

WORLD WIDE WEB FOUNDATION

World Wide Web Foundation
1110 Vermont Ave NW,
Suite 500
Washington DC 20005,
contact@webfoundation.org

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Restoring Internet Freedom)	WC Docket No. 17-108

**Replies to Comments
World Wide Web Foundation**

August, 2017

Introduction

Everyone has the right to access the internet and use it freely and fully. This is one of the aims of net neutrality and a function for the Federal Communications Commission (FCC) to uphold as part of its broader mandate¹.

The participatory process carried out by the FCC to revisit current Net Neutrality provisions has been historic. Seldom if ever has a technical agency of the government received such a massive response from the general public. By August 15 Docket 17-108 has received over 21 million comments². On the one hand, it is important to celebrate the massive participation as a signal that the people are interested in the work carried out by the FCC (and government agencies in general), which is an acknowledgement to the legitimacy of government and the people's trust in its institutions' capacity to deliver services in the public interest. It is in this light that we fully welcome the FCC's decision to provide a two-week extension of the deadline for filing reply comments in response to the *Restoring Internet Freedom* Notice of Proposed Rulemaking³.

We also consider that honoring the efforts of the millions of people who have engaged in this participatory process requires the FCC to launch an in-depth and transparent investigation into both the allegations of a DDoS attack and that hundreds if not millions of comments were sent by automated bots that relied on stolen identities.

We call upon the FCC to ensure the continuation of these participatory processes and to uphold these as a necessary component of the technical debate. The FCC must remain non-partisan and engage key actors. All comments should be considered and addressed.

We also request that the FCC lead the way in helping the government modernize the way it engages with the public. The massive number of comments received under the current format makes it difficult for the agency and interested parties to effectively take advantage of the information provided by the public. It is important to underline that the FCC is not only compelled to engage with the comments it requested but ensure that those who participated in the process perceive that this is the case⁴.

¹ FCC Website (n.d.) <https://www.fcc.gov/about-fcc/what-we-do> . (Last accessed 8/29/2017)

² FCC (2017) Docket 17-108

https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-108&q=restoring%20internet%20freedom&sort=date_disseminated_DESC

³ FCC(2017, August 11) FCC extends "Restoring Internet Freedom" Reply deadline to August 30. FCC. <https://www.fcc.gov/document/fcc-extends-restoring-internet-freedom-reply-deadline-aug-30>

⁴ To an extent, this mimics the obligation that rest on Judges not only to be impartial, but to be perceived as impartial by the interested parties. In these subjective ques lies much of the trust that underlies the people's delegation of matters of public interest onto institutions.

We would also like to remind the FCC commissioners that given the internet's borderless nature, whichever decision the FCC arrives to will have ripple effects on the global information ecosystem, affecting the lives of millions of people who cannot participate in this process. We hope those interests are also taken into consideration.

About the World Wide Web Foundation

The World Wide Web Foundation was established in 2009 by web inventor Sir Tim Berners-Lee to advance the open web as a public good and a basic right. We are an independent, international organisation fighting for digital equality — a world where everyone can access the web and use it to improve their lives. To deliver digital equality, we aim to change government and business policies for the better. We believe that everyone has the right to access the internet and use it freely and fully — and these principles underpin all our work. In recent years, we have influenced policies in over a dozen countries, helping to unlock the benefits of the web for hundreds of millions of people.⁵

Overview

As was stated in the comments presented by the Web Foundation on July 17⁶, "for the rules in place to be repealed, the FCC should prove either that the process through which that decision was made was flawed, or that circumstances have changed or otherwise shown that the rule [Open Internet Order, 2015] is not having the intended effects." If the FCC proceeds towards a repeal without strong evidence on these fronts the decision would amount to administrative arbitrariness.

The Supreme Court has claimed "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."⁷

In compiling this submission, we have not been able to find any comment with evidence that the Title II classification has had any pernicious effect on the internet ecosystem as a whole. As presented in the Web Foundation's July submission, the short period of time between the enactment of the Open Internet Order (2015) and the publication of the 2017 NPRM does not allow to control

⁵ For more information regarding our vision and projects, visit our website: <http://webfoundation.org/> (last accessed 7/12/2017)

⁶ Web Foundation (2017, July 17). Comments on Net Neutrality. *Web Foundation*. Available at https://ecfsapi.fcc.gov/file/10717560630144/World_Wide_Web_Foundation_Comments_on_Net_Neutrality_Submitted_to_FCC_July2017.pdf

⁷ Motor Vehicles Manufacturers Association v. State Farm, 463 U.S. 29 (1983) See 42-43.

for the many other variables that influence the outcome. Amongst these variables is the general uncertainty triggered by an electoral period⁸, and regulatory uncertainty triggered by the FCC's 2015 NPRM, the court filing that followed, and the current process.

