Network Neutrality Over the Top: Why the FCC Should Not Try to Establish Rules Affecting Internet Content and Applications Providers

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The Federal Communications Commission (“FCC”) has issued a Notice of Proposed Rulemaking (“NPRM”) that would codify rules aiming to preserve a free and open Internet for consumers. The NPRM properly concentrates on the relationship between end users and Internet access providers (“IAPs”), but has solicited comments on whether the Commission should apply one or more Internet openness principles as obligations on providers of content, applications, and services. The FCC has proposed enforceable rules about Internet access in the absence of an explicit statutory mandate. While the FCC’s ancillary jurisdiction and the scope of its public interest mandate support reasonable efforts to promote consumer freedom by overseeing the conduct of facilities-based IAPs, the FCC has no legal basis to regulate content providers and meddle with the robustly competitive marketplace for content and services.

The FCC’s NPRM responds to concerns about the behavior of IAPs in their capacity as first and last mile providers of Internet access and as intermediaries between consumers and sources of content, applications, and services. Empirical and anecdotal evidence support an investigation whether the Commission should impose enforceable rules to ensure that IAPs do not engage in anticompetitive behavior masquerading as legitimate network management, or otherwise reduce the spillover benefits accruing from Internet access. However, no such evidence points to any dysfunction in the marketplace for content, applications, and services available via the Internet.

The marketplace of ideas available via the Internet is as vigorous and open as any medium of communications so long as facilities-based intermediaries do not interfere with the flow of traffic.

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upstream from content sources and downstream to end users. The Commission frequently has acknowledged the different characteristics of network access vis a vis the content and applications that run “over the top.” Internet access constitutes an essential end user access link lacking robust competition while the content and applications marketplace offers unlimited consumer choice.

The FCC needs to act with caution in its assessment of what it should do to preserve an open Internet. The potential for anticompetitive and otherwise harmful conduct lies in the terms and conditions imposed by IAPs that do not operate in a vigorously competitive marketplace for first and last mile services. Facilities-based IAPs have both the incentive and ability to operate non-neutral networks that may not serve the public interest, particularly in light of their ability to operate content origination and termination monopolies providing end users a single link to and from the Internet cloud.

The need to investigate and possibly remedy problems in the terms, conditions, and nature of consumers’ access to the Internet does not provide the FCC with the basis for an unprecedented expansion of its regulatory wingspan to regulate content and applications that traverse networks. Ample case law supports the premise that the FCC has no basis to impede and regulate Internet-mediated content and services. Network neutrality objectives never have extended upstream to sources of content and software, because consumers have unlimited choices of options, subject only to the constraints imposed by IAPs in their capacity as intermediaries, and operators of the sole means for end users to access the Internet.
I. Absent a New Legislative Mandate, the FCC Lacks Jurisdiction to Regulate the Creators of Content and Software Applications.

Throughout the FCC's comprehensive explanation of how the Internet has become a successful medium of communications, along with the Commission’s efforts to promote access, the Open Internet NPRM concentrates on the relationship of end users upstream to the Internet cloud via facilities-based IAPs:

The rules we propose today address users’ ability to access the Internet and are not intended to regulate the Internet itself or create a different Internet experience from the one that users have come to expect. Instead, our proposals attempt to build on existing policies . . . that have contributed to the Internet’s openness without imposing conditions that might diminish innovation or network investment.

Wisely, the FCC has left the application and content layers essentially unregulated. This has helped enable the incredible outpouring of innovation and creativity online.

However, as part of its Open Internet NPRM, the FCC now asks whether it should depart from this approach, and apply openness principles to Internet content and applications as well. The FCC cannot lawfully extend its regulatory wingspan to impose enforceable rules and regulation for two reasons. First, while the FCC’s ancillary jurisdiction and the scope of it public interest mandate support reasonable efforts to promote consumer freedom by overseeing the conduct of facilities-based IAPs, the FCC has no legal basis to regulate content and application providers. Second, the policy rationale for regulating IAPs does not apply to content and application providers.

Operators at the network level provide an essential link between ends users and sources of content and applications. Consumers generally have limited options available and typically select one and only one operator to provide all access services. The lack of competitive options, coupled with an origination and termination monopoly for individual subscribers, accrues ample market power for IAPs that possess both the incentive and ability to abuse this power, particularly when vertically
integrated IAPs offer subscribers content and applications that compete with what unaffiliated ventures have available.

The FCC has no basis to depart from its longstanding policy that recognizes the competitive and operational distinctions between facilities-based providers and those services that depend on networks to reach end-users. Consistent with its statutory mandates, the Commission applies more comprehensive regulatory oversight where facilities-based, first and last-mile providers have the incentive and power to use their control in network infrastructure in ways that interfere with competition and innovation in services that depend on this infrastructure. Content and applications, riding on top of network links, qualify for little if any regulation in light of the fact that these layers operate competitively and must rely on the telecommunications transmission services of carriers subject to regulatory oversight. Ventures offering content and applications operate in a robustly competitive marketplace, limited only by the network bottleneck through which all content and applications must traverse. Applying openness principles to the vibrant application and content markets would endanger the open Internet, because of the real potential for such regulations to stifle innovation, create disincentives for investment, and impose unnecessary operating costs.

In the absence of a new statutory mandate to impose network neutrality rules, the FCC must find a jurisdictional basis from existing law. The Commission primarily has applied its ancillary jurisdiction based on Title I of the Communications Act, as amended, coupled with the view that other portions of the Communications Act provide the statutory basis for regulatory efforts to promote access to the Internet. A reasonable reading of these statutory references would limit their applicability to ventures that operate wire or radio conduits to the Internet and use them to provide access to Internet-mediated content, software, and services. Nothing in the statutory provisions cited by the FCC to justify its regulatory intervention to promote an “Open Internet” provides any basis for the
Commission to extend its regulatory reach to ventures supplying the content delivered by unaffiliated IAPs.

A. The Commission’s Statutory Basis for Applying Network Neutrality Rules (including Title I, Secs. 201(b), 230(b), and 706(a)) Extend Only to Ventures that Provide Internet Access via Wire or Radio.

The FCC recognizes that facilities-based IAPs, operating between end users downstream and content providers upstream, have the incentive and ability to engage in practices that can frustrate the Internet access goals of both subscribers and content providers, and broader public interest objectives:

In many parts of the United States, customers have limited options for high-speed broadband Internet access service. Moreover, broadband providers generally sell other services—such as voice and video—that face competition from content and applications offered by others over the Internet. As a result, broadband providers’ interests in maximizing profits may not always align with the interests of end users and the public.

Broadband Internet access service providers possessing market power may have an incentive to raise prices charged to content, application, and service providers and end users. Not only would that harm users overall, but it could reduce innovation at the edge of the network and cause some end users to decide not to subscribe to broadband Internet access service.

While acknowledging that it “has traditionally focused on providers of broadband Internet access service,” the FCC nevertheless invites comments on the merits of “phrasing one or more of the Internet openness principles as obligations of other entities, in addition to providers of broadband Internet access service.”

