The 110th Congress and Network Neutrality: S.215 - The Internet Freedom Preservation Act

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THE 110TH CONGRESS AND NETWORK NEUTRALITY:

S. 215—THE INTERNET FREEDOM PRESERVATION ACT

I. INTRODUCTION

Generally, Network Neutrality (NN) is the idea that Internet users should have the ability to access any and all content available on the Internet without suffering from interference by their Internet service provider (ISP). Why might an ISP want to interfere, you ask. The simple reason is that ISPs can profit from doing so. For example, an ISP like Verizon might contract with one search engine like Google to be the exclusive search engine for Verizon’s customers. Google would then pay Verizon for this service, and in exchange Verizon would block their customers from accessing other search engines, such as Yahoo!, Ask, and MSN, to name a few. This practice, known as “blocking,” is the most extreme example of a NN violation. But any similar practice that interferes with a user’s access to content is contrary to the principles of NN.

This article addresses the Internet Freedom Preservation Act of 2006 (Senate Bill 215) and the NN surrounding Senate Bill 215 and its legislative predecessors. To start, the NN debate is complex. First, in order to fully understand the details of Senate Bill 215 and its predecessors, one must have a basic knowledge about the technical aspects of the Internet. Second, the debate implicates broad social and economic policy. Academics, economists, and “techies” have all added their two cents on what would be the best policy, but the discussion is speculative at best. Much of the debate centers on what policies ISPs might adopt and the effect that regulation, or lack thereof, might have on these tentative policies. However, one cannot eschew an analysis of
these various policy suggestions, because we must determine whether Congress's reluctance to enact any legislation is wise. Many authors have made sound economic and social arguments both for and against regulation. This article will examine many of these arguments in an effort to understand where the NN debate currently stands and explain why NN legislation has been unsuccessful.

Section II of this article will discuss the origins of the NN debate and its evolution into a mainstream issue. Part A of Section II explains the technical aspects of the NN debate and then Part B introduces the NN movement and countermovement. Section II concludes in Part C with an explanation of how NN ended up on Capitol Hill and Congress's response.

Section III explores the contours of S. 216, the Internet Freedom Preservation Act of 2006. Part A of Section III discusses the bill's sponsors and the sponsor's statements in support of its introduction. Part B provides an overview of the language of the bill. It includes an explanation of what its sponsors hoped to achieve by its passage. Finally, Part C explains the current status of the bill, which has received little attention since its introduction.

Finally, Section IV discusses why the bill and its predecessors have failed to pass in Congress. Part A elucidates the philosophical differences between NN proponents and opponents. Part B explains which side has won out in Congress. Part C describes the impact that the 2007 Federal Trade Commission report has had on the debate. And Part D addresses whether Congress's apparent policy of inaction is appropriate, given the circumstances. Part E explores whether legislation is likely to pass in the immediate future. Lastly, Part F explains where the three presidential candidates for the 2008 election stand on the NN issue. The article concludes with a solution that both supporters and opponents of NN should be able to agree upon.

II. BACKGROUND

A. Technology

As stated above, in order to understand the origins of the debate
and the various arguments, one must have a solid understanding of how the Internet works. The goal of this section is to explain how information travels across the Internet and how an ISP can control what information its customers access.

1. The Internet: How It Works

The Internet consists of a system of computers connected by infrastructure, via links, to a set of routers.¹ Computers are on the “outside” of the network and send data to one another through the routers in the “middle.” The computers on the outside are controlled by the content providers and the content users (users). Users are people like you and me who surf the web, write emails, and search for information on search engines like Google. Needless to say, computers perform most of the work involved in the transmission of information.² The middle, which is essential to the transformation of information, consists of the routers and infrastructure that make up the network. The middle can be thought of as “pipes” through which information flows from one computer to another. These pipes are controlled predominantly by ISPs.³

When a user accesses a web page, data from the content provider’s computer must be sent to the user’s computer. In order for the data to reach the user, the content provider breaks the information down into “packets” of information. Each packet is then transmitted, via links,⁴ from router to router until it reaches the user’s computer.⁵

As the Internet grows and traffic becomes heavier, Internet

² The concept of placing the intelligence on the outside of the networks is what has come to be known as the “end-to-end” principle. Id. at 2. This is the idea that the routers are “dumb” in that all they do is transfer information on a first come first serve basis. See id. Routers do not provide any information to users.
³ The NN debate is largely between the ISPs and the content providers/users. Id.
⁴ “Links,” also known as “pipes,” are the infrastructure that connects routers to each other. See id. at 1.
⁵ Id.
speed becomes increasingly important. Two things control the speed at which a user can access information from the Internet, "bandwidth" and "latency." Bandwidth controls the amount of information that can flow through the pipes at any given time. Latency is best understood as the waiting period packets experience while waiting to be transmitted to the next router. When a router receives a packet from an upstream router, its software reads the recipient's IP address and sends the packet to the next downstream router. This assumes that the link to the downstream router is available; sometimes it is not. A router can send only a limited amount of information at a time. As such, when a packet arrives at a busy router, it is "queued" or "buffered" and stored on the router's memory while it waits for its turn to travel further downstream. The period of time a packet has to wait, commonly known as its queuing or buffered period, is what latency refers to. During times of high traffic, a router's memory often fills to its limit with information. If this happens, the router must then "drop" either the packets that are already waiting or the packets that have just newly arrived. In this

7. Id. It may help to think of packets as cars on an entrance ramp to a highway, where bandwidth is the size of the highway and latency is the stop light on that regulates cars entering the highway. The wider the lanes, the more traffic the highway can hold. If the highway can hold more packets, the light will stay green and all the packets can enter the flow of traffic. But if the highway is busy, the light must stay red and packets will be held up on the entrance ramp. See id. at 12-13.
8. Imagine a packet flowing from one computer to router 1, then to router 2, then to router 3, then finally to the user. When the packet is at router 3, both routers 1 and 2 are "upstream" routers because they transmitted the specific packet to router 3. When the packet is at router 1, routers 2 and 3 are "downstream" routers.
10. Routers sometimes cannot transmit all the data that is sent to it at one given time. Thus, these routers are equipped with a hard drive that stores the data packets while they wait to be transmitted. When a packet is waiting, it is said to be "queued" or "buffered."
11. FELTEN, supra note 1, at 2.
12. See Hurwitz, supra note 6, at 12.
13. FELTEN, supra note 1, at 2.
situation, users competing for the router’s limited resources and packets often face an unpredictable queuing period. Every Internet user has experienced latency and most know that it can be frustrating. In a sense, the NN debate is about latency and an ISP’s ability to control it.\(^4\)

Internet “speed” is measured in megabytes per second (mbps).\(^5\) The current small business or residence high speed Internet connections top out, on average, at somewhere between 1.5 and 4.5 mbps.\(^6\) The recent trend for major ISPs, however, has been to plan major upgrades of networks. Their goal is to increase high speed Internet connections to top out at between 6 and 18 mbps.\(^7\) This type of upgrade will require ISPs to invest billions of dollars into their networks.\(^8\) The question of how to pay for these upgrades is a major concern and one of the primary issues surrounding the NN debate.\(^9\) The question is, thus, whether we should allow ISPs to implement policies that violate NN in order to fund their upgrades.

2. The ISPs’ Ability to Control Data

The issue of “discrimination” is central to the NN debate.\(^{20}\) Levels of discrimination exist on a continuum. Every form of discrimination is based on how ISPs program their routers. This is because programming affects the order in which routers transmit packets. As such, a user’s ability to access information in a timely manner is based on the ISP’s programming of its routers. It should

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14. One major question in the NN debate is whether legislation would lead to faster Internet service or slow it down.
15. Hurwitz, \textit{supra} note 6, at 16.
16. \textit{Id}.
17. \textit{Id}.
20. Discrimination occurs when a router’s software assigns a packet a certain level of “priority” when it arrives at the router. FELTEN, \textit{supra} note 1, at 3. This priority can determine the order in which the packet will be sent downstream and the order in which packets will be dropped. \textit{Id}. It is called discrimination because some packets are treated better than others. \textit{Id}. Obviously, prioritizing a certain packet means degrading another.
be noted that even some of the staunchest NN advocates admit that some discrimination is sometimes necessary. Tim Wu, the father of the concept of NN, has admitted that an absolute ban on discrimination would be "ridiculous." The goal of NN advocates, rather, is to limit certain types of discrimination.

