



900 17th Street, N.W.  
Suite 1100  
Washington, DC 20006  
Phone: 202.783.0070  
Fax: 202.783.0534  
Web: www.ccianet.org

## ABSTRACT

Computer & Communications Industry Association

### OPEN INTERNET

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- *The Internet was founded as a collaboration among U.S. government, private sector and university resources 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.*
- *Court decisions and FCC deregulation removed open access guarantees from cable broadband and DSL phone lines. The FCC applied its Internet policy principles to combat blocking by a cable Internet access provider, but lost in court for lack of enforceable rules. Late in 2010, the FCC adopted the first open Internet rule.*
- *Without an FCC rule on 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 computing services while disadvantaging online competitors offering video programming and data cloud services. Charging more for the bandwidth to access online alternatives is one form of anticompetitive discrimination the FCC and the Justice Department should closely monitor.*

**Definition:** “Net neutrality” is the concept that owners of critical “last-mile” broadband access infrastructure should not block, degrade, or otherwise impair end user access to lawful applications, content, or services over the Internet, using their own choice of devices. Under the Telecommunications Act, the FCC has always had clear authority over interstate communications by wire and radio spectrum. Controversy developed because a former FCC in its discretion decided (wrongly we think) to classify Internet access as an unregulated “information service.” However, at the same time, the FCC in 2005 adopted network neutrality principles and ordered that non-discrimination rules for broadband access be applied temporarily to AT&T after its merger with local phone company SBC. These principles mirrored traditional open Internet access service that residential and business customers are accustomed to. In 2009 the FCC proposed rules based on the original Internet Policy principles plus transparency provisions involving disclosure to customers and a ban on unreasonable discrimination. After a lengthy proceeding with unprecedented public input, the FCC adopted very minimal basic rules in late 2010. The FCC rules do NOT regulate the Internet, but prohibit monopoly and duopoly access providers from abusing their market power over wired Internet connections when most American end users have, at best, a choice of two vendors for landline access to the Internet.

**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 simple rhetorical slogans like “Internet regulation” misleading. In promoting universal affordable Internet access, the FCC has struck a delicate

balance between customer choice and entrepreneurial innovation online 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 degradation. 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, who 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. 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 those services together in order to bootstrap their critical underlying telecom connections into the full deregulation that was applied to "information services." In contrast, the UK still has hundreds of competing ISPs, because they forced British Telecom to separate its local monopoly networks and make local access connections available wholesale to all competitors on an equal footing.

Wireless technologies once offered hope for more competition, but the FCC's auctions resulted in incumbent sweeps of spectrum bands. The harsh economic and political reality is that for potential new entrants, the magnitude of investment required for spectrum bidding and building out new independent networks and the relative level of market risk without an established customer base and legacy network infrastructure is insurmountable. Clearwire's difficulties and Lightsquared's horrific experience are the most recent proof of how heavily the deck is stacked against innovative new entrants.

The open Internet was first threatened when big telecom executives announced intentions to change traditional Internet access models and charge the most popular online applications for high quality fast lanes on "their" pipes to "their" customers. From 2007-2010, Congress debated bipartisan legislation intended to restrict broadband access providers from discriminating among users and competitors. The FCC investigated "Industry Broadband Practices" in 2007. The House Judiciary Committee held a hearing in 2008 entitled "Net Neutrality and Free Speech on the Internet" at which diverse groups—from the Christian Coalition to indie rock band OK Go! to the ACLU—agreed on the importance of an open and nondiscriminatory Internet. The FCC opened an inquiry into blocking of bit torrent-style filing sharing by cable operator Comcast, which was found to be violating 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.

As network technologies advance and IAPs now have the ability to monitor and filter network traffic, IAPs can easily block or interfere with the delivery of competing video content or cloud

computing services, or charge more for the bandwidth to access alternative services. They introduce tiered pricing in which consumption of their own video content does not count toward a user's bandwidth caps. Netflix has accused Comcast and AT&T of such content discrimination. Normal business incentives of dominant broadband providers incline them toward these discriminatory practices to disadvantage video programming and cloud computing competitors.

***CCIA's Position:*** FCC rules for Internet access that preserve or enable household and small business connectivity are essential where a truly competitive market is lacking, and actually diminishing through such new partnerships as the Verizon and cable companies' Spectrum Co. deal, in which telco and cable IAPs divvy up the markets for landline and mobile broadband and tacitly agree not to compete with each other. The lack of competition for critical physical local access connections cannot be ignored given the layered nature of the Internet and the fact that user access to everything online is dependent upon a local physical network connection (wired or wireless) and on Internet backbone fiber optic infrastructure. Indeed, implementation of the National Broadband Plan (NBP) ordered by Congress depends on clarification of how the FCC's clear statutory authority over telecommunications applies to local broadband Internet access connections.

Further monitoring of access and refinement of the new open Internet rule may be necessary as long as network owners have unbridled discretion to determine bandwidth, latency and throughput. Employing techniques such as deep packet inspection, they can favor some users, services, applications, and content at the expense of others. The new mandated disclosure of such practices might expose them for public scrutiny, but not cure abuses. IAPs should be able to charge the heaviest Internet users higher rates for using more capacity, but they should not be free to make capacity for access to competing IP video content or data cloud services substantially more expensive than their own offerings. This could make competing alternatives unaffordable for average American households and small businesses.

The FCC's open Internet rule codifies the nondiscrimination principles upon which the Internet was launched. Given the concentrated duopoly market for landline Internet access, it is better for economic growth that nobody needs network operator permission to launch innovative online services. Protecting the fully competitive "downstream" free market (websites, content, applications, and services) should be the highest policy priority.

***Current Status:***

The FCC Open Internet rule took effect last year. Verizon filed a court appeal, still pending, seeking to overturn the rule. If the Court eventually rejects the FCC rule, which would not likely happen before 2013, the agency could be left with no authority over broadband Internet access, wired or wireless, unless it reclassifies those services as Title II telecommunications. If the FCC ever starts moving in that direction, we expect the IAPs would lobby strenuously for a rewrite of the Telecommunications Act. The U.S. House passed a resolution of disapproval of the FCC rule in 2011 under the obscure Congressional Review Act, but the Senate defeated that same resolution on a straight party line vote with Democrats supporting the FCC rule. Senators Maria Cantwell (D-WA) and Al Franken (D-MN) have sponsored separate pieces of legislation to impose stronger regulation on Internet access providers. Senator Franken calls net neutrality "the free speech issue of our time."

In February 2012, the Securities and Exchange Commission (SEC) ruled that net neutrality is an important enough issue, “a significant policy consideration” that AT&T and other publicly held IAPs will have to allow shareholders to vote on whether their company should adopt an open Internet policy and operate its wireless services in accordance with net neutrality principles.

Meanwhile, further industry consolidation and vertical integration of video content providers with broadband network IAPs could force a test of the FCC Open Internet rule, as exclusive programming deals cause consumers to face difficulty accessing desired news, sports and entertainment content from their landline or wireless IAP. The pending Verizon – Cable deal is a marquis example of this trend.