able to deliver next-generation services, while everyone else’s online offerings stagnate.” Timothy B. Lee, *The Durable Internet Preserving Network Neutrality Without Regulation*, CATO 24 (Nov. 12, 2008), www.cato.org/pubs/pas/pa-626.pdf.

²¹³ See Lee, *supra* note 212.

²¹⁴ See *Who Won the “Social Bowl,”* METRICS BLOG (Feb. 10, 2011), <http://blog.metricsmarketing.com/?tag=super-bowl-ads>. “Even giants in the content provider category – like Facebook and YouTube – were nascent sites at one point, and if they had to jump through hoops to have ISPs feature their content, they may never have grown into the cultural forces they are today.” Hercules K., *How Internet Neutrality Affects Online Innovation and Business*, BUSINESS2.0PRESS (Sept. 16, 2010, 8:58 AM), <http://business2press.com/2010/09/16/how-internet-neutrality-affects-online-innovation-and-business/>.

industry.²¹⁵ These commentators believe that new regulations will “discourage needed investment in new technologies like fiber optics and 4G wireless networks.”²¹⁶ With the increase of high bandwidth-consuming services like NetFlix, a capacity crisis in ISP networks may be on the horizon without more investment in broadband infrastructure.²¹⁷ The question becomes: Who will pay for this new

²¹⁵ See Larry Downes, *Net Neutrality Would End Innovation, Not Preserve It*, THE HILL (Mar. 15, 2010 2:32 PM), <http://thehill.com/opinion/op-ed/86817-net-neutrality-would-end-innovation-not-preserve-it>.

The imposition of such requirements, they state, is not only unnecessary, but would have negative consequences for the deployment and advancement of broadband facilities. For example, further expansion of networks by existing providers and the entrance of new network providers, would be discouraged, they claim, as investors would be less willing to finance networks that may be operating under mandatory build-out and/or access requirements.

Gilroy, *supra* note 146, at 5. (citations and internal quotation marks omitted).

²¹⁶ Downes, *supra* note 215. Verizon Communications Chairman and CEO Ivan Seidenberg stated:

More broadly, if we can't earn a return on the investments we make in broadband capacity, our progress toward a connected world will be delayed, if not halted altogether, ... If this burdensome regime of net regulation is imposed on all parts of the Internet industry, it will inject an extraordinary amount of bureaucratic oversight into the economy's main growth engine for the future.

Grant Gross, *Study Disputes Claim Net Neutrality Hurts Investment*, PCWORLD (Oct. 21, 2009 4:20 PM) http://www.pcworld.com/article/174070/study_disputes_claim_net_neutrality_hurts_investment.html. (citations and internal quotation marks omitted).

²¹⁷ Eric Kihlstrom, *Does Innovation Really Need Net Neutrality?*, GLOBAL TELECOMS BUSINESS (Dec. 12, 2010), <http://www.globaltelecomsbusiness.com/Article/2747670/Does-innovation-really-need-net-neutrality.html>.

According to a recent Cisco report, the average traffic over a broadband connection increased 31% in the last 12 months, generating 14.9 gigabytes of internet traffic a month. More importantly, for network planners, peak busy hour traffic grew even faster than average traffic, up by 41% in the last year,

infrastructure? Currently, “ISPs’ revenue growth is significantly less than traffic growth.”²¹⁸ Therefore, they have no economic incentive to invest in such costly measures without some major change that increases profits.²¹⁹ Without a way to increase profit margins, innovation in newer broadband technology will stagnate. Furthermore, proponents of private network management argue that the problem is that “a small number of heavy users make services more expensive for everyone.”²²⁰ Therefore, if net neutrality regulations were to prevent tiered pricing, average users would be made to subsidize the costs for heavy-bandwidth consumers.²²¹ Thus, opponents of regulation conclude that tiered pricing will more effectively match network usage and costs and will promote broadband infrastructure growth.²²² In addition, opponents contend that a long-term consequence of government regulation of network-management practices could be that the Internet could stagnate and become stuck at its current stage of development.²²³ “Do we really think that today’s service offerings, and today’s 3G and FIOS networks are the best the Internet can ever offer?”²²⁴

2. Content Innovation

In the 1990s, “Congress rescinded rules that prevented television networks from owning their own programming. Network

and peak-hour internet traffic is now 72% higher than internet traffic during an average hour.