In its mildest form, packets are not assigned a priority level. Instead, they are queued on a "first-in-first-out" (FIFO) basis. FIFO was ubiquitous in older routers and is still dominant in modern routers. While the FIFO method is the least discriminatory method, it still results in some discrimination. For instance, when a router's buffer is running low on space—during times of high traffic—smaller packets are favored because buffer space can only hold the smaller packets.

While FIFO still dominates modern routers, new technology has allowed ISPs to control the transmission of packets. Now, the ISPs have the ability to assign different priority levels to different packets. ISPs see this new technology as a potential source of revenue: if the ISP can prioritize one packet over another, the ISP can provide a service to content providers who are willing to pay for faster service. NN supporters believe that packet prioritization is an unacceptable form of discrimination.

Besides the necessary discrimination involved in the FIFO method, "minimal discrimination" is a slightly more nuanced form of discrimination. This practice consists of discriminating only when a router's buffer memory is full. Packets are still prioritized and still sent on a FIFO basis, but when a packet is ignored or

21. Tim Wu & Christopher Yoo, Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate, 59 FED. COMM. L.J. 575, 577 (2007) (quoting Wu as saying, "Yet I don't think that the fact that an absolute ban on discrimination would be ridiculous undermines the case for discrimination laws"); see also FELTEN, supra note 1 (stating "minimal discrimination sometimes may be an engineering necessity due to the finite speed of network links").

22. Hurwitz, supra note 6, at 13 (explaining FIFO as a form of routing where each packet is transmitted on a first come – first serve basis).

23. Id.

24. Id.

25. See Rob Frieden, Network Neutrality or Bias? - Handicapping the Odds for a Tiered and Branded Internet, 29 HASTINGS COMM. & ENT. L.J. 171, 204-09 (2007).

26. See FELTEN, supra note 1, at 3.
dropped due to heavy traffic, packets with higher priority remain on the router’s buffer memory or replace the lower priority packets already in que.27 In this minimal discrimination practice, lower priority packets are only inconvenienced if the router is unable to serve everyone.28 Therefore, under normal network circumstances, prioritization would have no negative effect on any data packet.

“Non-minimal discrimination” is a more drastic form of discrimination, which can result in worse treatment for low-priority packets. Here, the ISP allocates a certain percentage of the network’s capacity for packets of a higher priority.29 Suppose, for example, that a router limits low-priority packets to 25% of the network’s capacity. In this situation, low-priority packets will not be able to access the remaining 75% of the network even if that portion is inactive.30 The result of such an allocation is that the router discards an increased number of low-priority packets. This ultimately results in slow or non-existent downloads for the user. This type of discrimination is never technologically necessary. Instead, it must be justified by a “more complicated economic argument.”31

Even if a portion of the network is not set aside for prioritized packets, ISPs can still discriminate by reordering packets. Here, ISPs program their routers to forward higher priority packets before lower priority packets.32 Importantly, this form of discrimination affects the speed of a degraded packet’s transmission even when a router’s buffer memory is not full.33 This presents the possibility that a packet will neither be

27. See id.
28. Id.
29. Id.
30. Id.
31. Id. An example of such an argument would be that the networks own the infrastructure and they have the right to charge end users for access to it. In imposing this type of discrimination, the ISPs would charge content providers extra for access to their “superhighway”. Also, by making the “slow” lane frustratingly slow, it would encourage all content providers to utilize the “fast lanes.” The big economic question remains: should ISPs be able to do this?
32. FELTEN, supra note 1, at 3.
33. As long as higher priority packets keep coming to the same router, they will be forwarded before the lower priority packets regardless of how long the low priority packet has been queued. Id. at 4.
transmitted nor dropped for an indefinite period of time, thereby increasing latency for the user.

In sum, ISPs have the ability to prioritize content or grant exclusive access to specific content providers. Prioritization of some content means degrading other content. Exclusive access to one content provider means blocking its competitors. The NN debate is largely about discrimination. The two questions are how much discrimination should be permitted and whether ISPs should be able to exploit this technology to produce revenue.34

3. New Technology and Quality of Service

Real-time applications such as voice over Internet protocol (VoIP), online gaming, and television over Internet protocol (IPTV) have created the need for faster and more consistent service. These real time applications are “time-sensitive” in that they can only tolerate a very limited end-to-end delay.35 Imagine two people attempting to use a VoIP application to converse with one another but they have to deal with a significant delay in the transmission of data packets. These two people might hear certain parts of the other person’s speech, but it would be jumbled and inconsistent. This would become very frustrating, to say the least, and it could make communication impossible. This hypothetical illustrates how packet-dropping or significant delay, can render real-time applications useless. Quality of Service (QoS) is the solution to this problem.

Quality of Service is the technical term that describes the quality of communication an Internet application receives from the ISP.36 QoS involves a number of practices to ensure that real-time applications receive the service required to function properly.37 These services include increased bandwidth, assigning packets a higher priority, and, for extremely important applications,38

34. For instance, in the “non-minimal” discrimination example, ISPs could charge content providers for access to their “high-speed” lane.
35. Hurwitz, supra note 6, at 16.
36. Zhu, supra note 9, at 619.
37. Litan & Singer, supra note 18, at 535-36; see also Zhu, supra note 9, at 619-21.
38. An example of such an application would be telesurgery. See Litan &
reserving a dedicated line. QoS is extremely important in the NN debate. Opponents of NN offer QoS as an example of necessary discrimination that renders NN regulation unwise. NN proponents, on the other hand, have a tendency to downplay the importance of QoS. Some NN advocates suggest that QoS is another form of unnecessary and unacceptable discrimination. These advocates argue that if ISPs simply build their networks to exceed the normal demand of traffic loads, the problem of real-time applications will be solved.

As Professor Edward Felton has stated, however, QoS is “more than just giving [an application] lots of bandwidth or prioritizing its traffic above other applications.” Rather, it is a guarantee that an application will perform consistently over a short period of time. Other commentators share Professor Felten’s sentiments. They argue that increasing bandwidth alone will not solve the problem in the long run because the “normal demand” is a moving target. One commentator argues that increasing network capacity will only induce new applications which will lead to more traffic. Hence, increasing bandwidth alone will not solve the problem for real-time applications, so QoS is therefore necessary. QoS and NN, however, are not mutually exclusive.

Singer, supra note 18, at 536. Telesurgery is where a doctor performs a surgical operation miles away from the patient by using a robotic mechanism. Computers and the Internet have made such a thing possible. The doctor uses a computer program, and the robot, at the location of the patient, responds to and performs his commands. The Internet transmits these commands. In this situation, the Internet connection must not be interrupted. Thus, it requires the security of a dedicated line.

39. See Felten, supra note 1, at 9.
40. Id. at 9-10.
41. Zhu, supra note 9, at 619.
42. Frieden, supra note 25, at 195.
43. Id. at 195-96.
44. Felten, supra note 1, at 9.
45. Id.
46. Zhu, supra note 9, at 621.
47. Id.
48. Id.
49. Id. at 641.
B. The NN Movement

The NN debate has been a mainstream issue since 2005. Before 2005, ISPs had little ability to distort the flow of traffic over their networks because the FCC had classified the Internet as a "telecommunications service." But in 2005, the FCC changed the classification to "information services" and the ISPs were no longer grounded by non-discrimination principles. NN advocates, however, were quick to act.

