

## Network Neutrality

### **BACKGROUND**

Network Neutrality (net neutrality) is a principle that ensures that all Internet traffic is treated equally. Net neutrality has recently become endangered as the telecommunication companies try to create a tiered system of broadband access in which companies and Web sites would pay for premium access to faster data connections. If this happens, law libraries may not be able to pay the fees for preferred access, preventing users from having a consistent and reliable way of accessing important online legal information. This could also create a barrier for start-up companies and small businesses to enter the market which would inhibit competition. Companies such as Google, Microsoft, and Apple would not have been able to get started had they had to pay such a premium. AALL strongly supports net neutrality, which has kept the Internet open and non-discriminatory and allowed it to thrive and flourish.

AALL is a member of the [Save the Internet Coalition](#) and the [Open Internet Coalition](#), which bring together individuals, non-profit organizations, businesses and bloggers who strongly support net neutrality. This issue is very important for law libraries because law librarians are providers, creators and users of digital, legal information. It is up to law librarians to ensure that everyone has equal access to the information they need.

Currently, all that is required to access the Internet is a computer and the ability to pay a telecommunications company a monthly service fee for use of their data lines. Once this fee is paid, everyone has access to the same speeds and content as everyone else, whether a Fortune 500 company or your next door neighbor. Net neutrality has allowed start-up companies the same opportunities as an established company with more resources. It promotes innovation, competition, and freedom of expression by maintaining an equal Internet superhighway.

In September 2005, the Federal Communications Commission (FCC) adopted Policy Statement FCC 05-151, which “ensure[s] that broadband networks are widely deployed, open, affordable, and accessible to all consumers.” Since then, the FCC has had a series of inquiries and comments on broadband deployment and Internet management policies and practices. For example, the AT&T/BellSouth merger (FCC 06-189) was stalled due to arguments over net neutrality. The merger was given the green light only after AT&T agreed to provisions that comply with FCC Policy Statement FCC 05-151.

In October of 2007 Comcast was investigated on accusations that it was interfering with customers’ use of peer-to-peer applications. Formal complaints were filed by nonprofit organizations Free Press and Public Knowledge on the grounds that Comcast was violating FCC 05-151. In Memorandum Opinion & Order (MO&O) FCC 08-183, the FCC found in favor of Free Press and Public Knowledge and ordered Comcast to reform and fully disclose the company’s network management practices. However, an April 6, 2010 ruling by the United

States Court of Appeals for the District of Columbia Court determined that the FCC does *not* have the authority to regulate Comcast's network management practices. In response, FCC Chairman Julius Genachowski offered a detailed proposal that described under what authority the agency could continue to work to ensure the principles of net neutrality. This "third way" proposal was eventually dropped, however, in favor of three rules adopted by the FCC at the end of 2010 that require transparency of network management practices; no blocking of lawful content; and no unreasonable discrimination.

### **FCC PUBLISHES FINAL RULE (SEPTEMBER 23, 2011)**

On September 23, 2011, the FCC published its [Final Rule on Preserving the Open Internet](#). Barring delays on procedural grounds or from several possible legal challenges, the Rules will become effective November 20, 2011.

### **FCC ADOPTS RULES ON NET NEUTRALITY (DECEMBER 21, 2010)**

On December 21, 2010 the FCC adopted a Report and Order ("R&O"), In the Matter of Preserving the Internet, Broadband Industry Practices. The R&O explains the nation's need for openness in broadband management and explains how broadband providers have an ability and incentive to limit the openness of their management practices. More importantly, the R&O outlines instances in which the broadband operates have *already* used their influence to limit openness. Some of those instances were mentioned in the background section of this Issue Brief.

The Commission abandoned its anticipated "third way" in this R&O. Previously, the Commission had suggested it would reclassify broadband from an "information service" to a "telecommunications service." Because of statutory language, how the Commission classifies a service is relevant as to what regulations it may impose. In this R&O, broadband is still considered an information service. In deciding not to reclassify it as a telecommunications service, however, the Commission's authority to implement these rules is more questionable. In anchoring its new regulations in a variety of dubious arguments about its mandate from Congress, the Commission has ensured costly lawsuits that will take years to unfold.

