



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

In the Matter of:	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

**REPLY COMMENTS OF  
INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION**

Richard Bennett

Information Technology and Innovation Foundation<sup>1</sup>  
1101 K St N.W.  
Suite 610  
Washington, DC 20005

---

<sup>1</sup> ITIF is a nonprofit, non-partisan public policy think tank committed to articulating and advancing a pro-productivity, pro-innovation and pro-technology public policy agenda internationally, in Washington and in the states. Through its research, policy proposals, and commentary, ITIF is working to advance and support public policies that boost innovation, e-transformation and productivity.

The Information Technology and Innovation Foundation (ITIF) is pleased to offer the following additional reply comments on the FCC's Notice of Proposed Rulemaking, "In the Matter of Preserving the Open Internet", GN Docket No. 09-191, and "Broadband Industry Practices", WC Docket No. 07-52. ITIF previously offered comments and reply comments prior to the D. C. Circuit Court ruling, and offers these as a reaction to current events. We stand by our previous comments, and offer these for additional clarification.

## **Summary**

Following we include an op-ed that summarizes our interpretation of the court decision on Internet freedom and regulation. Following the op-ed, we offer additional remarks.

## **Clearer Regulatory Authority No Threat to Net Neutrality**

*On April 6, the U.S. Court of Appeals ruled that the Federal Communications Commission had, in effect, overstepped its regulatory authority to control the Internet. Much of the commentary on that decision has been misinformed, overwrought, or both. The court did not strip the FCC of its powers to protect consumers, and the decision is not the death of net neutrality (the idea that Internet Service Providers (ISP) should treat all content equitably.) Consumers shouldn't fear that ISPs are now set to go on a web-blocking rampage. The decision simply laid bare the limitations of the current regulatory regime. The ensuing commentary revealed fundamental misunderstanding of what it takes to manage today's information superhighway for the benefit of all.*

*The case at hand involved Comcast's decision to limit some customers' use of peer-to-peer file sharing programs such as BitTorrent to offer movies (most of them pirated) and other large data files to the Internet at large. Comcast was compelled to act because the use of such programs by a relatively small number of people can degrade the web surfing experience of their neighbors. The system Comcast initially used was less than ideal, but a replacement was already in the works before the FCC issued the sanction that was struck down by the court.*

*Net neutrality concerns aside, the court simply recognized that the Bush-era FCC's order against Comcast was bad lawyering. In fact, the current FCC realized the order was so deeply flawed it attempted to correct it on appeal, but that sort of thing is not allowed by our system of justice. The court's order makes it clear that the FCC can continue to use the legal doctrine of "ancillary jurisdiction" to stop actions that harm consumers or competition as long as it applies the doctrine more carefully.*

*Quite importantly, the case illustrates the Internet's unique character among communications systems and highlights the legal challenges involved in properly protecting it. Networks of the past were designed to support a single application, such as telegraphy, telephony, or television broadcasting. In contrast, the Internet is a multiple-use system designed to accommodate all of these applications and more. Regulating the*

Information Technology and Innovation Foundation  
1101 K Street, N.W., Suite 610  
Washington, DC 20005

*networks of past was as simple as ensuring that network operators didn't provide the network's one and only application with poor service, but the Internet requires operators to consider the ways that users and applications affect each other.*

*To be sure, this is not easy. Like assigning lanes on the freeway to carpools, trucks, ambulances, and cars, it's easy to get the balance wrong and hard to say what is the fairest and most efficient way of getting everyone where they need to be as fast possible. The Internet's design doesn't prescribe a single system for the fair sharing of bandwidth. Rather, it leaves fairness as an exercise for the operator, and always has. Up to now, this system has worked pretty well: There is no evidence of venal actions by companies to punish their own customers. Regulators are there to step in if this happens. As the Internet evolves, network operators, such as Comcast, are going to need some latitude to managing their systems. They are the only stakeholders in the ecosystem with a global perspective.*