1. Emergence of the NN Debate

In 2002, Professors Tim Wu and Lawrence Lessig sent a letter to FCC explaining the practice of some ISPs involving the blocking of certain websites. This letter led to one of the most significant events in the NN debate: the FCC's adoption of the "4 Principles of Internet Freedom." In the letter, Professors Lessig and Wu expressed their concerns about ISPs "blocking," the process by which an ISP restricts its customers' access to certain websites or services. Lessig and Wu felt that the behavior was a "threat to the neutrality of the Internet." The professors then proposed a set of rules for broadband Internet providers. FCC Chairman, Michael Powell, agreed with Lessig and Wu. Powell then set forth the following four Internet Freedom principles: (1) freedom for consumers to access content of their choice; (2) freedom for consumers to run applications and use services of their choice; (3) freedom for consumers to connect their choice of devices to the network, as long as they do no harm to the network; and (4) the right to competition among network providers, application and

50. Hurwitz, supra note 6, at 16-17 ("Telecommunications services are subject to common carrier requirements: a set of rules requiring that providers offer service at equal prices, terms, and conditions to all new and existing customers.").
51. Zhu, supra note 9, at 627.
52. Id. at 631.
54. Id.

The FCC had the opportunity to enforce these principles in 2004 when a small, North Carolina based telecommunications company blocked its customers' access to Vonage's VoIP service, an emerging alternative to ordinary phone service. Madison River Communications (Madison River), the self-proclaimed "17th largest phone company in the U.S.," offered both phone and high speed Internet service.\footnote{56. Paul Kapustka, \textit{FCC Fines N. Car. Provider 15K for Blocking Vontage}, NETWORK COMPUTING (Mar. 3, 2005), http://www.networkcomputing.com/channels/networkinfrastructure/60405195.} Madison River blocked Vonage because it wanted to prevent its Internet customers from switching from Madison River's phone service to new VoIP phone services like those offered by Vonage.\footnote{57. William D. Rahm, \textit{Watching Over the Web: A Substantive Equality Regime for Broadband Applications}, 24 YALE J. ON REG. 1, 2 (2007).} The blocking, however, did not go unnoticed. In 2005, after an investigation by the FCC, Madison River agreed to pay a $15,000 fine and not block VoIP services for the next two years.\footnote{58. Zhu, supra note 9, at 625.} Although Vonage believed the fine could have been heavier, it endorsed the FCC's decision because the FCC had acted swiftly and delivered the message that such anti-competitive conduct would not be tolerated.\footnote{59. \textit{See id.}} Content providers were satisfied as well because they believed that the FCC's decision made discriminatory blocking a thing of the past. This belief was proved wrong in 2005.

\section*{2. The Brand-X Decision}

In 2005, the Supreme Court, and a subsequent FCC decision,\footnote{60. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14852 (2005).} changed broadband Internet's classification from a
"telecommunication service" to an "information service." The reclassification of high speed Internet was extremely significant because, as a "telecommunication service," broadband Internet was subject to mandatory regulation as a common carrier under Title II of the Federal Communications Act. But as an "information service" broadband Internet is now subject to the less stringent requirements of Title I.

NN advocates' fears worsened only days after the Supreme Court's decision in National Cable & Telecommunications Ass'n v. Brand X Internet Services, when Ed Whiteacre, then-CEO of AT&T, stated that AT&T might begin to charge content providers for access to its network. In an interview, Whiteacre stated, "what they would like to do is use my pipes for free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it." Whiteacre continued, "[for] anybody to expect to use these pipes for free is nuts!" Thus began the NN movement, with content providers leading the push for binding regulation and ISPs leading the fight against it.

3. Taking Sides

a. Supporters of NN Regulation

Supporters of NN legislation gathered more than one million signatures to petition the 109th Congress to enact protective regulations. They were fronted by celebrities such as Internet "Godfather" Vint Cerf, the Dixie Chicks, Alyssa Milano, and Moby. Supporters also included a host of both liberal and conservative groups, such as the ACLU, MoveOn.org, Gun Owners of America, and even the Christian Coalition. Other

62. Id. Title II contains binding anti-discrimination language that requires providers to offer services at equal prices, terms, and conditions to all new and existing customers. Hurwitz, supra note 6, at 16-17.
63. Kelley, supra note 55, at 3.
64. Hurwitz, supra note 6, at 17-18.
65. Id.
organizations in favor of NN legislation include the American Library Association, Free Press, and Democracy for America. The major content providers, such as Google and Yahoo, as well as public interest groups, such as Public Knowledge and SavetheInternet.com, are leading the charge. NN proponents express their collective voice through the political-action committee (PAC) “Save the Internet.”

b. The Opposition to NN Regulation

On the other side of the debate are the NN opponents. Groups opposed to NN regulation include large cable and telecommunication companies (telcos) such as AT&T, Verizon, and Comcast. Siding with the cable and telcos are organizations like the National Association of Manufacturers, the American Conservative Union, and the National Black Chamber of Commerce. NN opponents even have their own PAC, called “Hands Off the Internet.”

The existence of PACs is a sure sign there is a great deal of money at stake. According to one author, in an attempt to gain support for their respective causes, PACs have “been spreading propaganda faster that you can download a Britney Spears video from YouTube”. Consequently, the advocacy groups have generated a great deal of publicity for the debate, making it an issue that Congress is hard-pressed to ignore.

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68. Zhu, supra note 9, at 625.
70. A “Political-action committee” is “an organization formed by a special-interest group to raise money and contribute it to the campaigns of political candidates who the group believes will promote its interests.” BLACKS LAW DICTIONARY 1196 (8th ed. 2004).
72. Id.
73. Hurwitz, supra note 6, at 26-27.
74. Zhu, supra note 9, at 626.
c. Where They Disagree

Network Neutrality proposals exist on a continuum. At one end is the argument that ISPs should be free to implement any pricing scheme they may choose because they own the infrastructure. At the other end of the spectrum is the NN proponents’ argument that the government should create a “commodity network,” where broadband Internet service would be offered without the option of differentiation in service. But between these two arguments, there are a number of other NN proposals. This section will sort through a few of the NN proposals on each side of the debate to understand where the fundamental differences lie.

i. Regulation Opponents

Opponents of NN regulation simply want ISP self-regulation, which amounts to no regulation at all. The arguments against NN regulation are based on societal and economic concerns. ISPs argue that because they own the infrastructure they should be able to charge whatever they want for the use of their networks. They add that restricting their ability to manage their own networks may violate their constitutional property rights.

AT&T and other major ISPs complain that major content providers, such as Google and Yahoo!, use too much of the networks’ bandwidth capacity and that this results in slow Internet service for users. Consequently, ISPs believe they should be able to charge these content providers extra. One solution, proposed

75. T. Randolph Beard et al., Network Neutrality and Industry Structure, 29 Hastings Comm. & Ent. L.J. 149, 152 (2007); see also supra notes 20-34 and accompanying text.
76. Beard, supra note 75, at 153.
77. Rahm, supra note 57, at 4.
79. Rahm, supra note 57, at 5. The idea is that regulation can limit ISPs’ ability to raise revenue and that this is a form of taking under the 5th Amendment.
80. Zhu, supra note 9, at 625.
81. Id.
by AT&T, is to provide better QoS to content providers willing to pay more. ISP opponents argue that having the ability to implement various pricing models will lead to faster service and faster expansion because it will create the incentive to invest in their networks. Regulation opponents believe that the potential for ISPs to realize extra sources of revenue will encourage them to expand their networks, and that this will promote innovation, risk-taking, and diversity in services and features.

