Net Neutrality and Content on the Internet

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Service Provider versus Content Provider

Three decades ago, the terms ‘service providers’ and ‘content providers’ had very different meanings from what can be found today. Previously, services providers could have been any company that offered some sort of specialized assistance, from legal advice to consulting to telecommunications. Commercial Internet service providers (ISPs) did not become widely available to the public until the late 1980s. Within a decade, the Internet had become an incredibly pervasive presence in every American business and household.¹ By the year 2014, the Internet had become a necessity for people in the developed world who wanted to connect with other businesses or individuals. More than 84 percent of people in developed countries use the Internet on a regular basis.² With the majority of Americans relying on the Internet for information and communication, it is no surprise that the Federal Communications Commission (FCC) sought to regulate this increasingly important resource. The order under which the FCC now seeks to regulate the Internet is controversial, and the purpose of this preliminary report is to assess some of its possible effects.

Before the FCC’s order was released on March 12, 2015, service providers and content providers remained largely undefined by the government. Instead, their roles became recognizable through pioneers and subsequent conduct. When the Internet was a new and exciting field, web hosting


services such as GeoCities and Angelfire\(^3\) made it incredibly easy for individuals to place content on a readily accessible website. ISPs eventually began offering web hosting as well, giving users even more opportunities to share information with the Internet community.\(^4\) Although the strict definitions of service providers and content providers had yet to be defined, the terms were already being slowly formed. Microsoft Windows later defined an Internet service provider as a “company that provides…access to the Internet, usually for a fee. The most common ways to connect to an ISP are by using a phone line (dial-up) or broadband connection (cable or DSL). Many ISPs provide additional services such as e-mail accounts, web browsers, and space for you to create a website.”\(^5\) In short, any company that gave the individual the ability to access anything on the Internet through an Internet line would constitute an ISP. However, the recent FCC order expanded on that definition. Within the §8.2 definitions, a Broadband Internet Access Service (BIAS) was defined as:

“A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service.”\(^6\)

The FCC exclusion of dial-up from the definition may be questionable if not for the fact that dial-up is almost obsolete when applied practically. Only three percent of Americans still use dial-up,\(^7\) which allows users to access the Internet through a standard phone line and tends to be cheaper than other

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\(^3\) GeoCities was a major web hosting service launched in 1994 by David Bohnett and John Rezner, and was later acquired by Yahoo!. The services have since been shut down on American services. Angelfire launched in 1996 and is still operating as a web hosting service.


connection services. However, dial-up barely has half the speeds of Digital Subscriber Line (DSL) Internet and does not interrupt the phone line.\(^9\) This has caused most Americans to seek the faster and more convenient Internet options. The user base of dial-up may be why the FCC’s order painted a broad stroke over every single other service that may provide access to the Internet. Previously, ISPs were only considered service providers if they directly connected a user to the Internet. However, the broad language of the BIAS definition includes even wireless providers such as cell phone companies, which had never been regulated as ISPs before the order. In 2013, Verizon Communications Inc. filed one of the first lawsuits challenging this expansive definition, a case that largely shaped the most recent order.\(^10\)

The U.S. Court of Appeals for the D.C. Circuit ultimately vacated two of the three parts of the FCC’s Open Internet Order of 2010. This was due largely to the FCC attempting to subject broadband providers to “common carriage regulation,” especially when the FCC had previously designated broadband providers as “information services” and not “telecommunication services.”\(^11\)\(^12\) The Communications Act of 1934, and more specifically the Telecommunications Act of 1996, prevented the FCC from regulating broadband providers like common carriers. However, Section 706 of the Telecommunications Act stated that the FCC “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans…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.”\(^11\)

Thus, in the recent order, the FCC attempted to circumvent the court’s

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10 Verizon v. F.C.C., 740 F.3d 623 (D.C. Cir. 2014). In this case, the court held that the FCC did not have the authority to regulate broadband providers due to the FCC’s own classification of common carriers. Two of the three parts of the FCC’s open Internet order were vacated. However, the court did agree that the FCC had authority to enact policies that would strengthen the broadband infrastructure, and that broadband providers threatened the openness of the Internet.


12 U.S. Code §1302 – Advanced Telecommunications Incentives
previous hesitation of allowing the FCC to regulate blocking and throttling by grouping every broadband service under the same terminology and emphasizing the communications service provided by the companies. This had the effect of placing every company that provided an Internet connection under the expansive umbrella of the title ‘service provider.’