Simply put, the FCC lacks any jurisdictional basis, or compelling public interest need, to impose Internet openness principles or rules on providers of content. None of the statutory clauses cited by the Commission to support its assertion of jurisdiction over IAPs can stretch further to include content providers. In the Open Internet NPRM, the FCC claims to have ancillary authority, under Title I of the Communications Act, to exercise jurisdiction over the Internet and to implement
Federal Internet policy. However, the Commission elsewhere has acknowledged that ancillary jurisdiction can apply only “where the Commission has subject matter jurisdiction over the communications at issue and the assertion of jurisdiction is reasonably required to perform an express statutory obligation.” The FCC does not have open-ended jurisdiction to regulate content, nor does a claim to regulate aspects of Internet-mediated communications and information services automatically extend to content carried via Internet conduits.

Similarly, the FCC cannot credibly read the language in Sections 230(b), and 201(b) of Communications Act, as amended, and Section 706(a) of the Telecommunications Act of 1996 as extending the Commission’s regulatory wingspan over any Internet-mediated content. Section 230(b)(1) states that it “is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media . . .” Section 230(b)(2) states that it “is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,” hardly an explicit or implicit endorsement of FCC regulation that could impact adversely the currently vibrant and free marketplace of ideas available via the Internet. Section 201(b) of the Communications Act authorizes the FCC to “to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act.” The FCC cannot lawfully bootstrap a statutory grant of authority to establish rules for any substantive area outside the Commission’s jurisdiction.

Section 706(a) of the Telecommunications Act of 1996 directs the FCC and state public utility commissions to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local
telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”

Congress defined advanced telecommunications capability “without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” The statute clearly focuses on promoting access to the Internet, i.e., the wire and radio facilities used by IAPs to provide first and last mile Internet access to end users and to provide these users with the upstream links into the Internet cloud for accessing content, applications, and services. Any statutory mandate available for the FCC to construe as authorizing it to regulate the Internet has explicit limits designed to narrow FCC oversight on enhancing public access to Internet conduits, whether classified as telecommunications services, or information services.

B. Network Neutrality Rules Can Only Apply to Conduit Providers.

If the FCC were to act on an invitation to extend binding regulatory obligations on content, application, and service providers the Commission surely will have engaged in an unlawful mission creep, based on “an implausible reading of the statute, . . . [thereby] exceed[ing] the authority given it by Congress.” Supreme Court Justice Scalia presciently warned that the FCC as an “experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions,” reserving, for example, the option of regulating Internet content based on statutes offering absolutely no basis for anything beyond promoting Internet access. Nowhere in its previous involvement with the Internet, or in its regulatory classification of telecommunications services and information services, has the Commission ever sought to expand its regulatory mission and the scope of oversight to include content, software, and services that traverse networks operated by IAPs. Similarly, nothing in the objectives of network neutrality articulated by the FCC and others requires
that the Commission make an unprecedented expansion of its jurisdiction ostensibly to achieve the
goals articulated by the Commission in its 2005 Internet Policy Statement \(^\text{23}\) and the Open Internet NPRM.

II. Ample Case Law Forecloses the FCC from Leveraging a Public Interest Argument to
Regulate Content, Application, and Software Providers.

Providers of content, applications, and services having no affiliation with downstream IAPs,
qualify for maximum protection from FCC regulation, because these ventures do not operate wire or
radio networks, and only use telecommunications bit transport services to deliver their content and
services to end users. The Commission has developed a long record of establishing a “bright line”
regulatory demarcation between regulated carriers providing telecommunications services and more
broadly wire or radio access on one hand, and unregulated ventures providing content, applications,
and software that ride on top of the transport services provided by facilities-based operators.

In its Second Computer Inquiry, \(^\text{24}\) the FCC established a regulatory dichotomy between regulated
basic telecommunications services and unregulated enhanced services based on the potential for
facilities-based carriers to abuse their bottleneck control over access to enhanced facilities. The
Commission created structural safeguards that required separation between a facility-based carrier’s
Title II regulated common carrier services and unregulated services provided by corporate affiliates. \(^\text{25}\)
The Commission subsequently concluded, in the Third Computer Inquiry, \(^\text{26}\) that a single firm could
achieve operational efficiencies without anticompetitive harm, by jointly providing basic and enhanced
services. However, this relaxation of structural and functional separation requirements did not
eliminate the dichotomy between regulated telecommunications services provided by network carriers
and unregulated services.

With enactment of the Telecommunications Act of 1996, \(^\text{27}\) Congress mandated continuation
of this regulatory dichotomy. The FCC must continue to apply Title II common carriage requirements
on telecommunications service providers, 28 subject to some regulatory forbearance opportunities where the public interest supports partial deregulation. 29 The Commission has limited regulatory oversight responsibilities for information service providers, the replacement classification for enhanced services. 30 Neither the Telecommunications Act of 1996 nor any other law, provide the FCC with statutory authority to regulate the content, applications, and software that traverse the networks operated by carriers subject to the Commission’s jurisdiction.

The holding in *American Library Ass’n v. FCC* 31 provides solid precedent for the premise that the FCC cannot leverage its ample statutory authority over facilities-based network operators, to extend its regulatory wingspan to include content and applications that these carriers deliver. The Court of Appeals for the District of Columbia Circuit held that the FCC ignored consumers’ rights to be free of government intrusion when the Commission sought to extend its regulatory wingspan to include electronic devices on consumer premises that receive content and may be remotely programmed by carriers to process Digital Rights Management instructions (“broadcast flags”) that would limit the copying, reformatting, and redistribution options available to consumers.

Characterizing the FCC’s action as the most sweeping assertion of authority in the Commission’s seven decades of existence, the court rejected the use of ancillary jurisdiction under Title I in lieu of explicit congressional authorization:

The Commission recognized that it may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities. The Commission’s general jurisdictional grant under Title I plainly encompasses the regulation of apparatus that can receive television broadcast content, but only while those apparatus are engaged in the process of receiving a television broadcast. Title I does not authorize the Commission to regulate receiver apparatus after a transmission is complete. As a result, the FCC’s purported exercise of ancillary
authority founders on the first condition. There is no statutory
foundation for the broadcast flag rules, and consequently the rules are
ancillary to nothing. Therefore, we hold that the Commission acted
outside the scope of its delegated authority when it adopted the
disputed broadcast flag regulations. 32

The court determined that broadcast flags operate as a curb on the ability of digital television
reception equipment to redistribute digital broadcast content after having received the content and not
during the actual broadcast transmission. 33 Finding no congressional authority for the FCC to regulate
consumers’ use of already received broadcast content, the court refused to defer to agency expertise. 34
The court reasoned that absent the need for explicit congressional authority the FCC would have
plenary authority to regulate any consumer electronics and computer devices.

