

# NET NEUTRALITY: FCC VS. FTC

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Opponents of net neutrality argue that it prevents competition among ISPs. Moreover, ISPs argue a net neutrality regulatory rule is preemptive and aims to solve a problem that doesn't exist. Proponents of net neutrality argue that it will keep the Internet open and free among users and content providers. Without net neutrality, ISPs could block content or charge for delivery speeds, which could give advantages to certain content providers and prevent new providers from entering and attracting consumers. This case will discuss the arguments for and against net neutrality, and the different regulatory solutions to ISPs potentially blocking content.

This case study was completed under the direction of Dr. Amber Díaz Pearson, The Kenan Institute for Ethics.

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## Introduction

There are multiple layers to the Internet, with a basic distinction between the Internet Service Providers (ISPs) and content providers. The ISP allows you to open a browser like Safari or Internet Explorer, and then individual websites, like Google, provide content.

While the Declaration of Internet Freedom calls for a free and open Internet, with expression, access, and openness, policymakers are concerned ISPs will compromise this vision of the Internet. Without regulation, ISPs can charge different prices for different delivery speeds of content. For example, Comcast can charge Google a higher price compared to Yahoo for the same delivery speed, or Comcast could even charge Google a higher price for a delivery speed that is slower than Yahoo's delivery speed. In a more extreme example, an ISP could block content directly or indirectly with such a high price for delivery to users.

Regulators want to protect the access and openness of the Internet from the possibility of ISPs discrimination against content providers. This concept that ISPs should provide Internet access regardless of content is called network neutrality, commonly called net neutrality.

Columbia Media Law Professor, Tim Wu, coined the term network neutrality in a 2003 paper. Network neutrality is the neutral competition of applications and content on a network; the network providers do not discriminate between applications and content. Wu argued to achieve network neutrality broadband providers should (in most cases) not discriminate in the delivery of content. Wu wrote that, "Promotion of network neutrality is no different than the challenge of promoting fair evolutionary competition in any privately owned environment."<sup>1</sup> Net neutrality should allow for the best evolution and competition of ISPs and online content and applications.

In 2007, Comcast was discovered to be blocking content. Comcast had prevented its users from sharing files online through file-sharing networks like Bit-Torrent. Given the core end-to-end architecture of the Internet, which is what allows any one person online to communicate and share files directly with another person, Comcast actively interfered with a defining feature of Internet use. The technology Comcast used to block or slow down file sharing targeted on specific type of content, which created a concern Comcast could block legal or non-harmful content.<sup>2</sup> ISPs claim that managing content allows the company to ensure quality of delivery and delivery speeds, and to create a profit that will enable the company to invest in infrastructure.<sup>3</sup> However, managing content involves discriminating against certain types of content. Discriminating against certain type of content leads to a slippery slope argument that asks what prevents ISPs from discriminating against competitors' content (like Time Warner

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<sup>1</sup> Wu, T. (2005). Network Neutrality, Broadband Discrimination. *SSRN Electronic Journal SSRN Journal*, 141-179. doi:10.2139/ssrn.388863

<sup>2</sup> Svensson, P. (2007, October 19). Comcast blocks some Internet traffic. Retrieved May 20, 2016, from <http://www.nbcnews.com/id/21376597/#.VwsPYxMrLdQ>

<sup>3</sup> Ibid.

blocking Comcast's website), or against young start-up sites that can't afford to pay for an Internet fast lane to make its content accessible, or in an extreme, against certain political news sites (e.g. blocking MSNBC but not Fox News or CNN).

Opponents of net neutrality argue that it prevents competition among ISPs. Net neutrality would inhibit an ISP from profiting, which de-incentivizes the ISP from innovating to improve its services and attract its competitor's consumers. ISPs argue that net neutrality prevents this competition and that this competition will not break the Internet. Moreover, ISPs argue a net neutrality regulatory rule is preemptive and aims to solve a problem that doesn't exist. ISPs specifically argue that only evidence that ISPs discriminate against legal and non-harmful content is the 2007 Comcast example.<sup>4</sup>

Proponents of net neutrality argue that it will keep the Internet open and free among users and content providers. Net neutrality would ensure content providers could compete against each other without interference from ISPs or barriers to enter the competition from fees for delivery speeds. Without net neutrality, ISPs could block content or charge for delivery speeds, which could give advantages to certain content providers and prevent new providers from entering and attracting consumers.