Given the vast amount of comments submitted, the Web Foundation has decided to focus on replying to three comments, one for each of the three key stakeholders involved in and affected by any FCC decision: Academia, Industry, and Civil Society.

Comment filed by Hal Singer⁹ (Academia):

Hal Singer is a Principal at Economists Incorporated, and a Senior Fellow at George Washington University's Institute for Public Policy¹⁰. As was mentioned in the previous section, few if any of the comments favourable to dismantling current regulations provide evidence regarding the effects of Title II that would merit modifying in any way the 2015 Open Internet Order. In his comments, Singer first defuses the claim made by the FCC in the NPRM (paragraph 109) that "there is evidence that the actions taken by the commission in the Title II order have reduced investments by ISPs." In his comment, Singer categorically states, "Whether that decline was caused by the rules is an open question." This is fundamental since the FCC repeatedly relied on Singer's publications to make such claim¹¹.

After conceding there is no robust evidence to claim there is a causal relationship between the Open Internet Order (2015) and a reduction in broadband investment, Singer strives to provide a proxy for the FCC to be able to approximate the effects of the regulation on broadband investment based on what occurred in a previous period.

To analyze the effects of a Title II classification on broadband investment, Singer claims that the FCC can rely on a natural experiment. Singer claims this natural experiment took place when in 2002 the Cable Modem Order was approved, and Cable was reclassified as Title I, whilst DSL remained classified as a Title II service until 2005¹².

According to Singer, the fact that broadband providers were under different regulations (common carrier in the case of DSL, and de-regulated information service in the case of Cable), provides a natural experiment setting that allows us to isolate the effect of the regulation on broadband

⁸ See Part V of our submission, Op.Cit.

⁹ Singer, H. (2017) Comments regarding Paragraph 46. FCC. Available here: https://ecfsapi.fcc.gov/file/10717926007033/Singer_Internet%20Freedom%20Comments_final.pdf
Version open to public comments here: <https://goo.gl/fZXE8p>

¹⁰ See link above for more detail on these and other positions held by Hal Singer

¹¹ We explored this situation in our July Comments before the FCC. See Part V. Web Foundation (2017, July 17). Comments on Net Neutrality. Web Foundation. Available at https://ecfsapi.fcc.gov/file/10717560630144/World_Wide_Web_Foundation_Comments_on_Net_Neutrality_Submitted_to_FCC_July2017.pdf

¹² Ortiz Freuler (2017) Net Neutrality - Key Stats. *Tableau*. <https://public.tableau.com/profile/juan.ortiz#!/vizhome/KeyStatsUS-Interannual/Keystats-Interannualvariations> (last accessed 8/16/2017)

investment. To do so, Singer suggests the *difference-in-difference* approach, whereby the growth in investment for the companies not subject to regulation is compared to the growth in investment for the companies subject to regulation during the same period. The difference between the accumulated growth during this period is assumed to represent the impact of the intervention.

Before going into the details of Singer's proposal it is important to state that even if the difference-in-difference approach *could* explain the impacts of regulation in the early 2000s, it would not be self-sufficient in providing the required evidence for a change in regulation in 2017 since i) That would assume the sector behaves in the same way it did 10 years ago, which given technological developments requires further evidence; and ii) It only focuses on broadband investment, and not on the broader internet ecosystem, which is what the FCC should focus on when carrying out a cost benefit analysis.

Having stated the basic limitations the approach faces, we will go some steps further and show that though Singer provides an interesting thought experiment, the application has limitations that should preclude it from being leveraged as such by the FCC to inform its decision-making process.