The court also rejected the Commission’s ancillary jurisdiction rationale based on the
Communications Act. With references to several communications cases where a court endorsed
ancillary jurisdiction, the court noted that all prior cases with precedential value involved entities
engaged in “communication by wire or radio”:

The Court’s decisions in Southwestern Cable, Midwest Video I, and Midwest
Video II were principally focused on the second prong of the ancillary
jurisdiction test. This is unsurprising, because the subject matter of the
regulations at issue in those cases--cable television--constituted
interstate communication by wire or radio, and thus fell within the
scope of the Commission’s general jurisdictional grant under Title I of
the Communications Act. However, these cases leave no doubt that
the Commission may not invoke its ancillary jurisdiction under Title I
to regulate matters outside of the compass of communication by wire
or radio. 35

The court also rejected the FCC’s rationale that broadcast flag processing regulations could lawfully fit
within the Commission’s congressionally authorized responsibility for promulgating technical
requirements for television receiving equipment as part of its implementation of rules relating to the
transition from analog to digital television. 36
III. The FCC Has Never Stated It Has Statutory Authority to Regulate Internet-mediated Content and Services, Except for Instances Where the Service Provider Offers a Related Telecommunications Service, or in Special Circumstances Provides Telecommunications to End Users.

Nothing in the FCC’s growing involvement with matters pertaining to the Internet evidences an intention on the Commission’s part to extend its regulatory wingspan to include Internet-mediated content and services. The Communications Act of 1934, as amended, expressly limits the FCC’s substantive jurisdiction, and with limited and narrow exceptions, services that fit within the information services classification face limited FCC oversight. Mindful that the information services classification significantly constrains what it can do to serve the public interest, and aware of the artificial competitive advantages that accrue from incorrect regulatory classification, the FCC has appreciated the need, on occasion, to clarify what regulatory obligations apply to particular types of operators.

For example, the FCC determined that wireless telecommunications service providers needed to be reminded of their still applicable common carrier obligations, including the duty to provide “roaming” subscribers with access to their networks, on cost-based and nondiscriminatory terms. 37 Similarly, the Commission determined that routing telecommunications services via the Internet does not automatically convert these services into information services. 38 Additionally, the Commission has asserted ancillary jurisdiction and has applied selective regulatory requirements on Voice over the Internet Protocol (“VoIP”) service providers, primarily limited to VoIP operators that provide service to and from the conventional, dial up, public switched telephone network (“PSTN”). Selective FCC regulation of information services and VoIP offer no foundation for supporting an expansion of FCC oversight to any other type of Internet-mediated content, application, or service.
A. Internet-mediated Telecommunications Services

The FCC has clearly stated that routing telecommunications service traffic via the Internet does not provide carriers an automatic "safe harbor" opportunity to convert their traffic into a less regulated information service. Remarkably AT&T, the party identified in the Open Internet NPRM as suggesting that the FCC regulate Internet-mediated content and services, attempted without success to convince the FCC that calling card long distance telephone services provided by the company should qualify for the information service safe harbor.

B. VoIP Services

Rather than treat VoIP carriers with the same sort of limited regulatory oversight it applies to information services, the FCC has saddled certain types of VoIP service with some of the regulatory burdens applied to conventional telephone service. The Commission reduces the competitive cost advantage for VoIP service providers, which offer subscribers telephone calling access to the PSTN, based on the specific characteristics of these services that make them competitive alternatives to conventional dial up telephone service. The narrow and specific regulatory incursions stem from the Commission’s public interest concerns about the potential for VoIP service to impact adversely universal service funding, national security, and consumer expectations about the safety and convenience features available from telephone service.

Interconnected VoIP service providers must contribute to universal service funding, reconfigure their service to provide wiretapping capabilities to law enforcement authorities provide caller location identification and emergency 911 access, and offer service to disabled users. Such service specific regulatory burdens provide no precedent for a more broad-based extension of FCC regulation over any and all Internet-mediated services.
IV. The FCC’s Network Neutrality Concerns Address Instances Where Conduit Providers Unnecessarily Impede End User Internet Access to Content, Applications, and Software.

The FCC has never stated that the goals of preserving an open Internet and safeguarding consumers require the Commission to extend legacy regulation onto content, applications, and software. Simply put, the factors supporting the creation of enforceable openness rules to IAPs do not exist for extending any such rules to Internet-mediated content and applications. IAPs operate a bottleneck in their capacity as intermediaries between end users downstream, and content and applications providers upstream. The Commission must safeguard end user access to the Internet in light of the ability of IAPs to exploit their bottlenecks in ways that disserve the public interest through obviously anticompetitive conduct, but also through unnecessarily restrictive, discriminatory, and intrusive service terms and conditions that are unnecessary to achieve legitimate network management objectives.

Absent vastly changed circumstances and compelling reasons, the Commission has expressly stated the intention to maintain “an established policy of minimal regulation of the Internet and the services provided over it.” 46 In the context of promoting network neutrality, the Commission’s concern about content derives not from an interest in regulating it to remedy some apparent market failure, but to ensure that end users can freely access Internet-mediated content, and content creators operate on a level competitive playing field when vying for consumers.

The extensive scholarly and advocacy literature on network neutrality has concentrated on the IAPs and their relationship downstream with end users and upstream with content, applications, and service providers. 47 Authors debate whether these carriers have the incentive and ability to discriminate, what they can do under the rubric of network management, and whether consumers and content/applications providers need FCC safeguards to guard against anticompetitive conduct and
other harmful practices. The matter of IAPs’ relationship with upstream ventures raises questions whether the FCC needs to establish rules that prevent prioritization and other preferential treatment of specific content, e.g., supplied by affiliates, and not whether the Internet has sufficient supply or competitiveness in the marketplace for content, applications, and services. 49

A. The 2005 Internet Policy Statement and the Open Internet NPRM Concentrate on Users’ Rights of Access Vis a Vis Conduit Providers.

Absent the two sentences contained in paragraph 101 of the Open Internet NPRM, the FCC consistently has considered Internet openness and the need for regulatory intervention to preserve it solely in terms of “users’ ability to access the Internet . . . [with no] intent[] to regulate the Internet itself or create a different Internet experience from the one that users have come to expect.” 50 For each of the rules the FCC proposes to enforce, the Commission expressly limits the scope of enforcement to “a provider of broadband Internet access service.” 51 The Commission properly limits its focus to the ventures able to affect consumer access to the Internet.

B. The Potential for Consumer Harm is Acute When IAPs Seek to Tilt the Competitive Playing Field by Favoring Affiliated Content Providers and Services.