The definition of content providers has grown as well. Previously, an Internet content provider (ICP) was defined as “a website or organization that handles the distribution of online content such as blogs, videos, music or files. This content is generally made accessible to users and often in multiple formats…Many of these providers are news sites, which provide up-to-the-minute on breaking news, or in-depth commentary on current issues.”\(^{13}\) The insinuation was that service providers had to make a concerted effort in order to distribute their information to the intended audience. However, the FCC’s recent order defines a content provider (“edge provider”) as “any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.”\(^{14}\) Under this broad and worryingly vague definition, individuals may unknowingly become content providers simply by owning a smartphone with a sync feature. The moment an individual takes a picture and the phone automatically stores the photograph on an Internet storage site, whether there is an audience or not, the individual becomes an edge provider.

Lastly, the FCC’s recent order created a third party using what may be the broadest definition yet. The end user is “any individual or entity that uses a broadband Internet access service.” Similar to content providers, an individual may become an end user without even actively seeking out content on the Internet. With mobile broadband becoming widely available, and almost necessary with some


\(^{14}\) In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, (rel. March 12, 2015).
mobile devices, an individual is likely connected to the Internet simply by turning on his or her phone. Applications designed to locate the position of the user are always running, even when the phone is in ‘sleep’ mode. This dictates that the person be classified as a perpetual end user, leaving thousands or even millions of Americans as constant end users as they move from place to place or even as they sleep.

With the definitions so broadly written, there is little surprise that some entities fall into more than one category. The most common overlap would be individual content providers (personal websites, bloggers, etc) and end users. Because of the openness and variety of the Internet, any individual may create and own a website while simultaneously accessing data on the Internet. Some tech savvy programmers may even use this accessed information to feed their own websites. Sharing and receiving data at the same time are incredibly easy to do with current technology.

The FCC likely does not care much about that particular overlap. However, what happens when an entity simultaneously fills the roles of a service provider and a content provider? Google began when two Stanford students in 1995 developed a simple search engine that would supposedly organize the infinite amount of information on the Internet.15 By 2011, Google had more than one billion unique monthly visitors using its search engine.15 In less than two decades, one-seventh of the world's population accessed Google on a regular basis. As one of the giants of content providers on the Internet, most would assume that Google would fully support the concept of net neutrality proposed by the FCC in 2010. Subsequently, in 2011, Google joined the realm of service providers with the Google Fiber network, giving the residents of Kansas City an Internet connection speed of one gigabit per second.16 One gigabit is almost one hundred times the speed most Americans experience with their

normal broadband connections, placing Google at the forefront of the broadband race. However, the
crossover into this area did little to deter Google's advances as an ISP. In fact, Google attempted to use
its new ISP status to enhance its business model. While being mostly silent on the issue of net
neutrality in the most recent debates, Google did assert that if it was to be regulated as an ISP, it should
have fair access to utility poles and other infrastructure.\(^{17}\) This would allow Google to cut previous
costs when deploying the fiber network in new areas. The FCC wholeheartedly agreed to the proposal,
stating that the regulation “ensures fair access...which would boost the deployment of new broadband
networks.”\(^{18}\) As a result, Google's enormous online presence and existence as an example of a
successful ISP under the new FCC regulations gives Google the FCC's undivided attention.\(^{19}\) To
illustrate, Google expressed concerns that the FCC's language in the new order would allow ISPs the
ability to charge content providers just for getting their information to end users.\(^{20}\) Google asserted that
“such a scenario could open the door to an avalanche of new fees for Web companies and threaten their
business models.”\(^{21}\) Because of this assertion, the FCC made last-minute revisions to their policy,
demonstrating Google’s influence on the government agency.

But how do the new regulations affect Google as a content provider? In short, they have not yet
done so. Google representatives have stated that the new regulations “did not have any specific impact
on [the] plans to build more Fiber cities,”\(^{22}\) but have remained silent as one of the largest content
providers in the world. Opponents of FCC regulations argue that the broadband regulatory practices are


\(^{18}\) Id.