NN Opponents insist that NN advocates over-dramatize the potential harmful consequences of Congressional inaction. For example, many NN advocates—whether because they really believe it or simply because they are trying to win support for their cause—say that allowing pricing models and service discrimination will essentially destroy the Internet and ruin its societal and cultural benefits. NN opponents counter that there has been no regulation since the FCC’s broadband reclassification in 2005, and since that time, there have been no negative consequences on the Internet’s growth or on competition in general. NN opponents argue that ISPs have no interest in partaking in anti-competitive behavior and that it is, therefore, unlikely that such behavior will occur. The argument is that the Madison River phenomenon was an anomaly and that ISPs would only hurt themselves by blocking users’ access to content. Furthermore, NN opponents state that the type of behavior that NN advocates are concerned with is already prohibited by anti-trust

82. Id.
84. Frieden, supra note 25, at 198.
85. Id.
86. Id.
87. Hurwitz, supra note 6, at 19-20 (“[W]e do not find sufficient evidence in the record before us that such interference by facilities-based wireline broadband Internet access service providers or others is currently occurring.”) (quoting Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853 (2005)).
88. Zhu, supra note 9, at 630 (citing 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, 84-85 (2000)).
89. Rahm, supra note 57, at 4.
regulation. They further argue that regulation would be difficult to enforce (and an inefficient use of both time and resources). NN opponents use these arguments to suggest that NN regulation is unnecessary and unwise.

ii. Advocates of NN Regulation

NN supporters urge Congress to adopt legislation that would prohibit ISPs from blocking, degrading, or favoring specific traffic streams. Supporters believe that it has been the Internet’s nondiscriminatory nature that has allowed it to prosper and contribute to national productivity and economic opportunity. Logically, the converse of this belief is the argument that discrimination would result in a reversal of the economic growth that the Internet has fostered. This section introduces three major NN proposals.

The strictest NN proposals advocate that networks should be prohibited from all forms of unnecessary discrimination, including prioritization of packets. This idea was first introduced by scholars like David Isenberg and Lawrence Lessig, but it has lost most of its support and Lessig has since retreated from the idea.

The next group of proposals would allow certain forms of prioritization but would not allow access-tiering. Some NN advocates warn that if ISPs are allowed to offer varying QoS, they

90. See Zhu, supra note 9, at 631.
91. Hurwitz, supra note 6, at 20.
92. Zhu, supra note 9, at 631.
93. Frieden, supra note 25, at 197-98.
94. Id. at 198.
95. Beard, supra note 75, at 153.
97. Zhu, supra note 9, at 628-29.
98. “Access-tiering” is where the ISP offers faster service to content providers if they are willing to pay a certain fee. PC Magazine Encyclopedia, http://www.pcmag.com/encyclopedia/ (search “access tiering”).
could favor applications who pay over applications who do not.99 They add that this presents the possibility for ISPs to grant a particular content provider exclusive access to its customers, which would eliminate the customers’ ability to choose the applications they use. NN proponents warn that another possible consequence is the stifling of innovation. The potential problem, here, is that new applications will not be able to compete with the applications that have established exclusivity contracts with certain ISPs. An even larger concern for NN advocates is that ISPs will start to charge access fees that correspond to the value of the application delivered to their subscribers.100 Examples of such a practice might include charging VoIP more than a streaming video provider even if they use the same amount of bandwidth, or charging a fee for financial transactions (such as for Ebay, PayPal, or online stock trading).101 In this price scheme, ISPs can use their market power to capture returns from value they have not created.102 Some consider this a problem of “rewarding the wrong people.”103 One problem with this practice is that it makes creating new applications less rewarding. Therefore, there is less incentive for future innovation.104 Another problem with access-tiering, articulated by Professor Lessig, is that it would weaken competition for Internet services by erecting additional financial barriers to innovators who are unable to pay the service charge required by ISPs.105 These proposals encompass the idea that ISPs should not be able to favor certain content providers over others by offering them exclusive preferential treatment.

The final group of proposals are the most basic and also the least controversial. They represent the collective idea that ISPs should not be able to directly block access to any content or application. Even some NN opponents concede that this practice is unwise, but

99. Hurwitz, supra note 6, at 3. “Applications” here refer to content providers that offer a service. The service they offer is an “application.” For example, Google and Yahoo! offer competing applications, as do Vonage and Comcast voice.

100. Crawford, supra note 78, at 70.

101. Hurwitz, supra note 6, at 4.

102. Crawford, supra note 78, at 70.

103. Id. at 68.

104. See Frieden, supra note 25, at 198.

105. Id. at 199.
nonetheless believe that legislation prohibiting such action is unnecessary because ISPs have no incentive to do it in the first place.\textsuperscript{106}

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\textbf{C. Congressional (In)Action}
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Since Congress took up the issue in 2006, a number of NN bills have been introduced. While two of these bills have had minor success, the effort to enact NN legislation is most realistically viewed as a failure. There are a number of reasons why it has been so. One is that NN proponents have not been able to reach a consensus on what NN legislation should include.\textsuperscript{107} A second reason is that NN advocates have simply been outmanned by the cable and telecommunications lobby.\textsuperscript{108} This Section introduces the four NN bills that were introduced in Congress prior to Senate Bill 215 and discusses their collective failure in the hope that it will provide insight into whether Senate Bill 215, or any future NN bill, will be enacted in the future. Although the various NN proposals differ in their details, their common aim has been to prohibit ISPs from discriminating against any particular content, application, or device.\textsuperscript{109}

1. \textit{Senate Bill 2360—The Internet Non-Discrimination Act of 2006}

The Internet Non-Discrimination Act of 2006 was introduced in the Senate by Democratic Senator Ron Wyden of Oregon.\textsuperscript{110} Introduced on March 2, 2006, it was the first NN bill to be proposed in Congress.\textsuperscript{111} The bill would prohibit ISPs from both

\begin{itemize}
  \item \textsuperscript{106} Zhu, \textit{supra} note 9, at 631.
  \item \textsuperscript{107} \textit{See} Beard, \textit{supra} note 75, at 152-53 ("Some [NN] proposals focus almost exclusively on nondiscrimination, while others include prohibitions on certain forms of exclusive arrangements for broadband transmission services.").
  \item \textsuperscript{108} Kelley, \textit{supra} note 55, at 4 (suggesting that the telcos and cable companies have spent more money on lobbying than the NN proponents).
  \item \textsuperscript{111} \textit{Id}.
\end{itemize}
blocking and impairing consumers’ access to content, prevent ISPs from discriminating against content providers in QoS provisions, and force ISPs to offer the same amount of bandwidth to all consumers and content providers. The bill acquired no cosponsors and received minimal attention after its introduction. Senate Bill 2360’s lack of success was due largely to the fact that it was the very first bill of its kind, but also because it was rather ambitious in its regulatory effect.


The next NN bill was introduced in the House of Representatives on May 2, 2006 by Edward Markey, a Massachusetts Democrat. In contrast to Senate Bill 2360, the Network Neutrality Act of 2006 gained significant support, obtaining 23 cosponsors. More importantly, it was similar to Senate Bill 2360 in that it never became law. House Bill 5273 would have required that ISPs “not block, impair, degrade, discriminate against, or interfere with the ability of any person to utilize their broadband service.” The bill would have prevented ISPs from giving themselves preferential treatment for content and services, and would have prohibited ISPs from requiring different surcharges based on the content, application, or service provided. The bill would have prohibited ISPs from offering preferential treatment in the form of exclusive QoS contracts to competing applications. Lastly, House Bill 5273 would have prohibited ISPs from charging for enhanced QoS.

112. Id.
113. Litan & Singer, supra note 18, at 538-39.
114. Free Press, supra note 110.
116. Id.
117. Id.
118. Litan & Singer, supra note 18, at 537-38 (quoting H.R. 5273, 109th Cong. § 2(10) (2006)).
119. Id. at 538.
120. Id. (citing H.R. 5273 § 4(a)(7)).
121. Id.
Neutrality Act of 2006 was never even scheduled for debate. 122

3. House Bill 5417—The Internet Freedom and Nondiscrimination Act of 2006

On May 18, 2006, Republican Representative James Sensenbrenner introduced the Internet Freedom and Nondiscrimination Act of 2006 with five Democratic cosponsors. 123 This bill would have expanded the Clayton Antitrust Act to include discriminatory behavior with regard to Internet access. 124 This became the first NN bill to make it past mere introduction when it was scheduled for debate 125 Unfortunately, it made it no further than that. 126

House Bill 5417 would have made it a violation of the Clayton Act for an ISP to (1) provide inferior service than that which its own applications or affiliates received; (2) refuse to connect with other broadband service providers; (3) block, impair, discriminate, or interfere with anyone’s services, applications, or content; (4) prohibit attachment of non-harmful equipment to the network; and (5) fail to disclose information about the broadband service. 127 House Bill 5417 also required ISPs to prioritize all traffic of the same type free of charge. 128 This bill was unique in that it sought to enact anti-trust legislation, but, in effect, it would have had the same effect as most of the other proposed legislation. In fact, Senate Bill 215 would implement all of the rules mentioned here. The ideological opposition to House Bill 5417 was the same as the other bills, thus it faced the same defeat.

