

NET NEUTRALITY IS UNNECESSARY REGULATION

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Proposals to subject the Internet to public-utility-era nondiscrimination rules threaten unnecessary and potentially harmful regulation. “Network Neutrality” laws would be inconsistent with the dynamic innovation that the Internet has long displayed and that is necessary to ensure that the United States continues to lead in the broadband era. Traditional unfair competition tools, tied to antitrust analysis, are superior, and can ensure that any anticompetitive actions are identified and punished.

The argument against independent network neutrality rules has three pillars:

First, broadband carriers are unlikely to engage in anticompetitive denials of access. Quite to the contrary, broadband carriers’ economic incentives will generally be to provide the maximum number of services and the greatest amount of content to their customers; that is what drives demand for their own broadband access. Where the market for broadband access is competitive, then one would expect to see differentiated service offerings. But such competitive differentiation would not hurt content and application providers, because they would have other avenues to reach potential users. Even where the broadband access market is concentrated, however, those carriers have the incentive to provide their customers what those customers want – the greatest degree of access to services, balanced against reliable and effective access service.

Second, more general unfair competition rules are a superior way to address any anticompetitive actions that broadband access companies may take. Antitrust law has a well-developed framework for evaluating “vertical foreclosure,” which is exactly what discrimination against content or applications would be. Moreover, this “vertical foreclosure” framework is superior, because it asks three questions that net neutrality rules would not. First, it focuses enforcement only in cases in which the access provider has actual market power. Second, it asks whether the access provider’s action actually distorted competition. And, third, it asks whether the access provider’s action was justified by network efficiency, innovation, or some other competition-neutral rationale. By contrast, a stand-alone net neutrality rule would punish any differential treatment of applications or content, whether or not that treatment had any anticompetitive impact.

Third, network neutrality rules are inefficient and risk interfering with innovation. Stand-alone net neutrality rules invite a thicket of regulation and encourage regulatory litigation. Even more importantly, net neutrality rules forbid carriers from efficient business relationships, and impose the costs of networks on parties other than those that are responsible for the costs.

In sum, network neutrality rules are largely unnecessary and are inferior to rigorous enforcement of general unfair competition principles.

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References: James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 Yale J. on Reg. 39 (2000); James B. Speta, *The Vertical Dimension of Cable Open Access*, 71 U. Colo. L. Rev. 975 (2002) (both available <http://www.law.northwestern.edu/faculty/fulltime/Speta/Speta.html>); The Digital Age Communication Act’s Regulatory Framework and Network Neutrality (available at <http://www.pff.org/daca/>).