\(^{21}\) Id.

simply the beginning and that the FCC has done little to assuage the concerns of the public.\(^{23}\) Additionally, they point out that content on the Internet is already open and largely unregulated, and that the lack of regulations promotes competition within the broadband market.\(^{24}\) One article argues that the FCC “is inserting government bureaucracy into all aspects of Internet access, the FEC is debating whether to regulate Internet content, specifically political speech for free online,” and that the “control [is] for control's sake.”\(^{25}\) With the distinct lack of a boundary between regulating service providers and regulating content providers in the FCC's statutory policies, it is quite possible that the concerns of proponents of openness on the Internet are well-founded. Despite all of these concerns, however, the current FCC order only addresses the actions of ISPs and appears not to indicate that the agency aims to regulate content on the Internet in any form.

Instead of seeking to hindering content, the FCC’s order gives the impression of being contentprotective. §8.5 of the order prohibits service providers from blocking what is designated as “lawful content:”

“A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or nonharmful devices, subject to reasonable network management.”\(^{26}\) However, nowhere within the new FCC order is lawful content defined nor does it state what an ISP's obligation is regarding unlawful content. Instead, the order states that the no-blocking rule “does not prevent or restrict a broadband provider from refusing to transmit unlawful material, such as child pornography or copyright-infringing materials.”\(^{27}\) The order further states that “this obligation does not


\(^{25}\) Id.

\(^{26}\) In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, (rel. March 12, 2015). §8.5

\(^{27}\) Id. at pg. 49.
impose any independent legal obligation on broadband providers to be the arbiter of what is lawful.\textsuperscript{27} The language of these two statements certainly does not prevent ISPs from being arbiters of what is lawful. They simply do not have the obligation of seeking out and blocking any unlawful content.

However, despite the language of the new FCC order, service providers and even content providers may have some obligation to block unlawful content if alerted to it. Within the \textit{Automattic, Inc. v. Steiner} case, the court discusses the applicability of the Digital Millennium Copyright Act (DMCA), in which a copyright owner may request “the removal of infringing content from a webpublishing platform.”\textsuperscript{28} Thus, under 17 U.S.C.A. § 512(c)(1)(C), a service provider must “remove or disable access to the material “expeditiously” or face infringement liability.”\textsuperscript{29} It appears from this sort of setup that service providers may be held accountable for laws passed by Congress concerning what is lawful. On the other hand, Congress routinely has a hard time passing bills aimed at regulating content on the Internet. In 2011, Congress proposed the Stop Online Piracy Act (SOPA), which was intended to combat online copyright infringement and online trafficking in counterfeit products.\textsuperscript{30} This bill was met with surprisingly strong opposition, from both the Internet community and legislators.

Opponents claimed that the bill threatened free speech and innovation, and would ultimately allow law enforcement to use service providers to black out entire Internet domains because of infringing content posted by a single content provider.\textsuperscript{31} Since then, Congress has been disinclined to define lawful content on the Internet and how best to regulate unlawful content. As a result, the nature of lawful content will likely be resolved through complaints to the FCC and subsequent litigation.

\textsuperscript{27} \textit{Id.} at footnote 250.
Although the order is ambiguous, it does secure liberties few end users knew were at stake. Before the new regulations, an ISP could legally use personal agendas to block or hinder content they did not want to be viewed. Senator Al Franken stated that if the public “learned that the government was planning to limit our First Amendment rights, we’d be outraged. After all, our right to be heard is fundamental to our democracy. Well, our free speech rights are under assault – not from the government but from corporations seeking to control the flow of information in America.”32 Franken pointed out that when Congress rescinded the rule preventing television networks from owning their own programming, the network owners originally promised that they would not give their own programming preference over others. Now, if you are a small or independent producer, it is impossible to get your show broadcasted unless you sell some of your rights to the network. Before the new FCC order, an ISP could take a political stance and subsequently block or slow down traffic to an opposing party. However, §8.5 and §8.5 of the new FCC order prohibit blocking and throttling in this manner, especially if the ISP is attempting to hinder the flow of “Internet content.”33 Theoretically, under these new regulations, an independent content creator on the Internet will not need to worry about competing against other larger companies who have paid to use an ISP’s ‘fast lane.’ This prevents users from becoming exasperated with slow or incomplete connections previously experienced on smaller websites and using the easier, faster routes bought by larger companies. Under the FCC’s broad definition, all content is to be created (and distributed) equally for the time being.

33 In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, (rel. March 12, 2015). §8.5-8.7