The marketplace for Internet-mediated content and services operates competitively, but runs the risk of becoming less so if IAPs can favor affiliated content providers. When the FCC sanctioned Comcast for unnecessarily meddling with subscriber traffic, the Commission identified a situation where an IAP acted on its incentive and ability to tilt the competitively playing field to disadvantage a competitive alternative to the company’s video on demand services:

Peer-to-peer applications, including those relying on BitTorrent, have become a competitive threat to cable operators such as Comcast because Internet users have the opportunity to view high-quality video with BitTorrent that they might otherwise watch (and pay for) on cable television. Such video distribution poses a particular competitive threat to Comcast’s video-on-demand (“VOD”) service. VOD . . .
operates much like online video, where Internet users can select and
download or stream any available program without a schedule and
watch it any time, generally with the ability to fast-forward, rewind, or
pause the programming. 52

More generally the Commission has acknowledged that:

a broadband Internet access service provider that is also a pay
television provider could charge providers or end users more to
transmit or receive video programming over the Internet in order to
protect the broadband Internet access service provider’s own pay
television service. Alternatively, such a broadband Internet access
service provider could seek to protect its pay television service by
degrad ing the performance of video programming delivered over the
Internet by third parties. The result may be higher prices or worse
service for some content and applications and inefficiently low
investment in some content and application markets. 53

C. IAPs Can Combine Vertical Integration of Conduit and Content with the Power
to Inspect, Drop, Prioritize, and Otherwise Discriminate Bit Streams for Both
Lawful Network Management Reasons and to Pursue Anticompetitive and
Other Strategies that Harm Consumers.

Unlike content providers upstream, an IAP can operate as “a gatekeeper to the content,
applications, and services offered on the Internet.” 54 The Commission acknowledges that IAPs “have
an incentive to use this gatekeeper role to make it more difficult or expensive for end users to access
services competing with those offered by the network operator or its affiliates.” 55 This gatekeeper
power provides IAPs with the capacity to constrain, prioritize, discriminate, and otherwise shape
traffic to achieve proper or improper objectives. If the Commission does not rein in such
anticompetitive practices, recent decisions by the Supreme Court severely restrict the relief available
through judicial appeals. 56

The IAP gatekeeper function grows more powerful in light of the ability to use packet
inspection techniques to “sniff” and identify types of traffic that the IAP wants to favor or handicap.
“An [Internet Service Provider (“ISP”)] able to examine packets for purposes of assigning bitstreams
into various tiers of service also provides an ISP with greater knowledge about the nature and type of the traffic it handles. Arguably, an ISP engaging in quality of service . . . and price discrimination through deep packet inspection no longer operates as a neutral conduit lacking actual or constructive knowledge of what the packets represent. IAPs that sniff packets actively examine the header of packets that provide traffic routing information, but also can identify characteristics of the content ‘payload’ contained in the packet.”

IAPs have found it commercially advantageous to combine their conduit role with various activities relating to the creation, packaging, and offering of content via the Internet. For example, cable television companies blend their Internet access conduit function, as a provider of cable modem service, with various video program services that the companies own or have an affiliate relationship. Similarly, wireless mobile telephone companies, provide both Internet access, but also showcase and provide easier access to a packaged collection of Internet-mediated content in what is commonly referred to as a “walled garden.”

The Commission appreciates the potentially adverse impact on consumers and competition arising from such vertical integration. For example, the Commission extensively regulates cable television ventures that vertically integrate content and conduit based on finding the potential for competitive and consumer harm:

[W]e conclude that there are no good substitutes for some satellite-delivered vertically integrated programming and that such programming therefore remains necessary for viable competition in the video distribution market. Based on this finding, we conclude that vertically integrated programmers continue to have the ability to favor their affiliated cable operators over competitive MVPDs [multichannel video programming distributors] such that competition and diversity in the distribution of video programming would not be preserved and protected absent the rule. . . . [W]e also find some trends that increase their incentive to withhold programming, such as the increase in
horizontal consolidation of the cable industry, the increase in cable clustering, and the recent emergence of new competitors. We also find specific factual evidence that, where the exclusive contract prohibition does not apply, such as in the case of terrestrially delivered programming, vertically integrated programmers have withheld and continue to withhold programming from competitive MVPDs. 60

Because cable television companies generate much of the desired video content and control the major medium for distributing it, the FCC has expressed concern 61 that the cable companies can stifle competition, extract rates above competitive levels from subscribers, favor affiliated content providers, and prevent the development of new content sources. Note however the Commission does not subject independent, stand alone content providers to such regulations.

D. Discrimination at the Network Level Can Adversely Affect the Degree of Competition, Innovation, and Investment in Applications and Services that Run “Over the Top.”

Just as the FCC has acted to prevent vertically integrated cable television operators from thwarting video programming competition, the Commission should use its Open Internet NPRM to establish rules that safeguard competition for content, applications, and services that travel via (“over the top”) IAP network links. 62 IAPs can exploit some of the same gatekeeper roles as cable television operators by resorting to tactics, masquerading as legitimate network management, that block, delay, degrade, and otherwise interfere with end user access to content.

Unlike the European Union, 63 the FCC has not formally adopted the Open System Interconnection 7 layer model to identify what Internet functions constitute regulated and unregulated services. However, both the Communications Act, and the Commission’s regulations calibrate the scope of government oversight in a manner that parallels the OSI model with extensive regulation primarily applied to facilities-based network providers, in light of their significant market power over first and last mile Internet access.
In contrast, the content and applications layers evidence no marketplace concentration or lack of competitive options. So long as IAPs do not interfere, consumers have complete sovereignty in selecting what content, applications, and services to access. Unlike the network level, where subscribers lock into one service provider, and may have limited facilities-based operator options, the content/applications layers evidence robust competition and boundless consumer choice. While consumers may incur significant costs in changing which network operator provides service, the switching costs at the applications and content layers approach zero. Without constant innovation and acute sensitivity to consumer wants, needs, and desires a currently successful content or applications provider is just one click away from declining market share and insignificance.

Because the FCC has abandoned functional separation safeguards, even as other nations embrace them as necessary and workable, the Commission relies heavily on IAP self-regulation and competitive necessity to prevent content discrimination. Remarkably, while the FCC remains skeptical about the viability of cable television self-regulation and competition, the Commission may have overstated the level of true facilities-based broadband Internet access competition. In light of real or perceived broadband competition, the FCC has undertaken an aggressive deregulatory campaign based on its assumptions and statistical compilations that support an inference of robust market penetration and competition in broadband markets. Advocates for even more deregulation regularly cite the Commission’s statistics as evidence that the unfettered marketplace can achieve broadband access and affordability goals as well as foreclose the need for Internet regulation. The prospect of regulating Internet-mediated content, applications, and software juxtaposes with frequent FCC conclusions that the consumers benefit from a robustly competitive and unregulated Internet marketplace.
Both the FCC and many stakeholders assume the frequently cited statistics present a true picture of the marketplace, but even the Commission has acknowledged that its data collection, based on zip codes, lacks granularity and defining broadband using a floor of 200 kilobits per second understates the bit rate needed for many broadband services. Rather than expand its regulatory mission to address phantom issues related to upstream providers of content, the Commission would better allocate its time and resources to resolving real Internet access problems.

Regardless of whether consumers have multiple broadband options available, most subscribe to, and are locked into the services of only one carrier. In the case of wireless broadband access, consumers typically agree to one or two year service contracts with financial penalties for early termination. For both wireline and wireless broadband access, subscribers may not have many service options and may incur significant switching costs should they learn of discriminatory service. But as the Commission stated in its investigation of Comcast, subscribers may not easily detect the source of service degradation even when the underlying carrier engages in anticompetitive conduct.