Without going into further detail, and underlining that Singer concludes that this proposed finding "does not imply causation" (paragraph 24), we will outline why the analysis as presented in paragraph 21 should not inform the FCC's decision-making process:

- Singer relies on a period of time (1996-2008) broader than the one during which both services were classified differently. To isolate the effect of being under Title II, the analysis should have focused on the 1996-2005 period (or using 1998 as a starting point, if an active stance regarding the classification is expected by the FCC to define the appropriate classification). By expanding the period under analysis Singer is not able to isolate the effect of other variables that might have impacted differently on both Cable and DSL.
- Singer assumes that cable and DSL internet follow the same pattern investment absent regulation, yet does not provide evidence of them complying with the *equal trends assumption*. The equal trends assumption implies that for a *difference-in-difference* approach to be implemented, whoever carries out the study must first show that both groups behave the same before the intervention takes place. Showing that both groups follow the same trend is key to showing that any variation between them after the intervention takes place can be understood as associated with the intervention¹³.

¹³ Gertler, Gertler, Paul, & World Bank. (2011). *Impact evaluation in practice*. Washington, D.C.: World Bank. Pg 99.

- There are reasons to believe that Cable and DSL do not follow the same patterns of investment given that they rely on different raw materials for the underlying infrastructure upon which they deliver service. Therefore each is subject to different variations in the market price of raw materials they depend upon for maintenance and extending the area of service provision. Cable and telecom companies also often bundle the service of internet access to different services (telephone, and cable TV), meaning that variations in interest in those products (and the prices of the hardware on which each depends) might also affect demand for their services differently, and indirectly the investment carried out by each sector.
- It is not possible to isolate the effect of the treatment (reclassification as Title I) on Cable from having spillover effects on DSL. The companies relying on these technologies compete in most places. This creates distortions that undermine the usefulness of what is presented as a natural experiment.

Comments filed by Oracle (industry)¹⁴:

Oracle is a multinational company that focuses on providing software for database and cloud-related services. Oracle's presentation has two key points:

- OTT and IAP are equally fundamental and therefore should be treated equally.
- Reclassifying broadband access will restore the FTC as the cop on the beat.

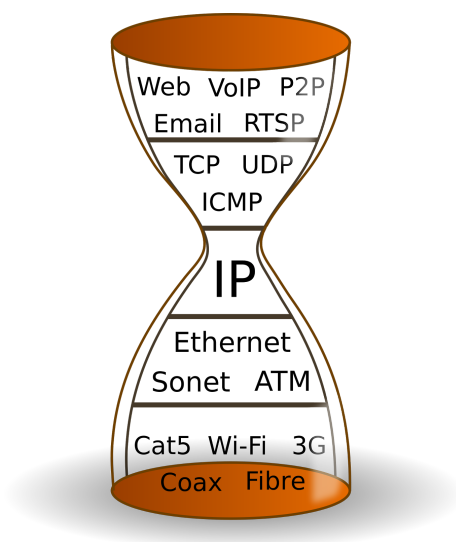
Regarding the first point, it is true that both OTTs and IAPs play a key role in the user's internet experience. Yet there seems to be a logical leap from the statement that both are key to claiming both should be under the same regulatory framework. To illustrate this point, it could be the same as stating that in the case of food, restaurants and farmers should be under the same regulatory framework because they are both key actors in the food provision sector.

It is important to underline that IAP's and OTTs, though each playing a key role, are different in relevant aspects. Perhaps a good example of this is that when observing the internet's architectural principles, they were placed on the opposite extremes of what is referred to as the hourglass model:

Fig. 1. The Hourglass model¹⁵

¹⁴ Oracle. (2017) Comments regarding NPRM. FCC https://ecfsapi.fcc.gov/file/10717356717926/Oracle_Comments_RIF_NPRM.pdf. Available in format open to comments <https://goo.gl/buwgou> (last accessed 8/18/2017)

¹⁵ Xander89 (2010). A representation of the "Internet Hourglass," with its waist as the IP(v6!) protocol. *Wikimedia Commons*. Available at



As shown in Fig. 1, whereas the IAPs are on the bottom layer, below the Internet Protocol (IP), the application services are on the top of the hourglass. Whereas a typical user will not have fixed broadband provision through more than one provider at his home, and only a few privileged people have access to more than a handful of IAPs which provide high speed service¹⁶, there are innumerable OTTs through which a user can access content or online services. In this sense, the IAPs have a greater gatekeeping power than OTTs. In any case, claims by Oracle regarding the lack of device neutrality¹⁷ seem more directed at expanding the application of the Title II-like obligations to other players, than to classify IAPs as a Title I service.

