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Kincaid C. Brown

University of Michigan Law School, kcb@umich.edu

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Net Neutrality: An Explainer

By Kincaid C. Brown

"Network neutrality" is a term coined in a 2003 law review article concerned with discrimination of content in the online environment.¹ Net neutrality is the idea that internet services or broadband providers should treat all content streaming through their systems the same, and providers who use their discretion to create "fast lanes," block particular content, or throttle (slow down) internet speeds are not in keeping with how the internet ought to work.² Hypothetical examples of practices that would not be net neutral are AT&T internet providing high speeds to DirecTV (a subsidiary of AT&T) while providing slower speeds for Netflix; Cox Communications slowing down streaming speed to Disney+ after monthly usage of a certain number of gigabytes and not doing so for another platform; Comcast restricting a home internet user from using a virtual private network other than one licensed by Comcast; or a broadband provider blocking access to an individual website based on its content.³

Net neutrality was supported by both the Bush and Obama administrations, and a formal net neutrality order was promulgated by the Federal Communications Commission (FCC) in 2015.⁴ Part of this order classified broadband providers as common carriers under Title II of the Communications Act of 1934⁵ to meet the requirements of a court decision holding that the FCC lacked authority to impose net neutrality standards on entities without common carrier status.⁶ Common carriers are businesses of such import to society that the government legislates open access to them while often providing the carriers with special legal benefits. For example, railroads are the classic common carrier and have a benefit of governmental permission to lay tracks on pub-

lic lands. The 2015 order was overturned in June 2018⁷ by the FCC, whose membership was reformulated after President Trump's election in 2016.

The Restoring Internet Freedom Order

In December 2017, the FCC voted to overwrite the 2015 order, publishing proposed language in February 2018. In May 2018, the FCC promulgated the final Restoring Internet Freedom Order, eliminating existing net neutrality restrictions. The new rules eliminate the classification of broadband providers as common carriers and replace restrictions on practices such as throttling, prioritization, and blocking with requirements requiring the providers to disclose information regarding network management.⁸ The Restoring Internet Freedom Order tasks the Federal Trade Commission (FTC) with jurisdiction for policing internet service providers' network management practices.⁹ This means that any net neutrality enforcement measures will be overseen by the FTC and be limited to consumer protection issues such as anticompetitive behavior among broadband providers or unfair or deceptive trade practices. As such, internet service provider practices such as fast lanes or content prioritization are not

consumer protection issues that would result in FTC enforcement action. Note also that the FTC is only an enforcement agency and cannot engage in any rulemaking regarding net neutrality or any other issue. The Restoring Internet Freedom Order also includes language preempting states from enacting net neutrality restrictions on broadband providers along the lines of the 2015 FCC order.¹⁰

Several states, nonprofits, and internet groups filed suit arguing that the Restoring Internet Freedom Order was arbitrary and capricious rulemaking, and thus, illegal, as violating the Administrative Procedure Act.¹¹ Additionally, regardless of the FCC preemption of state net neutrality action, Washington state¹² and California¹³ both passed net neutrality legislation in 2018, resulting in the FCC suing to block the net neutrality laws (though this case was delayed pending the result of the state and nonprofit lawsuit).¹⁴ In October 2019, the District of Columbia Circuit published a decision on the state and nonprofit lawsuit, upholding the bulk of the order and stating that it was within the FCC's mandate to set internet rules and determine whether to classify broadband providers as common carriers, but that the FCC overstepped in attempting to ban states from passing net neutrality legislation of their own (although the FCC can challenge

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state legislation on a case-by-case basis).¹⁵ Also, the D.C. Circuit held that the FCC had not fully considered the Restoring Internet Freedom Order's effect on three issues and remanded these issues to the FCC for reconsideration. The first of these issues was the order's effect on public safety,¹⁶ which has received much press in response to Verizon's throttling of mobile internet speeds for firefighters battling the 2018 Mendocino Complex fire.¹⁷ The second issue, utility pole regulation,¹⁸ weighs heavy on future competition as regulations could be promulgated to allow existing providers to block new providers from stringing cables on existing utility poles. The third issue the FCC failed to adequately consider was the effect of the order on a program subsidizing internet access to low-income families.¹⁹

Federal legislation

While Congress has not passed any laws relating to net neutrality, some bills have been introduced. These bills include a full reimplementation of the 2015 FCC net neutrality order²⁰ and a more limited bill²¹ prohibiting blocking, throttling, and paid prioritization (but not addressing data caps), while also defining broadband providers as information services and not common carriers.

State legislation

During the period before the D.C. Circuit decision while the Restoring Internet Freedom Order purported to preempt states from directly passing net neutrality laws, many states passed or introduced legislation related to net neutrality but came short

of reimplementing full net neutrality. For example, Colorado enacted legislation disqualifying internet service providers that do not adhere to net neutrality practices from receiving public financing for broadband deployment projects.²² The Colorado act also requires state governmental bodies to give preference for internet service contracts to providers following net neutrality practices. Maine enacted a law that prohibited state agencies from committing funds to an internet service provider without the provider first agreeing in writing to provide net neutral service in its provision of internet access services.²³ In a third example, California, in addition to the full net neutrality law noted above, enacted a law in response to the previously mentioned Verizon incident that would prohibit internet service providers from degrading internet access to agencies that are first responders in emergencies.²⁴

Michigan

To date, the Michigan legislature has not yet proposed any legislation on the net neutrality issue, nor has Governor Whitmer taken any action. ■



Kincaid C. Brown is the assistant director of the University of Michigan Law Library where he teaches Advanced Legal Research. He is a member of the SBM Michigan Bar Journal Committee and a former member of the Committee on Libraries, Legal Research, and Legal Publications.

ENDNOTES

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5. 47 USC 201 *et seq.*
6. *Verizon v Fed Communications Comm*, 740 F3d 623, 659; 408 US App DC 92 (2014).
7. *Restoring Internet Freedom*, 83 Fed Reg 21927 (May 11, 2018) (to be codified at 47 CFR pts 1, 8, and 20).
8. *Id.* at 21928.
9. *In re Restoring Internet Freedom*, 33 FCC Rcd 311(1) (2018) ¶ 20 *et seq.* Note: by reclassifying broadband internet access service as information, instead of telecommunications, the order transfers authority over it from the FCC to FTC, available at <<https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order>> [https://perma.cc/TE26-8XKP].
10. *Id.* at ¶ 194 *et seq.*
11. *Mozilla Corp v Fed Communications Comm*, 940 F3d 1 (2019).
12. RCW 19.385.
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