V. Ample Case Law Forecloses the FCC from Leveraging a Public Interest Argument to Regulate Content and Application Providers.

Providers of content and applications, having no affiliation with downstream ISPs, qualify for maximum protection from FCC regulation based on traditional First Amendment analysis and the lack of any basis for the Commission to apply the information service classification which it has used to justify selective regulatory intervention. In Reno v. ACLU, the Supreme Court considered the Internet a vast medium for the publication of content worthy of substantial protection from government regulation even when government presents a compelling reason for intervening, e.g., protecting children from the potential harm resulting from access to obscene or indecent material. On several occasions, the Internet’s importance as a mass medium of expression trumped legislative
efforts to protect children from harmful Internet-mediated content. These cases offer clear precedent mandating close scrutiny of content-based regulations with government bearing a substantial burden of demonstrating that content-affecting regulations are narrowly drawn and do not unduly restrict First Amendment protected rights of both content providers and consumers.

The Supreme Court has not imposed such a high burden on government when seeking to regulate other media such as cable television and broadcasting. First, the Court has evidenced greater willingness to consider regulation in terms of achieving economic public policy goals as opposed to whether and how they affect speech. The Court accepted the duty to balance speaker rights against other public policy objectives such as promoting widespread access to certain types of media, e.g., commercial, advertiser supported broadcasting. Second, the Court has acknowledged that media have different characteristics that affect accessibility and competitiveness.

Unlike the Internet, which heretofore has evidenced low barriers to market entry by content providers, other media have higher market entry barriers, e.g., the need to install costly infrastructure, or to secure a government-granted franchise, or license to use public spectrum and rights of way. For these type media, courts will examine regulation-sponsoring law in the broader context of supporting public policy goals, especially ones articulated by Congress, as opposed to a narrower view that the resulting regulations directly affect content and the rights of a particular type of speaker, e.g., cable network operators versus television broadcasters.

The FCC has attempted to frame its regulation of ISPs as having no First Amendment consequences whatsoever. By avoiding any First Amendment analysis, the FCC does not consider it necessary to state whether any form of Internet regulation impacts content providers and their speaker rights. Such avoidance also supports the FCC’s goal of justifying regulatory forbearance in most instances, coupled with the option of applying selective regulation on an as needed basis, particularly
for information service providers, whose classification possibly accords the Commission the option of invoking ancillary jurisdiction on an ad hoc basis. This pursuit of absolute flexibility supports the FCC’s predisposition not to regulate the Internet, while nevertheless reserving the option to do so whenever the Commission deems it necessary, despite the First Amendment and case law precedent that clearly prohibits such government intervention. While the FCC might be able to leverage Title I ancillary jurisdiction to regulate ISPs, under compelling circumstances, the Commission has no lawful means to extend such jurisdiction upstream to content providers.

When confronted with ISP claims that FCC regulation thwarts their First Amendment speaker rights, the Commission has sought to frame the matter as lawful extension of a regulatory mandate that has no impact on anyone’s First Amendment freedom:

Nor do we find Time Warner Cable’s analogy of a broadband provider to a newspaper to be apt. For one, the Commission is not dictating the content of any speech. Nor are we persuaded that Comcast’s customers would attribute the content delivered by peer-to-peer applications to Comcast, rather than attributing them to the other parties with whom they have chosen to interact through those applications. Under these circumstances, we find that our actions do not raise First Amendment concerns. 76

The Commission may ignore the First Amendment implications of ISP regulation, but it surely must appreciate that “the other parties with whom [consumers] have chosen to interact through those applications” 77 do qualify for First Amendment protection from expanding government oversight.

The FCC ignored consumers’ rights to be free of government intrusion when the Commission sought to extend its regulatory wingspan to include electronic devices on consumer premises that receive content. In American Library Ass’n v. FCC 78 the Circuit Court of Appeals for the District of Columbia reversed the FCC’s attempt to permit broadcasters to send Digital Rights Management instructions that would limit the copying, reformatting, and redistribution options available to consumers. Characterizing the FCC’s action as the most sweeping assertion of authority in the
Commission’s seven decades of existence, the court rejected the use of ancillary jurisdiction under Title I in lieu of explicit Congressional authorization:

The Commission recognized that it may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities. The Commission’s general jurisdictional grant under Title I plainly encompasses the regulation of apparatus that can receive television broadcast content, but only while those apparatus are engaged in the process of receiving a television broadcast. Title I does not authorize the Commission to regulate receiver apparatus after a transmission is complete. As a result, the FCC’s purported exercise of ancillary authority founders on the first condition. There is no statutory foundation for the broadcast flag rules, and consequently the rules are ancillary to nothing. Therefore, we hold that the Commission acted outside the scope of its delegated authority when it adopted the disputed broadcast flag regulations. 79

The court determined that “broadcast flags” operate as a curb on digital television reception equipment redistributing digital broadcast content after having received the content and not on the actual broadcast transmission. 80 Finding no Congressional authority for FCC regulation of consumer use of already broadcast content, the court refused to defer to agency expertise. 81 The court reasoned that absent the need for explicit Congressional authority the FCC would have plenary authority to regulate any consumer electronics and computer devices.

The court also rejected the Commission’s ancillary jurisdiction foundation based on the Communications Act. With references to several communications cases where a court endorsed ancillary jurisdiction, the D.C. Circuit Court of Appeals noted that all prior cases with precedential value involved entities engaged in “communication by wire or radio”:

The Court’s decisions in Southwestern Cable, Midwest Video I, and Midwest Video II were principally focused on the second prong of the ancillary jurisdiction test. This is unsurprising, because the subject matter of the regulations at issue in those cases—cable television—constituted
interstate communication by wire or radio, and thus fell within the scope of the Commission’s general jurisdictional grant under Title I of the Communications Act. However, these cases leave no doubt that the Commission may not invoke its ancillary jurisdiction under Title I to regulate matters outside of the compass of communication by wire or radio. 82

The court also rejected the FCC’s rationale that broadcast flag processing regulations could lawfully fit within the Commission’s congressionally authorized responsibility for promulgating technical requirements for television receiving equipment as part of its implementation of rules relating to the transition from analog to digital television. 83

VI. Conclusions

Consistent with the FCC’s examination of potential Internet regulatory issues, including the Open Internet NPRM, the network neutrality debate has focused on IAPs and their relationship downstream to end users and upstream to content, application, and service providers. While stakeholders and researchers differ significantly about whether and how the Commission should act, the debate never has included whether the Commission should become a content regulator. No one can credibly claim that the FCC has to remedy some public harm in what has become a quite robust marketplace of ideas. The public harm exists at the IAP level where manipulation of packets can occur leading to potential harm to the marketplace of ideas upstream.