Id. (citations and internal quotation marks omitted). As trends in “[I]nternet traffic and ISP revenue are not expected to vary dramatically from their current trajectory in the near future[,] [t]he investment gap will grow continually larger unless net neutrality is addressed by internet stakeholders.” *Id.*

²¹⁸ *Id.*

²¹⁹ *See id.*

²²⁰ *Id.* “Evidence of this phenomenon is found in the same Cisco report, which states that the top 1% of broadband connections are responsible for more than 20% of total internet traffic and the top 10% of connections worldwide are responsible for over 60% of broadband internet traffic.” *Id.*

²²¹ *Id.*

²²² *See id.*

²²³ *See Riley, supra* note 167.

²²⁴ *Id.*

executives swore in congressional hearings that they wouldn't give their own programming preferred access to the airwaves."²²⁵ However, "within a couple of years, NBC was the largest supplier of its own prime-time programming."²²⁶ Other conglomerates followed suit, and "[t]oday, if you're an independent producer, it's nearly impossible to get a show on the air unless the network owns at least a piece of it."²²⁷ This real life example illustrates the pitfalls of allowing networks to create their own network-management practices with no rules to prevent discrimination.

Without network neutrality regulation, "there is a real threat that network providers will discriminate against independent producers of applications, content or portals or exclude them from their network. This threat reduces the amount of innovation in the markets for applications, content and portals at significant costs to society."²²⁸ For example, in a market with little competition, "market leaders may prefer to stifle innovation," in order to protect their traditional offerings.²²⁹ Conversely, in a competitive market, rivals would be vying for market share and have an interest in creating new technologies to draw consumers to them.²³⁰

The current ISP market structure is an oligopoly.²³¹ The top five companies in the sector operate about 70% of the market.²³² As an oligopoly, the ISPs would have the power to implement a "two-tiered system favoring large, established businesses or those with ties to broadband network providers."²³³ Even without overt endorsement, this "fast lane"/"slow lane" network model, would still favor cash-flushed content providers over small, independent

²²⁵ Franken, *supra* note 181.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Rebecca Wong & Daniel B. Garrie, *Network Neutrality: Laissez-faire Approach Or Not?*, 34 RUTGERS COMPUTER & TECH. L.J. 315, 317 (2008).

²²⁹ Jon M. Peha, *The Benefits and Risks of Mandating Network Neutrality, and the Quest for a Balanced Policy*, DPACKET.ORG (Dec. 19, 2007), <https://www.dpacket.org/articles/benefits-and-risks-mandating-network-neutrality-and-quest-balanced-policy>.

²³⁰ *Id.*

²³¹ See ISP-Planet, *supra* note 173.

²³² See *id.*

²³³ Gilroy, *supra* note 146, at 6.

companies. These poorer content providers would have to settle for inferior service, resulting in their content being viewed by fewer users. Additionally, increased costs mean less profit, which would discourage independent content providers from creating new content and releasing it. These costs would be prohibitive for individuals who want to create new, innovative content and upload it for kicks. Furthermore, net neutrality proponents fear that a tiered-pricing model would eventually lead to all free content becoming ad-laden, slow, and of inferior quality.²³⁴

Opponents argue that “[a]pplication innovation could also be discouraged . . . if . . . network providers are restricted in the way they manage their networks or are limited in their ability to offer new service packages or formats.”²³⁵ “Such legislation is not needed, they claim, as major Internet access providers have stated publicly that they are committed to upholding the FCC’s four policy principles.”²³⁶ Furthermore, they contend that a two-tier pricing structure would enhance innovation by injecting more money into the Internet market.²³⁷ “The pricing structure of the Internet can be seen as an alternative means of subsidizing creativity and innovation. . . . As economic analysis suggests, setting a preferable price or ruling out certain types of fees for content providers may encourage creation of content or new inventions that would not otherwise occur.”²³⁸ In addition, broadband infrastructure is costly and increased profits will help to keep the Internet fast and encourage innovative technologies that require more bandwidth.