This case will discuss the arguments for and against net neutrality, and the different regulatory solutions to ISPs potentially blocking content.

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<sup>4</sup> Hazlett, T. W. (2011). *The fallacy of net neutrality*. New York, NY: Encounter Books.

## Where does net neutrality originate in US law?

In 2005, the Federal Communications Commission (FCC) introduced a policy that instituted the Net Freedom principles, a precursor to net neutrality. This policy called for consumers to have open access to Internet content, applications and services, and entitled to competition among ISPs, network providers, content providers and applications.

The FCC drew its authority to regulate ISPs under the Communications Act of 1934. The FCC specifically classified ISPs as an “Information Service,” which entails “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing.”<sup>5</sup> The Telecommunications Act of 1934 requires, “wire and radio...to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”<sup>6</sup> By classifying ISPs as an Information Service, the FCC has the authority to enforce anti-discriminatory rules as stated in the Telecommunications Act of 1934.

FCC sanctioned Comcast in 2008 for violating these principles. Comcast then sued the FCC over the rules after the FCC. Comcast argued that the FCC did not have the authority to regulate ISPs under the Communications Act of 1934. In 2010, the case went to the U.S. Court of Appeals, who ruled in favor of Comcast.

Months after the court’s ruling, the Federal Communications Commission (FCC) introduced the Open Internet Order. The basics rules called for ISPs to be transparent, not block content, and not unreasonably discriminating against content. ISPs must disclose their network management practices, the terms and conditions of their services, not block any lawful content or non-harmful devices, and not discriminate against lawful network traffic. ISPs claim these rules are unnecessarily restrictive, anti-competitive and will stifle online innovation. Content providers claim the rules protect new websites from steep barriers to entry that ISPs could create with charging for delivery speeds.<sup>7</sup>

The FCC returned to Court over the net neutrality rules when Verizon Communications sued the commission in 2014. The Court of Appeals now investigated whether the FCC’s authority to enforce net neutrality from the Telecommunications Act of 1996 is supported by law. The court vacated the anti-discrimination and anti-blocking rules of the Open Internet Order because the FCC lacked the legal authority to enforce the rules as ISPs were classified as information services, which the Telecommunications Act of 1996 excludes ISPs from FCC’s authority.<sup>8</sup>

The FCC then released a new Open Internet Order in 2015 to reflect the *Verizon v. FCC* ruling. The 2015 Open Internet Order also required ISPs to not block, throttle,<sup>9</sup> or allow for paid prioritization of content. This Open Internet Order drew its authority to enforce these rules under Title II of the Telecommunications Act of 1996. Under

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<sup>5</sup> U.S.Cong., Committee on Commerce. (1996, January 3). *Telecommunications Act of 1996* [Cong. S.652 from 104th Cong., 2nd sess.]. Retrieved May 20, 2016, from <https://transition.fcc.gov/Reports/tcom1996.pdf>

<sup>6</sup> Ibid.

<sup>7</sup> United States, Federal Communications Commission. (2010, December 23). *Preserving the Open Internet Broadband Industry Practices*. Retrieved May 20, 2016, from [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-10-201A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf)

<sup>8</sup> U.S.Cong., Committee on Commerce. (1996, January 3). *Telecommunications Act of 1996* [Cong. S.652 from 104th Cong., 2nd sess.]. Retrieved May 20, 2016, from <https://transition.fcc.gov/Reports/tcom1996.pdf>

<sup>9</sup> Throttling involves the intentional slowing of broadband service.

Title II, the FCC can, and has, classified the Internet as a public utility. The FCC’s Order calls for ISPs to not block or throttle content or to ask for paid prioritization of content.<sup>10</sup>

## Competition Policy

In regulating other industries, the primary concern is economic: protecting competition and consumer welfare. Within the United States, the Federal Trade Commission is responsible for those regulatory concerns. Typically, when a company has anti-competitive practices or harms consumers, an individual lodges a complaint with the FTC about the practice and the FTC lodges a suit against the company.

FTC Chairman Ajit Pai argued in a Congressional Hearing that net neutrality rules are too restrictive and will stifle competition. Net neutrality would unnecessarily restrict ISPs before any wrongdoing occurred. Chairman Pai said, “Title II (of the Telecommunications Act of 1934) is a solution that won’t work to a problem that doesn’t exist.”<sup>11</sup> He argued that the Net Neutrality rules under Title II would decrease competition among ISPs, which would increase broadband prices, decrease broadband speeds, and decrease consumer choice.