End users have unlimited choices of options, subject to downstream constraints imposed by IAPs. Legitimate IAP network management can and should address instances where specific types of content and applications can cause harm to networks, or to individual consumers. But the need to protect a network from spam and congestion, as well as the desire to protect individual subscribers from harmful content, does not elevate either an IAP or the FCC into a position of censor and content regulator. The Commission should take affirmative steps to regulate IAPs in their capacity as
gatekeepers, bottleneck operators, and intermediaries. However, the proper and lawful concern about end user access to the Internet via IAPs does not justify a further extension of regulatory oversight to include content and applications. Doing so would reduce the individual and societal benefits that accrue from an open, innovative, and robustly competitive marketplace for Internet-mediated content and applications.

The network neutrality debate seems to encourage provocateurs to raise and legitimize outlandish interpretations of law and policy. The FCC inadvertently may have contributed to confusion and uncertainty simply by acting on AT&T’s invitation to consider extending Internet policies to content, applications, and service providers. The Commission can contribute to clarity and certainty by expressly confirming that its jurisdiction is limited to matters pertaining to Internet access and the roles performed by IAPs.

FOOTNOTES


2 The Internet cloud refers to the vast array of interconnected networks that make up the Internet and provide users with seamless connectivity to these networks and the content available via these networks.

3 Open Internet NPRM ¶14. “Broadband Internet access service providers have an incentive to use this gatekeeper role to make it more difficult or expensive for end users to access services competing with those offered by the network operator or its affiliates.” Id. at ¶72.

4 “[E]ven if there is competition among broadband Internet access service providers, once an end-user customer has chosen to subscribe to a particular broadband Internet access service provider, this may give that broadband Internet access service provider the ability, at least in theory, to favor or disfavor any traffic destined for that subscriber.” Id. at ¶73.

5 Id. at ¶4. The Commission also noted: “The evolution in Internet usage, and associated developments in network technology, have respectively motivated and enabled network operators to
differentiate price and service for end users and for providers of content, applications, and services. A significant debate has developed over how best to preserve the Internet’s openness. We thus find it appropriate at this time to evaluate the need for oversight of broadband Internet access service providers’ practices.” *Id.* at ¶49.

*Id.* at ¶70.


*Id.* at ¶ 101. The FCC appears to make this request at the recommendation of a single ISP even though the Commission acknowledges that the 2005 *Internet Policy Statement*, which contains principles the Commission now wants to establish as rules, “was placed in five already-opened dockets dealing with issues relating to Internet access service providers, but it was not placed in the docket most likely to address content, applications, and services—the *IP-Enabled Services* [19 F.C.C.R. 4863 (2004)] docket.” *Id.* at n. 223.

“We have ancillary jurisdiction over matters not directly addressed in the Act when the subject matter falls within the agency’s general statutory grant of jurisdiction and the regulation is ‘reasonably ancillary to the effective performance of the Commission’s various responsibilities.’ That test is met with respect to broadband Internet access service.” *Id.* at ¶83, quoting United States v. Southwestern Cable Co., 392 U.S. 157, 172–73 (1968) and citing United States v. Midwest Video Corp., 406 U.S. 649, 662 (1972); Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications Practices Order, *Memorandum Opinion and Order*, 23 F.C.C.R. 13028, 13033-44 (2008).


15. “The dramatic expansion of this new marketplace of ideas . . . demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.” Reno v. American Civil Liberties Union, 521 U.S. 844, 885 (1997).


19. Telecommunications service is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46).

20. Information service is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).


22. Id. 545 U.S. at 1013.


25. “In the Computer II rules, the Commission subjected facilities-based providers to common-carrier duties not because of the nature of the ‘offering’ made by those carriers, but rather because of the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the ‘bottleneck’ local telephone facilities they owned.” National Cable & Telecommunications Ass’n v. Brand X Internet Services, 545 U.S. 967, 996, 125 S.Ct. 2688, 2708 (2005).


See, e.g., Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking, 22 F.C.C.R. 15817 (2007)(clarifying that automatic roaming is a common carrier obligation for commercial mobile radio service carriers that requires them to provide roaming services to other carriers upon reasonable request and on a just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act).

47 U.S.C. §160, Regulatory flexibility (2008) authorizes the FCC to forbear from applying portions of Title II common carrier regulation “if the Commission determines that-- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.” Id. 47 U.S.C. §160(a)(1)-(3).

“Under its Computer Inquiry rules, which foreshadowed the definitions of ‘information’ and ‘telecommunications services, . . . the Commission forbore from regulating as common carriers ‘value-added networks’-non-facilities-based providers who leased basic services from common carriers and bundled them with enhanced services; it said that they, unlike facilities-based providers, would be deemed to provide only enhanced.” Brand X, 545 U.S. at 1011, 125 S.Ct. at 2716.

406 F.3d 689 (D.C. Cir. 2005)[hereinafter cited as ALA v. FCC]. “In this case, all relevant materials concerning the FCC’s jurisdiction--including the words of the Communications Act of 1934, its legislative history, subsequent legislation, relevant case law, and Commission practice--confirm that the FCC has no authority to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.” Id. 406 F.3d at 798.

Id. 406 F.3d 691-692.

“The effectiveness of the broadcast flag regime is dependent on programming being flagged and on devices capable of receiving broadcast DTV signals (collectively "demodulator products") being
able to recognize and give effect to the flag. Under the rule, new demodulator products (e.g., televisions, computers, etc.) must include flag-recognition technology. This technology, in combination with broadcasters’ use of the flag, would prevent redistribution of broadcast programming.” Id. 406 F.3d 693.

34 See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 693 (1984), and United States v. Mead Corp., 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) the Supreme Court supported deferral to the expertise of a regulating agency “if the intent of Congress is clear.” Chevron, 467 U.S. at 842-43, 104 S.Ct. 2778. If “Congress has not directly addressed the precise question at issue,” and the agency has acted pursuant to an express or implied delegation of authority, the agency’s statutory interpretation is entitled to deference, as long as it is reasonable.” Id. at 843-44, 104 S.Ct. 2778.

35 ALA v. FCC, 406 F.3d at 702.

36 “It is enough here for us to find that the Communications Act of 1934 does not indicate a legislative intent to delegate authority to the Commission to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission. That is the end of the matter. It turns out, however, that subsequent legislation enacted by Congress confirms the limited scope of the agency’s ancillary jurisdiction and makes it clear that the broadcast flag regulations exceed the agency's delegated authority under the statute.” Id. 406 F.3d at 706.


38 See e.g., Regulation of Prepaid Calling Card Services, Declaratory Ruling and Report and Order, 21 F.C.C.R. 7290, (2006), partially reversed, Qwest Services Corp. v. FCC, 509 F.3d 531, (D.C. Cir. 2007) (affirming the FCC’s regulatory determination but reversing the Commission’s different treatment of calling cards that provide access to VoIP versus ones that provide a menu of services and options)[hereinafter cited as Regulation of Prepaid Calling Card Service Order].