*Unfortunately, most proposals from network operators we have seen over the last ten years to keep traffic flowing in the optimum manner have been quickly branded as discrimination, often with a heavy dose of incendiary rhetoric. The fact is, however, that responsible network management always involves some discrimination. So long as these "discriminating" management decisions are not anti-competitive or anti-consumer, so be it. If it takes a few seconds longer to download a book on your Kindle so an important call can get through, is that anti-competitive or anti-consumer? These issues can and should be settled with calm deliberation on the facts.*

*Going forward, Congress needs to consider the FCC's role with respect to Internet services, but it need not act in haste. The FCC doesn't need vast new powers as much as a focused mandate. Over-regulation can be as harmful as under-regulation, and as any expansion of the FCC's powers will have implications for many years, so it is important to get the regulatory framework right. The Federal Trade Commission is still empowered to take action against any abusive practices that might occur, and the FCC's powers remain as they have been ever since it initially classified cable-based Internet services in 2002.*

*The Internet is in no immediate danger of collapse. Let it continue to work within a system of cooperation and transparency among stakeholders while Congress considers carefully the aims of regulation with thoughtful attention to facts rather than speculation, hyperbole, or myth.*

## **Conclusion**

The Internet is perhaps the finest example of the value of self-regulation. The Internet is a global system that reaches far beyond the jurisdiction of any national regulator. Therefore, it depends on an entirely different system of regulation to ensure its orderly operation. The institutions of self-regulation that have grown up around the Internet include the North American Network Operators' Group (NANOG), the Réseaux IP Européens Network Coordination Centre (RIPE NCC), the Internet Engineering Task

Force (IETF), the Messaging Anti-Abuse Working Group (MAAWG) and the Internet Corporation for Assigned Names and Numbers (ICANN.) Together, these organizations are capable of applying significant sanctions against misbehaving network operators and network users, and often do. The mitigation of global cybercrime, identity theft, cyber-extortion, botnets, and spam would be impossible without the work they do. National regulators such as the FCC and the FTC can function best in relation to the Internet by joining the self-regulatory ecosystem. Government agencies bring additional enforcement tools in the event that the self-regulatory ones are not sufficient.

The global system of co-regulation by national regulators and industry stakeholders ensures the correct and efficient operation of the Internet, and has yet to show any significant inability to deal with real abuses. Some advocates insist that the FCC needs to take rash action in response to the court decision, such as classifying broadband Internet services under Title II of the Communications Act. We submit that there is a significant disconnect between the Communications Act and the Internet ecosystem.

The Internet has given rise to innovative new applications that resemble traditional communication applications such as telephony and differ from them in many ways. Skype, for example, is on its face a telephone network. The company earns the bulk of its revenue by connecting Skype callers to the public switched telephone network (PSTN,) yet it does not offer E-911 and other services required of similar VoIP applications such as Vonage. Skype occupies a gray area between traditional PSTN services and the Internet, yet it insists on the same protection from unfavorable operator treatment afforded to its fully regulated counterparts. This example illustrates the need for regulatory consistency.

Networks of the past were bound to applications, but the Internet of the present and future will accommodate multiple applications, each with different needs and each sensitive to different side-effects from other applications. This fundamental reality makes the Internet different from Title II, III, and VI networks. The Internet is not a telephone network, a mobile telephone network, or a cable TV network. That should be obvious.

It's reasonable to consider a regulatory framework tailored to the Internet. There is no such framework in the Communications Act at present, although many of its elements are sprinkled about various sections of the Act. It would be reasonable for the FCC to convene a group of stakeholders to determine the breadth of consensus regarding such a framework. If this is successful, and the group determines that additional authority is needed, a recommendation can be made to Congress to that effect. As the Internet is in no danger of imminent collapse, this process need not be undertaken against an atmosphere of panic, but it should be undertaken with all deliberate speed.