4. House Bill 5252—The Communications, Opportunity,
Of all the proposed NN bills, House Bill 5252 came the closest to being enacted into law. Named the “COPE Act” (Communications Opportunity, Promotion, and Enhancement Act of 2006), this comprehensive piece of telecommunications reform legislation was introduced on May 1, 2006 by Representative Joe Barton, a Republican out of Texas. This bill was unique among the other NN bills because it was a Republican-sponsored bill—of the 56 cosponsors, only 19 were Democrats—and also because it was the only bill that contained anti-regulatory language.

The most important part of the bill, for our purposes, is that it did not address the true risks of discriminatory service. Representative Markey proposed an amendment that would have prevented broadband providers from charging money for superior service and from providing more bandwidth to people willing to pay. The amendment failed 23-8 in the House Energy and Commerce Subcommittee on Telecommunications and the Internet. Markey and his supporters then submitted the amendment to the Energy and Commerce Full Committee markup, where it failed 34-22. Sans Markey’s amendment, the bill contained no specific NN language. It would have, however, allowed the FCC to enforce their 4 Principles of Internet Freedom and enabled the FCC to assess fines of up to $500,000 for a violation of those principles.

This bill easily passed both committees and then the House by a
vote of 321 to 101.\textsuperscript{136} Despite its success in the House, the bill’s Senate version never received full consideration.\textsuperscript{137} Not having been passed into law, the COPE Act died when the 109th Congress adjourned at the end of 2006. The fact that this bill contained no specific NN language, yet came the closest to passing, has led many to speculate that the NN opponents are winning out in Congress. However, we must keep in mind that this bill, like all the rest, was all for naught. Thus, the fight continues and the hope for a meaningful NN bill is not lost.

5. Senate Bill 2917—The Internet Freedom Preservation Act [I]

Although this bill was no more successful that any of the bills previously discussed, its lack of success is most significant. This is because it is the very same bill that would later be reincarnated as S. 215. The Internet Freedom Preservation Act [I], or Senate Bill 2917, was introduced on May 19, 2006 by Democratic Senators Olympia Snowe and Bryon Dorgan.\textsuperscript{138} In short, the bill aimed to prevent ISPs from discriminating against a content provider with respect to bandwidth or QoS.\textsuperscript{139} More specifically, ISPs would be allowed to prioritize certain packets but would be prohibited from charging for that service.\textsuperscript{140} Other important aspects of the bill are that it would prevent ISPs from “bundling” their services. Bundling is a practice where ISPs require their customers to purchase services in addition to high speed Internet, such as cable, telecommunications, or VoIP services.\textsuperscript{141}

The First Internet Freedom Preservation Act, Senate Bill 2917, and the second, Senate Bill 215, are identical. Therefore, from the outset, there was good reason for NN advocates to be concerned—Senate Bill 2917 did not even make it out of committee. The new Internet Freedom Preservation Act will have to overcome the same

\textsuperscript{136} Free Press, supra note 130.
\textsuperscript{137} Id.
\textsuperscript{139} Litan & Singer, supra note 18, at 539.
\textsuperscript{140} Id.
\textsuperscript{141} GovTrack.us, supra note 138.
opposition that defeated it last time. The same arguments that were used to defeat it in the 109th Congress will be proffered again. But while the bill’s opponents have the same inhibitions, the 110th Congress will contain fewer opponents than were present during the introduction of Senate Bill 2917.  

III. PROPOSED LEGISLATION: S. 215, THE INTERNET FREEDOM PRESERVATION ACT

A. Opening Statements

Bryon Dorgan, a Democratic Senator from North Dakota, gave the opening remarks for Senate Bill 215. In his speech Senator Dorgan reminded the Senate that binding nondiscrimination rules no longer apply to Internet providers. He warned that ISPs were planning to give better access to content providers that pay special fees. Nondiscrimination, stated Senator Dorgan, is what has “enabled the Internet to flourish, and consumers and innovation to thrive.” Dorgan said that one of the problems is that consumers have “at best . . . a choice of two providers” and that in such a noncompetitive market, discrimination is an issue to be concerned about. He continued:

[C]onsumers’ ability to use content, services and applications could now be subject to decisions made by their broadband providers. The broadband operator will become a gatekeeper, capable of deciding who can get through to a consumer, who can get special deals, faster speeds, better access to the consumer.

142. NN has grown in popularity in part because there are more democrats in Congress. But as it will later be shown, the opposition has continued to win out despite their declining numbers in Congress.
144. See id.
145. Id.
146. Id. at S287.
This fundamentally changes the way the Internet has operated and threaten [sic] to derail the democratic nature of the Internet. American consumers and businesses will be worse off for it.\textsuperscript{147}

Senator Dorgan was sure to include some reassuring remarks for the NN opponents. "It is clear," he said, "that an open and neutral Internet can co-exist and thrive along with competitive and profitable business models."\textsuperscript{148} Dorgan reported that Wall Street did not expect any impact on AT&T's bottom line as a result of their acceptance of a NN provision as a condition of its merger with BellSouth.\textsuperscript{149} The conditions AT&T agreed upon for its merger, however, are not permanent. Dorgan argued that legislation is necessary to make Internet freedom permanent, "ensuring that consumers can continue to receive the benefits of an open and vibrant Internet . . . from any broadband provider in the longer term."\textsuperscript{150} The Internet Freedom Preservation Act, according to Senator Dorgan will "ensure that the Internet remains a platform that spawns innovation and economic development for generations to come."\textsuperscript{151}

\textbf{B. Senate Bill 215}

The purpose of Senate Bill 215 is "[t]o amend the Communications Act of 1934\textsuperscript{152} to ensure net neutrality."\textsuperscript{153} The effect of the bill is to add a "Section 12" to Title I of the Communications Act of 1934.\textsuperscript{154} The new section would be titled "Internet Neutrality" and would implement NN requirements on ISPs.\textsuperscript{155}

The new Section 12 would have the following structure. Section
A would establish the policies that broadband ISPs would be required to implement. Section B lists activities that ISPs may still perform despite the restrictions listed in Section A. Section C states that the new Section 12 does not apply to any service regulated under title VI. Section D requires ISPs to offer stand-alone broadband service. Sections 'E' through 'G' deal with implementations, enforcement, and definitions, in that order.

Section A is what some might call the "meat and potatoes" of the new section twelve. Section A is titled "Duty of Broadband Service Providers" and imposes NN on all broadband ISPs.

156. *Id.* In other words, section D prohibits "bundling," the business model where ISPs require their customers to purchase other services, such as phone or television, in addition to Internet service.

157. Section A states that broadband ISPs shall do the following:
   (1) not block, interfere with, discriminate against, impair, or degrade the ability of any person to use a broadband service to access, use, send, post, receive, or offer any lawful content, application, or service made available via the Internet;
   (2) not prevent or obstruct a user from attaching or using any device to the network of such broadband service provider, only if such device does not physically damage or substantially degrade the use of such network by other subscribers;
   (3) provide and make available to each user information about such user's access to the Internet, and the speed, nature, and limitations of such user's broadband service;
   (4) enable any content, application, or service made available via the Internet to be offered, provided, or posted on a basis that--
      (A) is reasonable and nondiscriminatory, including with respect to quality of service, access, speed, and bandwidth;
      (B) is at least equivalent to the access, speed, quality of service, and bandwidth that such broadband service provider offers to affiliated content, applications, or services made available via the public Internet into the network of such broadband service provider; and
      (C) does not impose a charge on the basis of the type of content, applications, or services made available via the Internet into the network of such broadband service provider; and
   (5) only prioritize content, applications, or services accessed by a user that is made available via the Internet within the network of such broadband service provider based on the type of content, applications, or services and the level of service
Section 12(a)(1) prohibits ISPs from blocking and discriminating against any lawful content or service.\textsuperscript{158} Section 12(a)(4) provides that ISPs would be required to treat all content equally regardless of affiliation.\textsuperscript{159} Section 12(a)(4) also provides that ISPs may not impose a charge on the type of content. This means that ISPs would not be permitted to charge an additional fee to its customers for the use of a VoIP service or a video download, for example.\textsuperscript{160} It appears that Section 12(a)(5) would allow prioritization, but would require ISPs prioritize all packets of the same type without charging for the prioritization. Thus, if an ISP such as Comcast chooses to prioritize VoIP packets, it may do so, but it may not prioritize its own VoIP service without also prioritizing other VoIP packets such as those belonging to Vonage or Skype. ISPs would also be prohibited from entering into exclusivity contracts with any content provider that would involve blocking or the degradation of the content provider’s competitors.