V. ALTERNATIVES TO REGULATION

Other than a toothless policy statement provided by the FCC in 2005 and 2009, the Internet in the United States has been largely self-regulated since its inception. Former FCC Commissioner Robert McDowell stated, “the Internet is perhaps the greatest deregulatory

²³⁴ See Reardon, *supra* note 38.

²³⁵ Gilroy, *supra* note 146, at 5.

²³⁶ *Id.*

²³⁷ See Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, NEW AMERICA FOUNDATION (2009), <http://www.newamerica.net/node/13677>.

²³⁸ *Id.*

success story of all time. It became successful not by government fiat, but by all interested parties working together toward a common goal.”²³⁹ Furthermore, while government regulation proponents promote varying regulatory solutions to the net neutrality debate, opponents claim that “unintended consequences of legislation may be costly and inefficient.”²⁴⁰ As a result, regulation opponents advocate industry self-regulation based on competition or “best practices.”²⁴¹ They claim that voluntary agreements by stakeholders, rather than imposed governmental regulations, would create a “flexible, realistic approach to protecting an important principle.”²⁴²

“Best practices” involve “negotiations with stakeholders aimed at reaching a comprehensive accord.”²⁴³ Furthermore, by creating a voluntary set of best practices, one can sidestep the “unintended consequences of poorly drafted legislation.”²⁴⁴ Indeed, the FCC’s current rules, with its gaping holes and vague terms, would qualify as poorly drafted legislation. Prior to the FCC’s December regulations, Verizon and Google issued a joint proposal outlining core values that they believe, if followed, will work to satisfy Internet “players”’ economic interests, boost network

²³⁹ Adam Thierer & Mike Wendy, *The Constructive Alternative to Net Neutrality Regulation and Title II Reclassification Wars*, THE PROGRESS AND FREEDOM FOUNDATION vol. 17 iss. 19, 8 (May 2010), available at http://www.pff.org/issues-pubs/pops/2010/pop17.9-constructive_alternative.pdf.

²⁴⁰ Kevin Donovan, *Are Industry Best Practice Enough to Protect Net Neutrality?*, TECHDIRT (Mar. 6, 2009), <http://www.techdirt.com/articles/20090228/1530343930.shtml>.

Government regulation of private industry frequently leads to unintended consequences, and industry incumbents often find ways to turn the regulatory system to their own benefit. It would be unfortunate if a hasty effort to enact network neutrality rules led to decades of litigation and regulatory battles over the meanings of network neutrality concepts when the focus should be on developing new and better technology.

Lee, *supra* note 212, at 36. (citations and internal quotation marks omitted).

²⁴¹ See Donovan, *supra* note 240.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

investment and growth, and keep the Internet free and open. These principles are:

- (1) Preserving openness;
- (2) Encouraging investment and innovation in broadband networks;
- (3) Providing users with control;
- (4) Providing users with information;
- (5) Maintaining a balanced intellectual property policy;
- (6) Keeping Internet applications, content, and services free from communications regulation; and
- (7) Providing a leadership role for expert technical bodies.²⁴⁵

They posit, that if industry “players” follow these long-held core “values—which have kept government regulation largely out of the picture—the Internet ecosystem can continue to innovate and grow as it has, virtually unabated, since its inception.”²⁴⁶ Furthermore, these ISPs will be regularly monitored and scrutinized to see if they are acting in accordance with these values.²⁴⁷ There are many entities like the “Net Neutrality Squad, Computer Professionals for Social Responsibility, and the Berkman Center for Internet & Society’s Herdict project [who] . . . look to identify and address anticompetitive and discriminatory behavior on the Internet, and provide a forum for ‘fostering cooperation and mutually agreeable methodologies whenever possible’ . . . ”²⁴⁸ In addition to these active watchdogs, the Internet community itself will be constantly monitoring and reporting on ISPs’ behavior.²⁴⁹ Therefore, pressure from other Internet companies and the public to conform to these values will keep carriers in line.²⁵⁰

Another basis for self-regulating solutions is competition among broadband providers.²⁵¹ Government regulation opponents believe that “[b]ecause ISPs . . . recognize the competitive advantage

²⁴⁵ Thierer, *supra* note 239, at 8.

