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ABSTRACT

OPEN INTERNET **APRIL 2014**

The Internet was founded as a collaboration between the U.S. government and universities on a foundation of American innovation, openness and nondiscrimination. To sustain its social and economic benefits, the Internet must remain open and free of commercial or government gatekeepers.

Open access telecom regulation was removed from cable and telco broadband Internet access over 10 years ago. The FCC applied its 2005 Internet policy principles to combat blocking by Comcast, but lost in court for lack of enforceable rules. In 2010, the FCC adopted the open Internet rule. This was struck down by the Federal Court of Appeals in January 2014 because the FCC had not relied on the correct statutory authority.

Without FCC telecommunications authority over Internet access, there is nothing to stop Internet Access Providers (IAPs) from reserving most bandwidth for their biggest customers and favoring their own video content and proprietary cloud services while disadvantaging online competitors who offer similar services. Charging more for data usage to access unaffiliated "over the top" services is one form of anticompetitive discrimination that is likely.

***Definition*:** Open Internet access is the concept that owners of critical "last-mile" broadband access infrastructure should not block, degrade, or otherwise impair end user access to lawful online applications, content, or services. Under the Telecommunications Act, the FCC has always had clear authority over interstate communications networks and services. Controversy developed after broadband first appeared to replace dial-up Internet and cable modems, and the FCC decided to classify broadband Internet access as an unregulated "information service." Even if that was a good call in 2002-2005, as Internet connections have become a basic necessity of modern life, the quality of Internet access is too important to be left entirely to commercial market forces, especially where competitive choices of network providers are few or absent. After a lengthy proceeding with unprecedented public input, the FCC adopted simple basic open Internet rules in late 2010. The FCC rules did not regulate the Internet, but simply prohibited access providers from abusing their market power over wired Internet connections.

***Background*:** The complexity of the Internet ecosystem, which involves the interaction of many different market segments (network infrastructure, software, hardware, applications and content websites running "over the top"), renders broad rhetorical slogans like "Internet regulation" misleading. In promoting universal affordable Internet access, in 2010 the FCC struck a delicate

balance between customer choice and online entrepreneurial innovation on the one hand, and IAP network business model flexibility on the other.

As prominent Internet legal scholar Lawrence Lessig once noted in Congressional testimony, the Internet was born on and rapidly expanded over traditional phone lines. While the telephone companies were not interested in IP services at first, they were very willing to sell the dedicated transmission lines required for the Internet to be launched in the 1970s and commercially developed in the 1990s within a framework of nondiscriminatory open access. Local and long distance telecom networks were considered essential infrastructure, so they carried all new data traffic just as voice conversations had been carried – free of blocking, delay, or consideration of content or source. Neutrality principles were inherent in the Title II common carrier regulations that governed all of these networks until 2005.

The Supreme Court's 2005 *Brand X* decision initiated the broadband access debate by removing open access requirements from cable modem service. The FCC then released telephone DSL service from these same obligations in the name of regulatory parity. As a result, the few Internet service providers that actually own wired facilities that connect to end users acquired an unprecedented level of control over the information that flows through their local networks to and from the Internet. This is sometimes called the "terminating access" monopoly. Unlike in the 1990s when AOL and hundreds of other ISPs sold e-mail and other services separately from local dial-up phone networks, telephone and cable IAPs began to bundle their own Internet access and email services together thereby bootstrapping their critical underlying telecommunications transmission into unregulated "information services" status. By contrast, the UK still has hundreds of competing ISPs because they required British Telecom to separate its local monopoly networks and make local access connections available wholesale to all competitors on an equal footing.

The open Internet was first threatened when major telecom executives announced intentions to alter open Internet access business models and charge the most popular online applications for faster high quality network routing. AT&T's sponsored data plans and Comcast's holdup of Netflix in 2014 are the latest examples of this approach. In 2008, the FCC prohibited cable operator Comcast from blocking of bit torrent–style filing sharing, which was found to be in violation of the Internet Policy Statement. However, Comcast appealed and won because the FCC had never adopted enforceable rules on open Internet access. In December of 2010, the FCC finally adopted the first such rules. Verizon challenged the FCC Open Internet order in court and won because the FCC had not classified Internet access as a telecommunications service and therefore could not impose common carrier-like nondiscrimination requirements.

IAPs have the technical ability to monitor and filter network traffic, and can easily block or interfere with the delivery of competing video content or cloud computing services, or charge more for the bandwidth to access unaffiliated services. Some have introduced tiered pricing in which consumption of their own video content does not count toward a user's bandwidth caps. Normal business incentives of dominant broadband access providers incline them toward these discriminatory and anticompetitive practices.

***CCIA's Position*:** FCC safeguards for network Internet access connections that preserve and enable residential and business connectivity are essential where a truly competitive market is lacking or actually diminishing through further industry consolidation. Telephone and cable IAPs divide the markets for landline broadband and tacitly agree not to compete in each other's geographic territories leaving monopoly and duopoly local markets. The lack of competition for critical physical local access connections cannot be ignored given the layered nature of the Internet. End user access to everything online is dependent upon a local physical network connection and on Internet backbone fiber optic infrastructure.

The FCC's work on a new open Internet rule is critically important, but first the FCC should classify Internet access correctly as a telecommunications service. Then the agency would have the option to restore the nondiscrimination framework upon which the Internet was launched and the commercial web took off. Thousands of online services, at least a dozen of which are now household names with global reach, relied on an environment of "innovation without permission" from network operators. Nobody needed to strike deals with network operators in order to ensure clear sailing to and from their websites. Future entrepreneurs deserve no less, and economic growth depends on an open Internet.

***Current Status*:**

The FCC has launched a new proceeding to take public comments about approaches to protecting and preserving the open Internet after the Verizon v. FCC decision. Public interest organizations unanimously have urged the FCC to reclassify Internet access connections as telecommunications. In doing so, the agency could rely on basic Title II statutory authority to prohibit anticompetitive commercial discrimination that would degrade end user access to "over the top" services and content that is independent of their particular Internet access provider.

From the business side, companies like Netflix, Vonage and Level 3 emphasize the importance of FCC mandated network interconnection, so that Internet access providers cannot exploit their terminating access monopoly over their end users to demand new and unreasonable payments from unaffiliated online service providers and CDNs. Such deals are really contracts of adhesion where the content and service providers have no choice if they want to prevent end users from hitting a rocky road. They are not merely traditional "peering" arrangements for blind exchange of traffic, because in these cases the IAPs are the only ones with last-mile network access customers to leverage as a gatekeeper.

In response to the FCC's request for guidance on preserving the open Internet, CCIA recommended that the Commission focus on telecommunications network connections that support retail broadband public Internet access. CCIA also pointed out that interconnection of networks is critical and the FCC should establish a legal framework for limiting the extent to

which Internet access providers may leverage their terminating access monopolies against content and online app providers.