39 A safe harbor constitutes “[a]n area or means of protection [or a] provision (as in a statute or regulation) that affords protection from liability or penalty.” BLACK’S LAW DICTIONARY (8th ed. 2004). In light of the lack of a bright line distinction between regulated telecommunications services and largely unregulated information services, ventures possibly can secure a competitive advantage through regulatory arbitrage where ventures seek reduced regulatory oversight by characterizing telecommunications services as information services. The FCC defined regulatory arbitrage as “businesses making decisions based on regulatory classifications rather than on customers’ preferences and innovative and sustainable business plans.” Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Internet over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, 4846 (2002). See also, Rob Frieden, Regulatory Arbitrage Strategies and Tactics in Telecommunications, 5 N.C. J. L. & TECH. 227 (2004).
“AT&T asserted that its cards were ‘enhanced’ because they provided additional information to the calling party in the form of an advertising message provided by the retailer of the card. Accordingly, AT&T contended that the cards provide an information service, rather than a telecommunications service.” Regulation of Prepaid Calling Card Services Order, 21 F.C.C.R. at 7291.


Universal Serv. Contribution Methodology, Report and Order and Notice of Proposed Rulemaking, 21 F.C.C.R. 7518, 7538 (2006) (extending section 254(d) permissive authority to require interconnected VoIP providers to contribute to the USF), reh’g denied, vacated in part on other grounds, Vonage Holding Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007).


“Shifting to a system where access to and use of the Internet are allocated and prioritized according to users’ willingness and ability to pay... is also likely to reduce innovation at the applications level, since more of the value of that innovation will be transferred to the owners of the network. And encouraging that applications-level innovation may be more important than encouraging additional innovation in the network itself. In our view, the social opportunity costs of allowing network owners to dismantle the Internet’s infrastructure commons may be tremendous but incredibly difficult to measure precisely because so much of the value generated by the Internet is not fully captured in market transactions. Preserving Internet spillovers requires preserving network neutrality.” – Brett M. Frischmann and Mark A. Lemley, *Spillovers*, 107 Colum. L. Rev. 257, 298 (2007).

“In the absence of 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.” – Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. ON TELECOMM. & HIGH TECH. L. 329, 390 (2007). “Like cable television operators, the telephone company and cable modem duopolists in the broadband marketplace in almost all cases provide the sole interactive ‘data pipe’ into subscribers’ homes. They thus have the incentive, given their integration with broadband content providers, to act as ‘gatekeepers’ who can ‘flick the switch’ on competitors or any other online speakers whom they disfavor.” – Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 123 (Winter, 2009).

Open Internet NPRM at ¶14.
Id. Appendix A, Part 8, Sec. 8.5-8.23.


Open Internet NPRM at ¶72.

Id.

Id.

The Supreme Court has concluded that because industry sector-specific legislation provides the FCC with authority to craft regulatory remedies, when the Commission refuses to act, appellate courts have no legal basis for imposing additional antitrust safeguards. See Verizon Communications, Inc. v. Law Office of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (antitrust laws offer no additional safeguards when the FCC refuses to apply more aggressive safeguards available in the Communications Act, as amended); Pacific Bell Telephone Co., v. Linkline Communications, Inc., slip op. 555 U.S. ___ (Feb. 25, 2009); available at: http://www.supremecourtus.gov/opinions/08pdf/07-512.pdf (where the FCC has failed to investigate and remedy an instance where the wholesale price exceeds the retail price of service, courts have a severely limited basis to investigate further).


For background on how wireless carriers adversely impact the marketplace for content, applications, and software by erecting walled gardens, see Rob Frieden, Lock Down on the Third Screen: How Wireless Carriers Evoke Regulation of Their Video Services, 24 BERKELEY TECH. L.J. No. 2, 819 (Spring, 2009); Hold the Phone: Assessing the Rights of Wireless Handset Owners and Carriers, 69 U. PITT. L. REV. No. 4, 675 (2008).

“Where broadband Internet access service providers have market power and are vertically integrated or affiliated with content, application, or service providers, additional concerns may arise.” Open Internet NPRM at ¶72.


“Despite the increase in available programming over the past five years, we find that cable operators still own popular programming for which there are no close substitutes. The availability of new, non-integrated networks does not mitigate the adverse impact on competition of a competitive
MVPD’s inability to access popular vertically integrated programming. The record reflects that numerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes.” *Id.* at 17816.

“In the Open System Interconnection (‘OSI’) model, layered network architecture for packet networks typically consists of seven layers: physical, data link, network, transport, session, presentation and application. The model calls for the independent operation of the layers, and supports the interaction of various applications and equipment that is designed to address separately each layer in a product offering. In the Transport Control Protocol (‘TCP’)-IP model, only four levels are used: link (combines OSI physical and data link levels), network, transport and application (combines OSI session, presentation and application levels). The functions supported at each layer are as follows: physical–represents electrical signaling, modulation, etc.; data link–moves packets (also called ‘datagrams’) between hosts based on a protocol such as Ethernet, Asynchronous Transfer Mode, frame relay; network–defines how data is routed between hosts over one or several networks, often based on IP; transport–establishes the connection between two hosts, creating a ‘virtual’ network, often based on TCP or Universal Datagram Protocol; session–controls the setup and termination of communications sessions; presentation–defines the format of the data exchanged (e.g., text, graphic); application–defines how applications communicate with each other over the network (e.g., e-mail) using various protocols.” Communications Assistance for Law Enforcement Act and Broadband Access and Services, *Notice of Proposed Rulemaking and Declaratory Ruling*, 19 F.C.C.R. 15676, n.181 (2004).


“In most of Europe the connections between customers’ premises and telephone exchanges are provided by the incumbent fixed-line telecoms operator. A key objective of the regulation of fixed-line networks is to enable fair competition by ensuring that alternative operators can get non-discriminatory access to the incumbent’s access network. Under the existing EU regulatory framework, this problem is addressed through a range of regulatory access remedies. In particular, the incumbent telecom operator is often required to supply wholesale services to rival communications providers and to itself on a non-discriminATORY basis in order to facilitate fair competition in the provision of retail services to homes and businesses.

‘Functional separation’ complements these existing measures by placing the monopoly element in a separate business unit. This allows any wholesale products and any associated services to be offered to both the incumbent's own retail businesses and to those of rivals, on equal terms.

While regulators in other EU Member States are considering the merits of functional separation, the UK has had more than two years of experience in implementing the remedy. Ofcom accepted undertakings under national competition law in September 2005 from BT to place its access and backhaul businesses in a separate business unit called ‘Openreach.’ . . . New Zealand has since also introduced functional separation and it is under active consideration by several national regulators within the EU including those in Italy, Sweden and Poland.” Government of the United Kingdom, Office of Communications, The International Communications Market 2007, Sec.1.3.6 Functional separation (Dec. 2007); available at: http://www.ofcom.org.uk/research/cm/icmr07/overview/landscape/; See also Openreach, Keeping the UK Connected; available at: http://www.openreach.co.uk/orpg/aboutus/Downloads/web_corp_brochure.pdf.