²⁴⁶ *Id.*

²⁴⁷ *See id.* at 9.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *See* Thierer, *supra* note 239, at 8.

²⁵¹ Donovan, *supra* note 240.

of staying neutral, there is a force pushing them in that direction.”²⁵² Market forces that make it in the best interest of the ISPs to stay neutral include buyer power and the mere threat of legislation by the government.²⁵³ While it is widely recognized that the broadband industry is an oligopoly with few players and, thus, has little competition within the industry, government regulation opponents claim that “[e]ven if some service providers could exercise some market power, the multi-sided nature of the market means that they still have powerful incentives to offer a wide array of content.”²⁵⁴

VI. CONCLUSION

As we stand here now, the freedom and openness of the Internet is unprotected. No rules on the books to protect basic Internet values. No process for monitoring Internet openness as technology and business models evolve. No recourse for innovators, consumers, or speakers harmed by improper practices. And no predictability for the Internet service providers, so that they can manage and invest in broadband networks.²⁵⁵

-Julius Genachowski, Chairman of the FCC

“[T]he FCC rules are designed to prevent potential future harms and they could shape how Americans access and use the

²⁵² See *id.* In the United States, the driving force was largely the *threat* of legislation. *Id.*

²⁵³ See *id.*

²⁵⁴ See Hahn, *supra* note 9, at 5. For example, “[s]uppose AT&T tries to charge Google for the right to stream video over its high speed fiber and Google refuses to pay. AT&T might allow unfettered access to Google anyway because customers want it.” *Id.* This illustrates that, “even firms with market power in one part of the market will not necessarily be able to control content.” *Id.* Broadband providers in the “U.S. offers among the slowest broadband speeds in the world, yet providers charge the highest rates on the planet.” Pam Baker, *Net Neutrality - Will the FCC Get it Right?*, CIO UPDATE (Sept. 2, 2010), <http://www.cioupdate.com/trends/article.php/3901816/Net-Neutrality--Will-the-FCC-Get-It-Right.htm>. Why you ask? “There is not much competition and at this time, they are not being forced to improve.” *Id.*

²⁵⁵ Brian Stelter, *F.C.C. Poised to Pass Net Neutrality Order*, N.Y. TIMES (Dec. 20, 2010, 4:48 PM), <http://mediadecoder.blogs.nytimes.com/2010/12/20/f-c-c-poised-to-pass-net-neutrality-order/>.

Internet years from now.”²⁵⁶ The new regulations, though not perfect, are a great first step toward creating basic standards and rules for the Internet. Though there are good arguments for both sides of the net neutrality debate, this author believes that clear standards are needed in order to create stability in the “electronic frontier.” Marketplace stability would in turn “encourage investment and foster the growth of new services and applications.”²⁵⁷ Though there are several alternatives to regulation suggested as solutions to the net neutrality debate, the author of this article contends that some government regulations are still needed, as a last line of defense. Even though industry “players” would have agreements to conform to certain values and be constantly monitored by the public, this model relies on reputation as its only form of enforcement. There are no legal consequences for providers who decide not to conform. Similarly, the oligopoly that exists in the broadband market today is not conducive to self-regulation by competition. Therefore, the government should enact light-touch regulations over broadband management network practices to keep the companies in line, meanwhile focusing future efforts on promoting innovation and growth.

²⁵⁶ Shatz, *supra* note 116.

²⁵⁷ Gilroy, *supra* note 146, at 5.