Regarding the role of the FTC, it is important to note that at this moment both agencies overlap in their activities, and are both engaging with the IAPs on their respective fronts. This might change when the 9th District Court defines the FTC's jurisdiction in the *FTC v. AT&T Mobility* case¹⁸. Yet there are reasons to believe the Court will find that the Open Internet Order (2015) in no way limits the FTC from dealing with many of the issues Oracle is concerned about. That said, if the judiciary decided to limit the FTC's jurisdiction in the current context, there are strong reasons to prefer the FCC as the acting *cop on the beat* on issues such as net neutrality, than to expect the FTC to deal with them. Amongst them are:

<https://upload.wikimedia.org/wikipedia/commons/thumb/b/b8/Internet-hourglass.svg/2000px-Internet-hourglass.svg.png>

¹⁶ Beede, D. (2013) Competition Among U.S. Broadband Service Providers. US Department of Commerce <http://esa.doc.gov/sites/default/files/competition-among-us-broadband-service-providers.pdf>

¹⁷ E.g. "Google's Android operating system is the dominant global computing platform and the overwhelmingly dominant mobile platform (upwards of 80 percent globally). Google also controls the Android app store, can exclude apps at will, and favors its own apps in licenses with device vendors. The speculative harms hypothesized in the Title II Order pale in comparison to this type of discriminatory conduct." Oracle. (2017) Comments regarding NPRM. FCC https://ecfsapi.fcc.gov/file/10717356717926/Oracle_Comments_RIF_NPRM.pdf. Available in format open to comments <https://goo.gl/buwgou> (last accessed 8/18/2017)

¹⁸ Court Order (2017, May 9) Order. United States Court of Appeals for the ninth circuit. <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/05/09/15-16585.pdf> (last accessed 8/29/2017)

Arguments for FCC to be the enforcer of Net Neutrality, as defined by the Open Internet Order (2015):

- the FCC has more technical tools and expertise on the subject matter¹⁹. Whereas the FTC manages trade issues in general, the FTC is focused on communications policy, which gives it a better lense through which to evaluate the issues Oracle is concerned about.
- the Court in *Verizon* made it clear that the FCC couldn't enforce Net Neutrality unless IAPs were classified under Title II²⁰.

Arguments against relying on the FTC to protect the values underlying Net Neutrality:

- If the FTC tried to protect Net Neutrality, it would be
 - Based on a *case-by case* mechanism, by enforcing general legislation against "unfair and deceptive trade practices"²¹, and only after identifying harm on a specific consumer.
 - subject to the interpretation of the clause "unfair and deceptive trade practices", which would place a heavy burden of proof on the consumer and the FTC. This would make processes unbearably costly and slow.
 - Limited to the subset of net neutrality violations that could be classified as "unfair and deceptive trade practices".

For these reasons it seems that though Oracle's concerns are reasonable, these are best handled by the Open Internet Order, currently in place.

Comments filed by Media Freedom (Civil Society)²²

Media Freedom (mediafreedom.org) describes itself as "non-profit organization, operating as a watchdog of the so-called digital watchdogs by providing counterpoint to their advocacy in the Congress".

¹⁹ "The FTC doesn't have a lot of expertise in network engineering. We're not the FCC in that regard." FTC Commissioner McSweeney to Ars Technica. Brodtkin, J. (2017, April 11). "Unenforceable": How voluntary net neutrality lets ISPs call the shots. *Ars Technica*. <https://arstechnica.com/tech-policy/2017/04/unenforceable-how-voluntary-net-neutrality-lets-isps-call-the-shots/> (last accessed 8/18/2017)

²⁰ *Verizon v. FCC* 740 f.3d 623 (d.c. cir. 2014). Available in format open to comments here: <https://goo.gl/6qWfQY> (Last accessed 10/7/2017)

²¹ FTC (2017). A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority. FTC. Available at

²² Media Freedom (2017) Comments regarding the NPRM. *Media Freedom*. Available at https://ecfsapi.fcc.gov/file/107170205707123/MediaFreedom_17-108_Comments.pdf. Available in format open to comments here <https://goo.gl/FC7JNG> (last accessed 8/17/2017)