If the FCC enforced Net Neutrality and not the FTC, Pai argued “We are essentially going to be funneling their (ISPs’) entrepreneurial spirit through a regulatory bottleneck.”<sup>12</sup>

Chairman Pai stated that the FTC is in a better position to regulate ISPs. The FTC can use its established methods to regulate ISPs under anti-trust and consumer protection rules. According to Chairman Pai, the FTC methods would focus on real, observed abuses, whereas Net Neutrality under Title II would presume that every ISP is an anti-competitive gatekeeper. Under these methods, the FTC can protect competition and consumers without placing undue burdens on the companies, which would also stifle economic growth. “The scalpel of anti-trust, not the sledgehammer of Title II, is the best guarantor of consumer welfare,” Chairman Pai said.<sup>13</sup>

FTC Commissioner Joshua Wright similarly argued that regulation is only justified when there is a market failure: a lack of competition or harm to consumers. In the case of ISPs, Commissioner Wright does see any market failure that justifies regulation; “Not all gatekeepers require regulation.”<sup>14</sup>

## Free Flow of Information

Whenever a question of regulating the Internet arises, the immediate concern is “Don’t break the Internet!” The Internet is a unique platform that allows users to directly share information with each other with the end-to-end

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<sup>10</sup> Ruiz, R. R., & Lohr, S. (2015, February 26). F.C.C. Approves Net Neutrality Rules, Classifying Broadband Internet Service as a Utility. Retrieved May 20, 2016, from [http://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-internet-utility.html?\\_r=1](http://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-internet-utility.html?_r=1)

<sup>11</sup> U.S. House, Committee on the Judiciary. (2015, March 25). *Wrecking the Internet to Save It? The FCC’s Net Neutrality Rule* [H.R. Doc. 114–18 from 114th Cong., 1st sess.]. Retrieved May 20, 2016, from [https://judiciary.house.gov/wp-content/uploads/2016/02/114-18\\_93897.pdf](https://judiciary.house.gov/wp-content/uploads/2016/02/114-18_93897.pdf). 12.

<sup>12</sup> Ibid. 72.

<sup>13</sup> Ibid. 13.

<sup>14</sup> Ibid. 20.

architecture. Moreover, the exchange of content is through written speech, which is protected under the First Amendment. Any Internet regulation is held to protect the end-to-end architecture and the free exchange of information.

In deciding whether to enforce or not enforce net neutrality, the question is what will not break the Internet? If net neutrality were not enforced, would ISPs restrict content delivery and content competition to the point that there is no longer the free exchange of information between users? FCC Chairman Tom Wheeler argued, “Broadband providers (ISPs) represent a threat to Internet openness.”<sup>15</sup> He further argued that when Title II of the Communications Act was applied to broadband DSL providers in the 1990s and early 2000s it did not prevent the private sector from investing in innovative technology.<sup>16</sup>

Net neutrality addresses economic and social regulatory concerns. The economic regulatory concern protects competition and consumer welfare, whereas the social regulatory concern protects the free flow of information. Net neutrality aims to prevent content discrimination, which predominantly addresses the social regulatory concern, and it also prevents ISPs from engaging in anti-competitive practices. It addresses both economic and social regulatory concerns.

The social regulatory concern of the free flowing information makes regulating the Internet different than regulating other industries. If private organizations can restrict the flow of information without any check or oversight, it prevents the exchange of information among individuals. Information allows individuals to hold the private organizations and governments accountable. Intercepting information would prevent the accountability necessary for a democratic society.

FTC Commissioner Terrell McSweeney argued to Congress that regulating the ISPs is a task for both the FTC and the FCC. “There is not an either/or choice that must be made between FTC regulation and FTC enforcement as it relates to the Open Internet,” she stated.<sup>17</sup> The FCC can address the noneconomic First Amendment concerns regarding the exchange of information, and the FTC can address the economic concerns. The FCC has the oversight over the ISPs and the FTC has the regulatory and enforcement experience that would best ensure Net Neutrality.<sup>18</sup> McSweeney argued that the FCC may be better equipped to detect antitrust violations or harm to consumers than the FTC, and that the two organizations can and have cooperated for a better regulatory outcome.

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<sup>15</sup> Ibid. 6.

<sup>16</sup> Ibid. 7.

<sup>17</sup> Ibid. 46.

<sup>18</sup> Ibid.