Section B addresses the concern among NN opponents that regulation will hamper the broadband providers’ ability to provide necessary services and implement revenue-building business models. Section B lists services and pricing schemes that are acceptable under the new Section 12.\textsuperscript{161} Section B guarantees that

\begin{itemize}
  \item purchased by the user, without charge for such prioritization;
  \item and
  \item (6) not install or utilize network features, functions, or capabilities that impede or hinder compliance with this section.
\end{itemize}

\textit{Id.}

\textsuperscript{158} See \textit{id.}

\textsuperscript{159} See S. 215, at §2. “Affiliated” content is defined by section 12(g) as any content that is under common ownership or related by contract to provide service. \textit{Id.}

\textsuperscript{160} \textit{Id.} ISPs would be prohibited from charging users more for accessing their bank account than if they were merely using a search engine, or more for using a VoIP service than for any other type of content.

\textsuperscript{161} Section B states that nothing in Section A prohibits ISPs from the following:

\begin{itemize}
  \item (1) protecting the security of a user’s computer on the network of such broadband service provider, or managing such network in a manner that does not distinguish based on the source or ownership of content, application, or service;
  \item (2) offering directly to each user broadband service that does
\end{itemize}
ISPs will be able to offer their customers spam protection and parental controls, take all necessary security precautions, and address breaches of terms of service. Section B also permits ISPs to implement higher prices based on the customer’s level of use (defined by either the amount of bandwidth available or by the quantity of data that flows over a user’s connection).  

Finally the last portion of the bill, Section 3, establishes that the FCC shall submit reports to Senate and House committees regarding the implementation of the new Section 12.

C. Status

Even though the 109th Congress failed to enact a NN bill, the issue received a great deal of attention. In stark contrast, the 110th Congress has paid very little attention to the issue. Perhaps this phenomenon is due to the fact that other issues, such as the Iraq war and immigration, have dominated Congress’s agenda. It could also be that, in June of 2007, the Federal Trade Commission reported that broadband competition is on the rise and that there

not distinguish based on the source or ownership of content, application, or service, at different prices based on defined levels of bandwidth or the actual quantity of data flow over a user's connection;  
(3) offering consumer protection services (including parental controls for indecency or unwanted content, software for the prevention of unsolicited commercial electronic messages, or other similar capabilities), if each user is provided clear and accurate advance notice of the ability of such user to refuse or disable individually provided consumer protection capabilities;  
(4) handling breaches of the terms of service offered by such broadband service provider by a subscriber, provided that such terms of service are not inconsistent with the requirements of subsection (a); or  
(5) where otherwise required by law, to prevent any violation of Federal or State law.

Id.

162. Id.
163. See id. § 3.
has been no evidence of "any significant market failure or demonstrated consumer harm from conduct by broadband providers."\textsuperscript{165} But one should not forget that there are PACs involved, which means that there is a lot of money changing hands. Obviously, the cable and telcos have a strong desire to prevent the enactment of NN regulation. Some NN proponents suggest that it is the influence of the cable and telcos' dollars that has prevented the bill from passing more than anything else.\textsuperscript{166} But whatever the cause of Congress's inaction, the fact remains that since the bill's introduction in January of 2007, no further action has been taken.

\section*{IV. Analysis}

This Section will argue that it is unlikely that the Internet Freedom Preservation Act or any NN regulation will pass during the 110th Congress. This part will explain where the NN debate currently stands and provide this author's opinion on whether Congress has made the right decision by not enacting Senate Bill 215. This analysis speculates as to whether NN regulation will be enacted into law at any point in the future. Finally, this Section attempts to provide a middle ground proposal that would satisfy both the NN proponents and opponents.

\subsection*{A. Opposing Views on How to Achieve Similar Goals}

Both supporters and opponents of NN legislation agree on a few key issues: broadband policy must promote the deployment of network infrastructure\textsuperscript{167} and the development of applications.\textsuperscript{168}

\begin{itemize}
  \item \textsuperscript{165} \textit{FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY 11} (2007), \textit{available at} \url{http://www.ftc.gov/reports/broadband/070000report.pdf}.
  \item \textsuperscript{166} \textit{See} Posting of Marvin Ammori to SavetheInternet, \url{http://www.savetheInternet.com/blog/} (Feb. 6, 2008, 19:07 EST) (saying that ISPs such as Comcast "give millions in campaign contributions and support an army of connected lobbyists").
  \item \textsuperscript{167} The "deployment of infrastructure" means the Internet being made available to more people and faster service, which is achieved by inserting "pipes" in new places, and faster pipes in places where they already exist.
  \item \textsuperscript{168} \textit{See} Rahm, \textit{supra} note 57, at 52.
\end{itemize}
The disagreement on the NN debate is how to achieve these ends. ISPs oppose NN legislation because it will preclude potential pricing schemes that could result in higher revenues for the ISPs. ISPs argue that they need this income in order to expand their networks. NN supporters, on the other hand, want to preclude ISPs from partaking in anti-competitive blocking or prioritization because they fear such practices will retard application development by creating higher market-entry costs for upstarts. There are currently no laws preventing an ISP from charging a competing service provider for the use of their network or from blocking the application provider completely. NN proponents want to enact legislation to make it clear that such practices are illegal. The argument that has won out in Congress, however, is that where there is no proof that such conduct is occurring, legislation would be premature and unnecessary.

B. Prognosis: Failure

When Senate Bill 215 was introduced on January 9th, 2007, NN advocates were optimistic that the bill would pass with little delay. The conditions were good: Democrats were back in control of Congress, and the key telecommunications subcommittees were chaired by two strong NN advocates—Senator John Kerry and Representative Ed Markey, both Democrats from Massachusetts. Furthermore, Presidential hopefuls Hillary Clinton and Barack Obama were co-sponsors, providing Senate Bill 215 with plenty of star power. This optimism, however, was short lived. Well into the second year of the 110th Congress, they are no closer to enacting this legislation than they were on January 9, 2007, the day of the Bill’s introduction.
It appears that the argument that has won out in Congress is the expression, "if it ain’t broke, don’t fix it." As of late, ISPs have been on their best behavior in an effort to suppress any sense of urgency in passing network neutrality regulation. And, frankly, this has worked quite well. The opponents of regulation argue that regulation is unnecessary when there is little evidence that discrimination is occurring. Consequently, because of the lack of recent examples of discrimination, NN opponents are having a difficult time convincing swing-voters that enhanced regulation is a wise policy. The nail in the coffin, however, was the FTC report issued in June 2007 recommending that Congress refrain from enacting regulation.

C. The FTC’s Policy Recommendation and G.W. Bush’s Endorsement: Sealing the Deal for the 110th Congress

The Federal Trade Commission (FTC) is assigned with the responsibility of maintaining a competitive marketplace for both consumers and businesses. Therefore, it is not surprising that the FTC staff report was so influential in Senate Bill 215’s lack of success. The staff report, entitled “Broadband Connectivity Competition Policy,” identifies guiding principles that policymakers should consider in evaluating proposed regulations or legislation relating to broadband Internet access and network neutrality. In sum, the report recommends that in the absence of significant market failure or demonstrated consumer harm, policymakers should be particularly hesitant to enact new regulation in this area. The report, by saying that it is best if policymakers “proceed with caution” before enacting legislation, had the effect of condemning any regulatory measure on Capitol Hill.

