

# Net Neutrality: Applying (and Expanding) Nondiscrimination Norms in Cyberspace

**L**ate last year, the Federal Communications Commission (FCC) enacted regulations designed to promote net neutrality in the broadband industry. These rules limit the control that broadband providers such as Verizon or Comcast have over the use of their networks by Internet content and application providers, such as YouTube. According to the new rules, broadband providers must disclose any network management practice and are prohibited from blocking any lawful Internet content. The most controversial aspect of the new rules requires that broadband providers “shall not unreasonably discriminate” against any content when transmitting Internet traffic over their networks.



The term “unreasonable discrimination” has a long pedigree in telecommunications law. It is borrowed from § 202 of the Communications Act, which places common carriage restrictions on telephone companies and other telecommunications providers. At first glance, net neutrality appears merely to extend this traditional nondiscrimination norm into cyberspace. In fact, the FCC cited its 75-year history of enforcing § 202 to show the feasibility of enforcing its new net neutrality rules.

But a closer examination shows that this analogy is flawed. The net neutrality rules place greater restrictions on broadband providers than § 202 ever did on telephone companies. Even though some form of net neutrality is probably both inevitable and beneficial, a rule based on § 202 of the Communications Act would yield a more nuanced and balanced obligation to refrain from discrimination.

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### Net Neutrality and Tiering

The Federal Communications Commission has not defined the precise contours of its new nondiscrimination rule, but it stated that paid prioritization—or “tiering”—probably violates the standard. To understand the fight over tiering, one must know a bit about the Internet’s architecture. Content providers transmit information to consumers in the form of small “packets” of digital data that travel over the network to the consumer’s computer, where the packets are assembled into a message. The last—and narrowest—leg of that journey is over the broadband network that connects the customer’s computer to the Internet. FCC Chairman Julius Genachowski refers to this network as the “on-ramp to the Internet,” though it is perhaps more accurate to describe it as the Internet’s off-ramp.

When more packets wish to travel through a wire than the wire can handle, the network can become congested, thereby delaying the transmission of the packets. This delay affects some content more than others: a few-second delay in delivering a Web page, for example, is imperceptible to most users. But a delay in receiving real-time video conferencing packets can cause skipping, which degrades the customer’s experience and reflects poorly on the application provider.

To route packets efficiently, some have proposed a second tier of broadband service that would give a provider priority delivery in the event of network congestion; providers would be charged a fee for priority service. The model is like that of the U.S. Postal Service: anyone can send first-class mail, and those interested can pay extra for priority or express mail. Providers whose products would suffer from delays in delivery could pay to avoid them, and these revealed preferences would tell broadband providers which packets should receive priority.

But the net neutrality rules prohibit this form of intelligent traffic management. Instead, the FCC has endorsed “use-agnostic discrimination” to remedy congestion. Broadband providers may charge the end users a fee based on the bandwidth they consume and may limit the bandwidth of high-volume consumers in an attempt to alleviate congestion. But broadband providers may not generally prioritize certain types of traffic over others and—unlike the U.S. Postal Service—they may not charge for priority delivery.

### Applying § 202 to Cyberspace

Section 202 of the Communications Act places significantly fewer limitations on telecommunications providers. Under § 202, discrimination means charging two customers different rates or terms for “like” services. Two services are “like” if the consumer considers them “functionally equivalent.” As the D.C. Circuit has noted, § 202 “is not concerned with the price differentials between qualitatively different services or service packages. In other words, so far as ‘unreasonable discrimination’ is concerned, an apple does not have to be priced the same as an orange.” *Competitive Telecomm. Ass’n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993). This is why, for example, AT&T could offer private-line service (which offers a dedicated telephone line between two points for guaranteed com-

**INSIGHT** continued on page 15

As enlightening as a four-hour seminar on *Iqbal* and *Trombly* can be, not enough can be said for simple social activities. Baseball games, happy hours, balls, and formal events give us something to look forward to and increase both our camaraderie and productivity. For some younger lawyers, these networking activities are also the first opportunity to actually meet members of the chapter in person.

### Maintaining Interest and Participation

What happens after you have signed up a new recruit? How do you keep the person engaged and willing to renew membership? Committee, division, and section membership is an important tool toward this end. Our varying committees, divisions, and sections (both on the local and national level) give us an outlet in which we can contribute, learn, and participate in our areas of interest. A start-up kit<sup>4</sup> is available to chapters without a Younger Lawyer Committee. This packet of information provides younger lawyer members and recruits a framework for focusing their efforts and interests for the good of the chapter.

Each chapter wants to be an active and relevant organization in its community, and it is our membership that makes this possible. For example, I am the chapter president of one of the FBA's smaller chapters. Even though chapters like my own face challenges in growing our membership, we remain relevant and have promise to be more so.

The suggestions offered on recruitment, both in general and in regard to younger lawyers, may not be a perfect fit for your chapter, but I hope they provide a good starting point for your discussions regarding the health of your membership. Ultimately, we all want the same thing: a growing chapter consisting of active and contributing members ... *more*. **TFL**

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### Endnotes

<sup>1</sup>Chief Justice William H. Rehnquist, Remarks at the Dedication of the North Carolina Bar Association Center, Oct. 21, 1994 (unpublished).

<sup>2</sup>Bureau of Labor Statistics, OCCUPATIONAL OUTLOOK HANDBOOK, 2010–2011 ed., "Lawyers," available at [www.bls.gov/oco/ocos053.htm](http://www.bls.gov/oco/ocos053.htm).

<sup>3</sup>[www.fedbar.org/Membership/Member-Services.aspx](http://www.fedbar.org/Membership/Member-Services.aspx).

<sup>4</sup>[www.fedbar.org/Resources/Chapter%20Resources/Younger-Lawyers-Committee-Start-up.aspx?FT=.pdf](http://www.fedbar.org/Resources/Chapter%20Resources/Younger-Lawyers-Committee-Start-up.aspx?FT=.pdf).

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munication) at a premium rate, because this service was not "like" ordinary telephone service.

As dissenting Commissioner Robert McDowell noted, tiering is probably permissible under § 202. Just as first-class and priority mail are different, standard packet transport and priority transport are not "like" services. Broadband providers typically make their "best efforts" to route packets but do not guarantee delivery of standard Internet traffic. Priority transport could serve as a quality-of-service guarantee: priority packets could be guaranteed delivery at a certain speed, because they would not be impeded by congestion. This guarantee is different in kind from "best efforts" delivery and worth a premium to companies whose products are harmed by delays in delivering packets. Because priority and "best efforts" transport are not functionally equivalent, broadband providers could offer both without violating § 202.

### Benefits of a More Nuanced Approach

Tiering offers two significant benefits. First, it permits more intelligent Internet traffic management. Because bandwidth is a scarce resource in congested areas, tiering can use pricing to determine how best to allocate that scarce resource, just as markets allocate

other scarce resources in society. Priority would go to those whose services most need prompt delivery, as indicated by their willingness to pay. Second, tiering provides the possibility of greater competition among broadband providers. In most markets, customers have only two choices for broadband service, partly because of the high cost of deploying a network. But a new entrant that has a business model that is not explicitly net-neutral could raise capital by selling priority delivery to certain content providers. Customers could then choose whether a broadband provider that is net-neutral or one that is not net-neutral would better suit their needs.

Even though "discrimination" is a loaded term, § 202 of the Communications Act has long recognized that in telecommunications many forms of differential treatment can be beneficial. As its net neutrality policy develops, the Federal Communications Commission should embrace that more nuanced framework and grant broadband providers at least as much flexibility as common carriage law affords other telecommunications companies. **TFL**

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