The Report and Order establishes three separate rules with regard to broadband network management, each of which will be explained in this issue brief:

1. **Transparency.** Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services;
2. **No blocking.** Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services; and
3. **No unreasonable discrimination.** Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.

In the R&O, the FCC made a distinction between fixed broadband providers (such as cable

broadband and DSL) and mobile broadband providers. According to the Commission, it exempted mobile broadband providers from some of the rules placed on fixed broadband providers because the mobile broadband market is still developing rapidly and has greater competition. AALL is concerned about the level of protection afforded to mobile broadband users, as will be discussed more thoroughly below.

## **TRANSPARENCY**

The transparency requirement forces broadband providers to publish information the public needs for reasoned decision making. The requirement comes at the heels of an Order in which the FCC discovered that Comcast was interfering in some of its users' traffic. The FCC will require the providers to inform customers of the type of traffic subject to the management practices and the frequency with which these practices are implemented. Additionally, the requirement to publish expected and actual speed and latency is a step in the right direction, as too often broadband providers' hype is significantly higher than the effective bandwidth. AALL believes the transparency rule is good for libraries and other consumers, and is pleased that the rule applies equally to fixed and mobile broadband providers.

## **NO BLOCKING**

In an effort to keep the Internet open, the Commission implemented a rule that would prohibit any fixed broadband provider from blocking any lawful content. In particular, the rule prohibits fixed broadband providers from blocking content unless the content provider paid a fee to the broadband provider. AALL supports this rule, as it ensures that all users will have access to lawful content on the web, regardless of the fixed broadband providers' opinion of the material.

The rule is watered down for mobile broadband providers because of the Commission's view that the mobile competition is newer and more robust. The FCC believes the robust competition means the providers needn't have as many regulations at this stage, although it reserves the right to implement the rule at a later date.

The rule for mobile providers would require mobile networks to allow third parties access to the mobile network. The Commission learned that there had been instances of mobile networks blocking particular third party applications, such as Skype. Unfortunately, the rules do nothing to prohibit the phone *manufacturer* from blocking third party access. In other words, while AT&T could not stop an iPhone owner from using Skype, Apple could prohibit the program on its phone. AALL and many other groups who have been promoting net neutrality believe that the lack of adequate protections for wireless broadband is troubling because more people are turning to smart phones for business and personal use.

## **NO DISCRIMINATION**

This rule that purports to prohibit broadband providers from content-based discrimination is the vaguest of the three. AALL has previously expressed concern that the Commission would allow tiered pricing (also known as pay-for-priority). While the Commission expressed "concern" about the legitimacy of any pay-for-priority option, it also expressly states, "The framework we

adopt today does not prevent broadband providers from asking subscribers who use the network less to pay less, and subscribers who use the network more to pay more.”

Based on the vagueness of the rules, a broadband provider such as Comcast may be able to charge users more for accessing content from a service such as Netflix, based on the argument that this discrimination actually constitutes reasonable network management. Comcast might decide against implementing this practice, however, because of a fear of penalty or administrative proceedings. AALL is troubled by the uncertainty of this rule and concerned that some services might be prohibitively expensive for some law libraries. We are also concerned with the fact that the Commission exempted mobile broadband providers entirely from this rule.

Despite the rules being incomplete, AALL is pleased that the Commission has moved forward with Network Neutrality and notes that the proceeding that would reclassify broadband as a telecommunications service is still open. Not all members of Congress are in favor of these rules, however.

