Network Neutrality and the Restoring Internet Freedom Order

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The internet has transformed significantly since its prototype of ARPANET in the 1960s, and, with that transformation, the role of the internet itself has changed in our daily lives. The internet has become somewhat of a necessity within the past decade; not only is it a form of communication, but it can also act as a research tool, a diary, even a shopping mall. Like the internet, the role of internet service providers (ISPs) has also changed drastically. New legislation enacted this year now gives ISPs greater control over content and distribution. “Net neutrality,” the term used to describe the 2015 Open Internet Order and the corresponding consumer protection regulations (collectively referred to as the 2015 Order), was replaced in June 2018 with the Restoring Internet Freedom Order (the 2018 Order). Although some believe that the repeal of the 2015 Order gives ISPs the option to “throttle” or block content, proponents of the repeal believe that net neutrality itself was creating undue restrictions on business and investments in technology. A vocal leader of the new legislation, Ajit Pai, Chairman of the Federal Communications Commission (FCC), stated: “[A]fter-the fact regulation [like the 2018 Order]—which allows you to take action . . . based on actual harms that have been demonstrated . . .—is a much better way on balance to protect consumers. As opposed to preemptive regulation [like the 2015 Order], which might seem appealing at first, but . . . has serious long-term consequences.”

BACKGROUND

Net neutrality has been defined as “the principle that [i]nternet service providers may not discriminate between different kinds of content and applications online and should not choose which data to privilege with higher quality service.” The repeal of these regulations worry some consumers and small enterprises. Without these regulations, some are concerned how content will be accessible if one can’t afford higher premiums. However, critics of the original 2015 Order argue that it responded to an illusory threat of ISPs behaving this way, not actual conduct. They further argue that although proactive consumer protection laws, such as the 2015 Order, can ensure

4 “Throttling” is targeted degradation of a customer’s broadband connection.
that no harm will happen, they can also have an unintended chilling effect upon those being regulated.

The 2015 Order harkens back to strong consumer protection ideals under Title II of the Communications Act of 1934. These regulations established four requirements of ISPs: no blocking, no throttling, no paid prioritization, and increased transparency. Critics, including Chairman Pai, felt that these regulations stifled creativity and innovation. In contrast, Professor Susan Crawford, a net neutrality advocate, believes that not regulating corporate ISPs could allow for overly high prices for internet access. This could result in areas with low income to have limited access or no access at all because ISPs will be looking to high-income neighborhoods to make a profit. Regardless of these apprehensions, net neutrality has been repealed.

According to Chairman Pai, the 2018 Order will help consumers by promoting competition. ISPs have an incentive to build in rural areas and are now able to offer consumers a wider variety of service options. ISPs also possess more authority in what content is accessible; however, they will have to publicly “disclose any blocking, throttling, affiliated prioritization, or paid prioritization in which they engage.” Another major change under the 2018 Order is that the Federal Trade Commission will now handle consumer complaints, rather than the FCC.

While the original net neutrality regulations have been repealed, that doesn’t necessarily mean that one’s daily interaction with the internet will change. Major telecom companies and ISPs, such as AT&T and Comcast, have vowed that they would not change the way users distribute and consume content. Some states themselves have begun enacting legislation that mimics that of the original net neutrality rules. Twenty-two states and the District of Columbia have even filed a lawsuit against the FCC, stating that the 2018 Order is “arbitrary, capricious, and an abuse of discretion . . . [it] violates federal law . . . [and] conflicts with the notice-and-comment rulemaking requirements.” Other lawsuits have been filed by a few local counties, multiple websites, and even some internet operating systems, such as the County of San Francisco, Etsy, Inc. and Mozilla

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8 47 C.F.R. §§ 8.3, 8.5, 8.7, 8.9.
10 Id.
15 These states include Washington, Montana and New York. According to the National Conference of State Legislatures, 29 state legislatures have introduced bills meant to ensure net neutrality.
16 These petitioners include: attorneys general from California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and Washington.
The majority of these individual cases were consolidated with the states’ lawsuits in March 2018.19

CONCLUSION

Although the Restoring Internet Freedom Order replaced the original net neutrality regulations, one’s use of the internet may not actually be impacted due to this pending litigation. In the meantime, ISPs will retain more latitude under these new flexible guidelines. Only time will tell how the 2018 Order and the related lawsuits and state legislation will affect the internet and consumers.

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18 Others filing suit include, but are not limited to: Ad Hoc Telecom Users Committee, Benton Foundation, Center for Democracy & Technology, Coalition for Internet Openness, County of San Francisco, County of Santa Clara, Free Press, INCOMPAS, National Hispanic Media Coalition, New America Foundation’s Open Technology Institute, Public Knowledge, Santa Clara County Central Fire Protection District and Vimeo, Inc.