The key point of Media Freedom's presentation is that net neutrality in general, and the restrictions on paid prioritization in particular, violate free speech. The reply to this comment will be split into two parts. The first will explore the meaning and objectives of protections on free speech, whereas the second part will provide examples of how those whose voices are seldom heard claim net neutrality is key to their advocacy efforts,

It is important to start by defining the concepts:

Paid prioritization: According to the FCC, "*Paid prioritization* refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity" ²³. It is important to clarify this point, since members of the general public have often understood that the ban meant flat pricing of broadband services, which is not the case. The ban seeks to avoid IAPs from extorting extra fees from OTTs, since that could create a two tiered internet, or effectively exclude certain services and information from what is today called the open web. It could make the open web and open internet history, and with it much of its capacity to harbor new ideas. As the inventor of the web, Tim Berners-Lee, has said: "Net neutrality allowed me to invent the web without having to ask for permission."²⁴ Had IAPs been able to ask for a fee to allow TBL's invention to be deployed, there is a chance he would have never managed to set it into motion.

Freedom of Speech: The first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

When analyzing the role of freedom of speech in *Borough v. Guarnier* (2011), the Supreme Court stated "the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs. Beyond the political sphere, both speech and petition advance personal expression."²⁵

Far from limiting freedom of speech, net neutrality seeks to enable every internet user from enjoying an equal chance of being heard. This is specially relevant for minority groups whose voices and opinions are often excluded from the traditional mediums such as radio, tv and newspapers, most of which are privately owned, and are often seen as replicating and amplifying the voices and interest of the groups of people who own them. Allowing paid

²³ Open Internet Order, FCC 15-24 (2015). Available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf (Last accessed 8/8/2017)

²⁴ Tim Berners-Lee (2017, July 12) on Twitter. Available at https://twitter.com/timberners_lee/status/885100007749287936 (last accessed 7/13/2017)

²⁵ "Borough of Duryea, Pennsylvania, et al., Petitioners v. Charles J. Guarnieri". Legal Information Institute, Cornell University Law School. 20 June 2011. Retrieved 26 August 2013.

prioritization could extend and further entrench those inequalities to the web, limiting its transformative capacity. Such is the role of net neutrality in enabling free speech that advocates for the rights of minorities claim the debate over net neutrality is a racial justice issue:

It is because of Net Neutrality rules that the internet is the only communication channel left where Black voices can speak and be heard, produce and consume, on our own terms - Patrisse Cullors, Co-Creator of #BlackLivesMatter²⁶

The Internet is vital to all communities and essential to the political participation of communities of color (...)For Latinos and many low income communities of color, who have long been left out of mega Telecoms corporations' Internet access priorities, a free and open Internet is essential for our participation in everyday life. –Presente.org – Mariana Ruiz, Managing Director²⁷

Net Neutrality is a critical step in closing the economic, educational, and other racial equity gaps that disadvantage communities of color. That is why our network of 175 grassroots organizations across the country has been organizing for strong and enforceable Net Neutrality rules at the FCC. It is the only way to ensure our communities can rely on an Internet free from discrimination. -Media Action Grassroots Network – Steven Renderos – National Organizer²⁸

For these reasons it seems clear that the right to speak is best protected under strong and enforceable rules, which include a ban on paid prioritization.

Closing remarks

The Web Foundation considers the analyzed comments raise valuable concerns and reflect many of the reasons why the internet is cherished by the general public. As an organization that fights to keep the web open and a space for everyone to have the same rights and opportunities online, we share many of the concerns of the people, groups, and companies whose comments we have analyzed in this document. Nevertheless we consider that most if not all of the underlying concerns presented in those comments are best tackled by an open internet, with

²⁶ See Center for Media Justice (2017) Fact Sheet: Net Neutrality, Communications Law, and Racial Justice http://centerformediajustice.org/wp-content/uploads/2017/02/FP-NetNeutrality-FactSheetVoices_Final.pdf (last accessed 7/17/2017)

²⁷ National Hispanic Media Association (2015, February 15). Racial Justice Leaders Push Congress for Net Neutrality. NHMC <http://www.nhmc.org/racial-justice-leaders-push-congress-net-neutrality/> (last accessed 17/7/2017)

²⁸ Ibid

strong and enforceable net neutrality rules. We therefore continue to recommend the FCC keep the Open Internet Order (2015) in place as it stands.