The report makes a point of stating that the FTC is charged with the primary responsibility of maximizing consumer welfare. It states that it is impossible to tell whether data discrimination or

2008).
174. FED. TRADE COMM’N, supra note 165, at 11.
175. Id. at 10.
176. See id. at 4.
access tiering will be harmful or beneficial to consumers: "[s]uch prioritization may provide benefits, such as increased investment and innovation in networks and improved quality of certain content and applications that require higher-quality data transmission . . . ." The report also notes that broadband providers may pursue certain conduct and business arrangements, including prioritization and exclusivity arrangements, which can actually benefit consumers. As noted in the report:

The primary reason for caution is simply that we do not know what the net effects of potential conduct by broadband providers will be on all consumers, including, among other things, the prices that consumers may pay for Internet access, the quality of Internet access and other services that will be offered, and the choices of content and applications that may be available to consumers in the marketplace.

Another area where the FTC came out on the side of the NN opponents is on the competition debate. Supporters of NN regulations argue that competition is weak and that it is growing weaker. This, they argue, necessitates regulation because a lack of competition creates incentive for ISPs to engage in the anti-competitive behavior NN advocates are trying to prevent. Opponents of regulation, on the other hand, believe that competition is on the rise. The FTC staff conducted no independent research on this question but concluded that the

177. *Id.* at 7.
178. *Id.* at 10.
179. *See id at 7-8.*
181. The following logic applies: when there is no competition, ISPs would be more likely to engage in anticompetitive behavior such as blocking or discrimination because consumers have no choice but to stay with that provider. Even if the customer is unhappy with the service, they might not have any other option but to stay with that particular ISP because there is no other company to provide that customer with high speed Internet.
evidence was on the side of the NN opponents. The executive summary of the report stated the following:

We note that opponents of net neutrality regulation have pointed to evidence on a national scale that (1) access speeds are increasing, (2) prices (particularly speed-adjusted or quality-adjusted prices) are falling, and (3) new entrants, including wireless and other competitors, are poised to challenge the incumbent cable and telephone companies.

The report also states that broadband deployment has increased dramatically since 2000. Thus, without providing a definitive answer on the question of competition, the FTC seems to suggest that whether there is a lack of competition or not, there has been no significant harm to consumers.

Opponents of NN regulation saw the FTC Report as a victory for their cause. Verizon’s Executive V.P. for public affairs stated that the report “confirms that there is no problem to fix.” Qwest’s senior V.P. of federal relations similarly stated, “Qwest is pleased with the findings of the report released today by the Federal Trade Commission that government regulation of the Internet is unnecessary because there is no evidence of market failure or consumer harm.”

NN supporters took the opposite view of the FTC’s findings. Both the Open Internet Coalition and SavetheInternet.org criticized the FTC publicly. The research director of Free Press, of the SavetheInternet.com Coalition, stated, “[t]his is not the time for caution, but rather forward-looking and decisive action reinstating Net Neutrality once and for all.” The FTC did find that consumers strongly prefer the current open access model, but

183. Id. at 8.
184. Id.
185. Id.
186. See id. at 12.
188. Id.
189. Id.
190. Id.
this minor victory for NN supporters was greatly overshadowed by the FTC’s larger finding that regulation was unnecessary.  

One must wonder whether the FTC’s “findings” were in any way politically motivated, especially considering how the NN issue has been characterized as divided down partisan lines. It is certainly relevant that the FTC Chairperson at the time of the report, Deborah Platt Majoras, is Republican. Adding fuel to this fire, the Bush administration endorsed the FTC’s position in September of 2007. The endorsement came in the form of a public statement by the Department of Justice to the FCC. It was more of the same language: “[h]owever well-intentioned, regulatory restraints can inefficiently skew investment, delay innovation and diminish consumer welfare, and there is reason to believe that the kinds of broad marketplace restrictions proposed in the name of ‘neutrality’ would do just that, with respect to the Internet.” The statement by the Department of Justice, had a profound affect on the NN debate for two reasons: (1) it unified the Republican congressmen, sending them the clear message that NN legislation should not be enacted, and; (2) having realized this, it caused the Democrats to expend their resources elsewhere. One observer had an interesting way of explaining the NN phenomenon on Capitol Hill, “[NN] went from being the political equivalent of a first-run Broadway show, with accompanying street protests and high profile votes in Congress, to a third-rate performance with no budget and slumping attendance.”

D. Is Anticompetitive Behavior a Thing of the Past?

The FTC’s conclusion that legislation is unnecessary hinges on the fact that there is very little evidence that current ISP policies

191. See FED. TRADE COMM’N, supra note 165, at 11.
193. See id.
have a negative affect on consumers. NN proponents can point to relatively few instances of discrimination or blocking to support their conclusion that legislation is immediately necessary. Furthermore, the few instances of blocking or discrimination have either been too minor to cause a significant outcry or have been dealt with swiftly by the FCC. The greatest single example of outright anticompetitive behavior is the *Madison River* case. As discussed above, the FCC quickly responded by fining the ISP involved, and the ISP promised not to block content again in the future. The lack of anticompetitive behavior has caused popular support for NN legislation to dwindle.

Certain forms of discrimination, however, still exist. A current example of discriminatory behavior is that of Comcast, the U.S.'s second largest provider of high-speed Internet, which has recently amended their Acceptable Use Policy to specify that they reserve the right to break off file-sharing connections in an effort to ease traffic on congested cables. Many consumer groups and NN proponents do not approve of this practice, saying that it does not treat all traffic equally. NN opponents counter that Comcast has the right to manage their network in an effort to improve the Internet experience for everyone.

ISPs have been behaving themselves recently. There are a few possible explanations for this phenomenon. Some NN proponents posit that ISPs are purposely keeping their heads low and waiting for the NN issue to blow over. Their concern is that once the issue blows over, ISPs will implement discriminatory policies. NN proponents argue that we should not wait until further discrimination or blocking occurs. Instead, we should act preemptively, by passing legislation, to prevent it from occurring. Another possibility, however, is that ISPs have listened to their customers. The FTC reported that consumers have “revealed a

196. *See supra* notes 56-58 and accompanying text.
198. *Id.*
199. *Id.* “[Opponents] also say the company was hampering movie downloading services because they might compete with Comcast's cable TV business.” *Id.*
200. *See id.*
strong preference for the current open access to Internet content and applications." If this is the explanation for the ISPs' behavior, NN proponents have achieved their goal. While legislation would provide a security blanket for NN advocates, their real goal is to maintain the open access of the Internet. Legislation is one way to achieve the desired end, but so long as the end is reached, NN supporters should be content.

Indeed, the incentive for ISPs to discriminate—to make money—is still there. But perhaps the public outcry has forced ISPs to consider alternative ways to earn the extra money they insist that they need. Currently, it appears as though the open access characteristic of the Internet has been salvaged. If ISPs change their policies in the future, to the detriment of consumers and smaller content providers, Congress will likely reconsider enacting legislation.

E. Consulting the Crystal Ball: What Will Happen in the Future?

Whether legislation will pass in the future is largely up to the ISPs. At this point, it is likely that, as long as ISPs maintain their current practice of regulating traffic only when pipes are congested, Congress will not pass NN legislation. This is because popular demand for legislation has passed and the fears of NN advocates have subsided. However, if at any point in the future ISPs try to prioritize affiliated content or block Internet applications that compete with their services, the public will demand Congressional action once again.