“We note that opponents of net neutrality regulation have pointed to evidence on a national scale that (1) access speeds are increasing, (2) prices (particularly speed-adjusted or quality adjusted prices) are falling, and (3) new entrants, including wireless and other competitors, are poised to challenge the incumbent cable and telephone companies. We note, too, that statistical research conducted by the FCC has tended to confirm these general trends.” Federal Trade Commission, BROADBAND COMPETITIVITY POLICY, FTC Staff Report, 8 (June, 2007); available at: http://www.ftc.gov/reports/broadband/v070000report.pdf. However, this report did acknowledge that “[b]ecause alternative broadband providers are not perfect substitutes for cable or DSL broadband providers, the mere counting of providers using new technologies does not answer the question of whether or not they are effective competitive alternatives to cable and DSL.” Id. at 104; see also, J. Gregory Sidak, A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet, 2 J. COMPETITION L. & ECON. 349 (2006); Cabletechtalk, Blog site, The Trouble with Broadband Deployment Statistics; available at: http://www.cabletechtalk.com/news-items/2008/02/06/the-trouble-with-broadband-deployment-statistics/.

“[T]here is substantial competition in the provision of Internet access services. Broadband penetration has increased rapidly over the last year with more Americans relying on high-speed
Rob Frieden  
Network Neutrality Over the Top: Why the FCC Should Not Try to Establish Rules Affecting Internet Content and Applications Providers

connections to the Internet for access to news, entertainment, and communication. Increased penetration has been accompanied by more vigorous competition. Greater competition limits the ability of providers to engage in anticompetitive conduct since subscribers would have the option of switching to alternative providers if their access to content were blocked or degraded. In particular, cable providers collectively continue to retain the largest share of the mass market high speed, Internet access market. Additionally, consumers have gained access to more choice in broadband providers.” AT&T Inc. and BellSouth Corp., Application for Transfer of Control, Memorandum Opinion and Order, 22 F.C.C.R.5662, 5724-25 (2007). John Kneuer, Former Assistant Secretary for Communications and Information and Administrator at the Commerce Department’s National Telecommunications and Information Administration claimed in 2008 that the United States “has the most effective multiplatform broadband in the world.” True or False: U.S.’s Broadband Penetration Is Lower Than Even Estonia’s; Answer: True, NEWSWEEK, 58 (July 9, 2007); available at: http://www.newsweek.com/id/33456/page/2.

“In sparsely populated rural Zip Codes this could mean that a given provider has just one broadband subscriber who is located in a small town or at some other location convenient to telephone or cable facilities. Broadband “availability” could be non-existent for that carrier’s other customers located a few blocks or many miles away from that single customer. In other words, and notwithstanding the value of data currently submitted on the Form 477, there is more precise information that we could gather to give us a more accurate picture of current broadband deployment.” Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VoIP) Subscribership, Notice of Proposed Rulemaking, 22 F.C.C.R. 7760,7765-66 (2007), Report and Order and Further Notice of Proposed Rulemaking, 23 F.C.C.R. 9691(2008), on recon., 23 F.C.C.R. 9800 (2008).

“As many commenters noted, the range of information transfer capacities included in the current lowest tier of 200 kbps to 2.5 mbps captures a wide variety of services, ranging from services capable of transmitting real time video to simple always-on connections not suitable for more than basic email or web browsing activities. We find that requiring providers to report data in more detailed speed tiers will better identify services that support advanced applications, creating distinctions that reflect different capacities for transmitting high quality video and similar high bandwidth communications. We also find that, as technologies and services evolve, upload speeds are an increasingly significant aspect of broadband services, and increased granularity in reporting both download and upload speed data will assist us in understanding the broadband services market.” Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VoIP) Subscribership, Report and Order and Further Notice of Proposed Rulemaking, 23 F.C.C.R. 9691, 9700 (2008), on recon., 23 F.C.C.R. 9800 (2008). See also, Rob Frieden, Lies, Damn Lies and Statistics: Developing a Clearer Assessment of Market Penetration and Broadband Competition in the United States, 14 VA. J.I.L. & TECH. 100 (Summer, 2009); available at: http://www.violnt.net/vol14/issue2/v14i2_100%20-%20Frieden.pdf.
“Many consumers experiencing difficulty using only certain applications will not place blame on the broadband Internet access service provider, where it belongs, but rather on the applications themselves, thus further disadvantaging those applications in the marketplace.” Comcast Investigation, 23 F.C.C.R. at 13058-59.

The Supreme Court considers Internet communications as a publishing activity and therefore a core element of First Amendment speaker/publisher rights. “Any person or organization with a computer connected to the Internet can ‘publish’ information.” Reno v. American Civil Liberties Union, 521 U.S. at 853, 117 S.Ct. 2335.

See, e.g., Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004)(prohibition on commercial transmission of material harmful to minors deemed unconstitutionally overbroad when less restrictive alternatives, such as filtering, are readily available).

The Supreme Court also stated: “The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweights any theoretical but unproven benefit of censorship.” Reno v. ACLU, 521 U.S. at 885, 117 S.Ct. at 2351.

“[U]nlike the Internet, the broadcast medium has traditionally ‘received the most limited First Amendment protection.’” Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married By America” on April 7, 2003, Forfeiture Order, 23 F.C.C.R. 3222, n.74 (2008) quoting Reno v. ACLU, 521 U.S. at 867, 117 S.Ct. at 2342. In the Reno case, which addressed the lawfulness of Internet content regulation designed to protect children from harm, the Court supported maximum First Amendment freedom for Internet-based speakers as compared to the comparatively less freedom available to broadcasters.

Comcast Investigation, 23 F.C.C.R. at 13053, n. 203.

Id.

406 F.3d 689 (D.C. Cir. 2005) [hereinafter cited as ALA v. FCC]. “In this case, all relevant materials concerning the FCC’s jurisdiction—including the words of the Communications Act of 1934, its legislative history, subsequent legislation, relevant case law, and Commission practice—confirm that the FCC has no authority to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.” Id. 406 F.3d at 798.

Id. 406 F.3d 691-692.
“The effectiveness of the broadcast flag regime is dependent on programming being flagged and on devices capable of receiving broadcast DTV signals (collectively "demodulator products") being able to recognize and give effect to the flag. Under the rule, new demodulator products (e.g., televisions, computers, etc.) must include flag-recognition technology. This technology, in combination with broadcasters’ use of the flag, would prevent redistribution of broadcast programming.” Id. 406 F.3d 693.

See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and United States v. Mead Corp., 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) the Supreme Court supported deferral to the expertise of a regulating agency “if the intent of Congress is clear.” Chevron, 467 U.S. at 842-43, 104 S.Ct. 2778. If “Congress has not directly addressed the precise question at issue,” and the agency has acted pursuant to an express or implied delegation of authority, the agency’s statutory interpretation is entitled to deference, as long as it is reasonable.” Id. at 843-44, 104 S.Ct. 2778.

“It is enough here for us to find that the Communications Act of 1934 does not indicate a legislative intent to delegate authority to the Commission to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission. That is the end of the matter. It turns out, however, that subsequent legislation enacted by Congress confirms the limited scope of the agency’s ancillary jurisdiction and makes it clear that the broadcast flag regulations exceed the agency’s delegated authority under the statute.” Id. 406 F.3d at 706.