### **STATUS OF NET NEUTRALITY IN THE 112<sup>TH</sup> CONGRESS**

- On January 5, 2011, Rep. Marsha Blackburn (R-TN-7) introduced a bill, the *Internet Freedom Act* ([H.R. 96](#)), which would prohibit the FCC from regulating the Internet. The bill has 75 original co-sponsors, and we predict that more co-sponsors will be added. AALL opposes this bill.
- Also on January 5, Rep. Cliff Stearns (R-FL-6) introduced the *Internet Investment, Innovation, and Competition Preservation Act* ([H.R.166](#)), which is identical to a bill he introduced in the 111th Congress ([H.R. 5257](#)) that AALL opposed. The bill would prohibit the FCC from regulating the Internet without first proving there is a market failure causing harm to consumers.
- On January 25, Sen. Maria Cantwell (D-WA) introduced a bill with Sen. Al Franken (D-MN), *The Internet Freedom Broadband Promotion, and Consumer Protection Act of 2011* ([S. 74](#)) that would ensure net neutrality by amending Title II of the *Communications Act of 1934*. The bill would prohibit a broadband Internet access service provider from interfering with a user’s ability to use or offer lawful content, applications, or service and prohibit a provider from creating a pay-for-priority system.
- On February 17, the House voted to approve an [amendment](#) to a continuing resolution ([H.R. 1](#)) that restricts the FCC from using funds from the continuing resolution to implement the new net neutrality rules.
- On February 23, Senator John Kerry (D-MA), chairman of the Commerce Subcommittee on Communications, Technology and the Internet, Sen. Ron Wyden (D-OR), Sen. Maria Cantwell (D-WA) and Sen. Al Franken (D-MN) sent a [letter](#) to Senate Majority Leader Harry Reid and Minority Leader Mitch McConnell expressing their opposition to efforts

to use the appropriations process or the *Congressional Review Act* to keep the FCC from implementing the net neutrality rules.

- On March 9, the House Energy and Commerce Subcommittee on Communications and Technology approved [H.J. Res 37](#), which AALL opposes, to prohibit the FCC's net neutrality rule from having any force or effect. The resolution will now go before the full committee for a vote.
- On April 8, H.J. Res 37 passed the House by recorded vote of 240 – 179. [House Report 112-51](#) details further the House's rationale behind its attempts to nullify Network Neutrality.

## **STATUS OF NET NEUTRALITY IN THE 111<sup>TH</sup> CONGRESS (2009-2010)**

### ***Status in 2010***

The recent decision by the United States Court of Appeals for the District of Columbia struck a blow to the FCC's assumed authority to regulate Internet service provider's network management practices. The Court ruled that the agency failed to make the necessary showing to prove that barring Comcast from blocking access to BitTorrent was "reasonably ancillary to the...effective performance of its statutorily mandated responsibilities." This decision was a significant setback for the FCC in light of its recently-released [National Broadband Plan](#) and raised many questions about whether the agency would continue to be able to regulate broadband communications.

On May 5, House Energy and Commerce Committee Chairman Henry Waxman (D-CA-33) and Senate Commerce, Science and Transportation Committee Chairman Jay Rockefeller (D-WV) sent a [letter](#) to Chairman Genachowski urging the agency to consider "all viable options" in order to retain its authority, including reclassifying broadband services as a "telecommunications service."

On May 6, Chairman Genachowski announced a new approach that would allow the FCC to regulate the transmission component of Internet access and maintain competitiveness, innovation and free speech. Under Chairman Genachowski's [plan](#), referred to as the "third way," the FCC would:

- Recognize only the transmission component of broadband access as a telecommunications service;
- Apply a select number of Title II provisions that, prior to the *Comcast* decision, were generally assumed to fall under the Commission's purview for broadband;
- Forbear from application the many sections of the Communications Act that are unrelated to broadband access service; and
- Establish forbearance and meaningful boundaries to guard against regulatory overreach.

The FCC's proposal is widely considered a reasonable alternative that would ensure that the FCC could continue to promote investment in the Internet and broadband while protecting users.

Markham Erickson, Executive Director of the Open Internet Coalition, [said](#) of the plan: “It is a middle path that ensures that broadband access providers are not subject to an overly regulatory structure, while still ensuring that some basic rules of the road apply. It is a win-win for consumers, Internet and technology companies, and broadband access providers.”