ISPs are still trying to come up with alternate methods of raising revenue. ISPs are keeping a close eye on Time Warner, an ISP in the process of conducting a trial business model that bills users based on their usage, as opposed to the standard flat fee. The

201. FED. TRADE COMM'N, supra note 165, at 11.
202. Yinka Adegoke, Time Warner to Test Internet Billing Based on Usage, REUTERS, Jan. 16, 2008, available at http://www.reuters.com/article/marketsNews/idUKN1639580720080117?rpc=44&pageNumber=1&virtualBrandChannel=0. One such source of income is a pricing scheme that involves charging customers for the amount of data that flows over their connection. The more customers use, the higher their bill will be at the end of the month. Time Warner is testing the consumption-based billing scheme on subscribers in Beaumont, Texas. Id.
trial is part of Time Warner’s strategy to reduce congestion of its network by a minority of customers. Time Warner estimates that a mere five percent of their customers account for more than half of the network’s bandwidth. Those few users who take up the bulk of the network’s bandwidth must either reduce their Internet use or be willing to pay the extra charges.

Certainly, Time Warner’s heavy users will not like this new pricing scheme, but the people who use the Internet less frequently will be happy to see their monthly Internet bill drop. One concern the author has with such a billing method is that it will create an incentive for users to refrain from using the Internet. Every time a person wants to search for information on a political candidate they will have to decide whether it is a wise economic decision. This will create a problem particularly for low-income Internet users. In this sense, the pricing scheme goes against at least one major policy goal of making the Internet available to as many people as possible as a tool for accessing information. On the other hand, those users who are not using significantly more than the average user will have either lower monthly bills or no significant increase. Therefore, it is unlikely that many people will seriously ask themselves “can I afford to use the Internet” every time they want to do so. Thus, while the consumption-based payment plan has some drawbacks, it achieves the difficult goal of raising revenue for ISPs without blocking data or charging content providers extra for priority service. Whether this payment plan is the future of ISP business models is yet to be seen. However, this does prove that with a little creativity, ISPs can create ways to increase revenue that do not run counter to the principles of NN.

203. Id.
204. Id.
205. Downloading web pages and sending and receiving email involves little data flow. In such a pricing scheme, looking up information on a political candidate would likely have a negligible effect on a customer’s monthly bill.
206. That is, unless they want to download a large file such as a song or video. Such tasks require a great deal of data transfer, and, with enough downloads, a user’s bill could potentially skyrocket.
F. What Should We Do?

To review, NN advocates want legislation that will require ISPs to treat all content providers equally. This type of legislation will prohibit ISPs from using their ability to prioritize or block data packets as a way to generate revenue. The argument that has won out in Congress, and the leading argument in the fight against NN legislation, is that current ISP policies do not harm either content providers or consumers; therefore, legislation is unnecessary.\(^\text{207}\) In sum, NN advocates want to enact legislation to prevent ISPs from behaving in a way that they are currently not behaving. There are two potential solutions to the Congressional dilemma surrounding the NN issue, one passive and one proactive.

1. The Passive Solution

One possibility is that NN advocates accept that legislation is not absolutely necessary to preserve NN principles. For the time being, ISPs will continue their current policies and NN proponents will continue to keep a close watch on ISPs to make sure they do not cross the NN line. Perhaps in the future, if ISPs change their policies in a way that interferes with a content provider’s ability to compete or interferes with a user’s ability to access information, the issue should be raised again and hopefully legislation will be passed. Here, Congress waits for ISPs to do what they have done before (and expressed a desire to do in the future).

2. The Proactive Solution

Instead of waiting for ISPs to enact harmful policies, NN advocates could keep pressing Congress to enact preventative legislation. We have already seen that ISPs are willing to discriminate against content in certain situations. This solution involves passing legislation now to prevent harmful ISP policies in the future.

It would be wise to enact legislation now because the debate is still fresh and people are aware of the issues involved. Congress

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\(^{207}\) See supra note 165 and accompanying text.
already knows that the ISP behavior is wrong, so there is no need to wait for them to cause harm. The ideal legislation would lay out the rules and provide the FCC with jurisdiction to fine any ISP that violates those rules. The rules would be based on Michael Powell’s four principles of Internet freedom and would protect both consumers and content providers from the threat of ISPs’ discriminatory policies. Legislation, obviously, has proved difficult to enact. Thus, perhaps the fastest way to passing legislation will involve the voting booths in November of 2008.

G. FYI: Where The Candidates Stand

Democratic presidential hopefuls, Senators Clinton and Obama, are both cosponsors of the Internet Freedom Preservation Act. But there have been recent accusations from both camps that the competitor is growing soft on NN. Questioning Clinton’s dedication to the issue, one author has stated: “[t]hough she’s supported Net Neutrality legislation in the past, she has yet to mention it on the campaign trail, even within her Internet agenda released last month.” Despite’s NN being absent from Clinton’s Internet agenda, a Clinton campaign spokesman stated a month later, “Hillary . . . continues to be a strong supporter of NN.” The same Clinton spokesman also stated that Hillary would “make sure that the architecture of the Internet stays open.” NN proponents, however, want a solid commitment from Clinton.

208. See supra note 55 and accompanying text.
209. In reality, it is unlikely that this issue will play a significant role in the November 2008 elections.
213. Mark, supra note 211 (quoting Clinton campaign spokesperson Jin Chon).
214. Id.
grassroots NN organization MoveOn.org stated that Clinton’s failure to include NN in her Internet agenda was “proof that she was backing away from her stance on this issue.”\textsuperscript{215} Professor Lawrence Lessig, an Obama supporter, has opined that this might be a result of Clinton’s “acknowledged funding from telecoms.”\textsuperscript{216}

A Clinton spokesman, however, has said, “[i]f Sen. Obama is so concerned about the influence of contributions from the telecommunications industry, perhaps he should return the more than $84,000 he has received during this campaign.”\textsuperscript{217} In November 2007, however, Obama said in front of a crowd at the Google headquarters in California, “I will take a back seat to no one in my commitment to network neutrality.”\textsuperscript{218} Obama has also promised that he would appoint only pro-NN FCC officials.\textsuperscript{219}

While the potential democratic nominees accuse each other of being soft on network neutrality, John McCain makes his stance very clear: he opposes network neutrality legislation.\textsuperscript{220} McCain has stated that “[u]nless there is a clear-cut, unequivocal restraint of competition, the government should stay out of it.”\textsuperscript{221} McCain’s position, therefore, is very similar to the Bush administration’s. Until there is an identifiable victim in the NN issue, McCain believes that legislation is a solution looking for a problem.

V. CONCLUSION

Network neutrality has been a hot topic on Capitol Hill since 2006. Between 2006 and the present day, Congress has introduced six different NN bills.\textsuperscript{222} None of these bills, however, have been passed into law. NN is a complicated issue that involves many policy considerations. For example, in weighing the pros and cons

\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Mark, supra note 211.
\textsuperscript{221} Id.
of legislation, one must consider (1) what is best for consumers, both economically and regarding Internet accessibility; (2) what is best for ISPs, including competition, property rights, and ability to create revenue; and (3) what is best, overall, for the people and businesses with stakes in the Internet. These questions have been debated hotly by academics, economists, and by politicians in the halls of Congress. The speculative nature of the question has complicated the debate and the argument that has won out is that the potential harms of regulation outweigh its benefits. This argument has been particularly convincing considering the fact that the concerns of NN proponents have largely subsided since ISPs have refrained from partaking in blocking or degrading content in any significant way.

It appears as though the NN issue, at least on Capitol Hill, died with the end of the 109th Congress. It is important to note that as of late, the list of opponents seems to be increasing faster than the NN proponents. The June 2007 FTC report was the nail in the coffin. Perhaps the new President and Congress will have a renewed desire to pass NN legislation, but until that time, the popular opinion is that NN regulation is unnecessary. For now, it appears as though S.215 will not pass, nor will any conceivable NN bill in the immediate future. On one hand, NN proponents could view this as a defeat: they sought legislation to protect open access to the Internet and they failed to get it. On the other hand, NN proponents could view this as a victory. Yes, NN advocates sought legislation, but what they really sought to do was protect the Internet from harmful ISP practices. Those practices that NN opponents sought to prevent, however, are no longer occurring. In that sense, NN proponents can rightly say: mission accomplished.

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