

The Principle of Network Neutrality and Freedom of Speech: The Development of U.S. Jurisprudence

Ching-Yi Liu^{*}

Abstract

Much of the policy debate and scholarly literature on the principle of “Network Neutrality” (Net Neutrality) in the United States has addressed whether the Federal Communications Commission (“FCC”) has statutory authority to require Broadband Service Providers (BSPs) or Internet Service Providers (ISPs) to operate in a nondiscriminatory manner. Such analysis largely focuses on questions about jurisdiction, the scope of lawful regulation, and the balance of power between stakeholders without much thought about broader concerns such as First Amendment values. For their part, BSPs and ISPs have aggressively advocated for First Amendment speaker rights when selecting content and applications, packaging them into easily accessible and user-friendly format. This Paper focuses on the constitutional analysis and responds to the First Amendment assertions favoring the position of BSPs and ISPs. First, this Paper explains the definition of Net Neutrality, followed by a review of the regulatory history of the principle of Net Neutrality and the role played by Internet Intermediaries, such as BSPs and ISPs. Second, this Paper examines the legal rationale that supported and opposed the principle of Net Neutrality by examining relevant regulatory efforts of the FCC, legislative initiatives in Congress, and the implications of judicial decisions concerning the implementation of Net Neutrality. Third, this Paper considers what we can learn about Net Neutrality through the lens of Free Speech decisions made by the Supreme Court. This Paper concludes current telecommunication and media regulatory models and Supreme Court decisions provide inconsistent and

^{*} Professor of Graduate Institute of National Development, National Taiwan University.
E-mail: cy1117@ms17.hinet.net

incomplete direction on the future of Net Neutrality. The paper provides some observations as to how we shall approach the principle of Net Neutrality in the spirit of promoting First Amendment values while imposing reasonable nondiscrimination responsibilities on BSPs and ISPs.

Keywords: network neutrality, internet intermediaries, editorial discretion, broadband service providers, internet service providers, freedom of speech, content-neutral, viewpoint discrimination, common carriers