Unsurprisingly, there has been pushback from some members of Congress who claim that the FCC is trying to regulate the Internet. On May 11, Rep. Cliff Stearns (R-FL-6) introduced the *Internet Investment, Innovation, and Competition Preservation Act* ([H.R. 5257](#)), which AALL opposes, to prevent the FCC from any type of Internet access regulation without first proving with thorough evidence that there is a market failure causing harm to consumers. On May 12, Republican Leader John Boehner (R-MO-8) and Republican Whip Eric Cantor (R-VA-7) sent a [letter](#) to President Obama urging him to reconsider the FCC’s plan.

The FCC will soon seek public input on its proposal, and we will keep this Issue Brief updated as developments occur.

### ***Status in 2009***

On May 29, 2009, President Obama reaffirmed his commitment to net neutrality, stating, in a [speech](#) about the nation's cyber-security: “Indeed, I remain firmly committed to net neutrality so we can keep the Internet as it should be -- open and free.”

On July 31, Rep. Edward Markey (D-MA-7) and Rep. Anna Eshoo (D-CA-14), introduced the *Internet Freedom Preservation Act of 2009* ([H.R. 3458](#)) to amend the *Communications Act of 1934* to establish a national broadband policy, safeguard consumer rights, and spur investment and innovation.

On September 17, during an oversight hearing of the FCC, House Energy and Commerce Chairman Henry Waxman (D-CA-30) expressed his support for net neutrality and pledged to co-sponsor the *Internet Freedom Preservation Act of 2009*. AALL supports this bill, which will ensure net neutrality by guaranteeing that telecommunications companies cannot discriminate against certain types of Internet traffic. Save the Internet put together a useful [interactive map](#) of House representatives who support net neutrality.

On September 21, FCC Chairman Genachowski introduced a proposal that would add two more principles to FCC Internet Policy Statement FCC 05-151. The first would prevent Internet access providers from discriminating against particular Internet content or applications, and allow for reasonable network management. The second principle would ensure that Internet access providers are transparent about the network management practices they implement. The Chairman’s proposal included a clarification that all six principles will apply to all platforms that access the Internet. The process of codifying the existing four open Internet principles along with the two new proposals through a [Notice of Proposed Rulemaking](#) (NPRM) began at the October 22 meeting.

Also on September 21, Sen. Kay Bailey Hutchison (R-TX) introduced an amendment to an appropriations bill that would prohibit the FCC from spending any funds “to develop and

implement new regulatory mandates.” The bill is co-sponsored by Sens. John Ensign (R-NV), Sam Brownback (R-KS), David Vitter (R-LA), Jim DeMint (R-SC) and John Thune (R-SD). These are the same senators that have received more than \$400,000 in campaign and political-action contributions from AT&T. The telecom giant, along with other large telecom and cable companies, has criticized the new FCC rules.

On September 22, Chairman Genachowski placed a phone call to Senate Republicans to begin a dialogue. Due to the Chairman’s openness and willingness to talk, the Senate Republicans agreed to stop their push to prevent funding for the FCC as a protest of proposed net neutrality rules.

### **STATUS OF NET NEUTRALITY IN THE 110<sup>TH</sup> CONGRESS (2007-2008)**

Two important net neutrality bills were introduced in the Senate and House during the 110<sup>th</sup> Congress. The first, the *Internet Freedom Preservation Act* ([S. 215](#)), was introduced in January 2007 by Senator Byron Dorgan (D-ND). This bill would have amended the *Communications Act of 1934* to prevent broadband service providers from discriminating against Internet content, applications or services or interfere with the ability of any person to lawfully use broadband service. The bill stalled in the Senate Commerce, Science, and Transportation Committee and never made it out of committee.

On the House side, Rep. Edward Markey (D-MA-7) introduced the *Internet Freedom Preservation Act of 2008* ([H.R. 5353](#)) in February 2008. This bill would have amended the Communications Act to ensure net neutrality as well as “enable the United States to preserve its global leadership in online commerce and technological innovation.” The bill also directed the FCC to conduct a proceeding and public broadband summits to assess competition, consumer protection, and consumer choice issues relating to broadband Internet access services. It was referred to the House Energy and Commerce Committee’s Subcommittee on Telecommunications and the Internet, which Rep. Markey chaired in the 110th Congress. The Subcommittee held a hearing on the bill in May 2008, but there was no further progress on the legislation.

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