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Net neutrality and rock 'n' roll revolution

By Pantelis Michalopoulos

Net neutrality is to the millennial online community what rock n' roll was to the young in the 1960s. Like rock n' roll, it has changed the world in the space of a few years, and can change it more radically still. But to that end, the net neutrality proponents must do two things: realize there are other parts to a good song than the catchy refrain, and keep it simple.

What is net neutrality? The answer isn't complicated: It is the principle that Internet service providers (ISPs) should not discriminate against some content or in favor of some other content, including their own. They should neither block nor throttle traffic, nor ask for money to give an application adequate bandwidth (i.e., "pay-to-play"). It means that if you want to watch a show on Amazon Instant Video or Netflix, you should be able to do so without having to watch a buffering circle for minutes on your screen, because your ISP, who is also your cable company, would prefer you to buy its own shows.

While the description of net neutrality fits on one page, it would take many pages to do justice to its history. Twice the Federal Communications Commission has tried to establish the principle. Twice it has been rebuffed (or semi-rebuffed) by the U.S. Court of Appeals for the D.C. Circuit. The first time, in 2010's *Comcast v. FCC*, the court found the FCC lacked the authority. The second time, four years later in *Verizon v. FCC*, the court agreed with the FCC that the agency does have authority, but sent the rules back never-

theless on different grounds: that they look too much like the rules imposed on common carriers, such as telephone companies, and the FCC has found that ISPs are not common carriers. The agency's third shot at establishing net neutrality rules, which millions of people hope will be the charm, is expected this February.

We can confidently say "millions," because millions have written to the FCC about ISP regulation, the vast majority in support of net neutrality rules. What have most said? Use "Title II." Title II is shorthand for the part of the Communications Act of 1934 dealing with common carriers. The idea is that because the court has faulted the previous net neutrality rules for looking too much like Title II, classifying broadband access service as such would solve that problem. After reclassification, the rules could look like Title II all that the FCC liked, and the court's criticism could go away.

So Title II became the slogan and the battle-cry. In fact, if you listened carefully, you could almost hear something else, too: "(I Can't Get No) Title II." Like the Stones in '64, the Title II team tinged its request for satisfaction with some frustration and resentment at the elder Washington sages. They had bungled the cause of net neutrality for years. They did not get the importance of net neutrality, and the millennial online generation did not get the satisfaction, for which Title II became a powerful symbol.

So what happened? The Title II camp seems to be winning so far, and doing so in a spectacular fashion. In fact, its chorus has been joined by no less Stentorian a voice than that

of President Barack Obama. It would be a difficult and rather trivial pursuit to confirm this, but it is hard to imagine that any other presidential address in the history of the republic has ever used a citation from the U.S. Code as short-hand for a presidential request. Protect net neutrality, Obama asked the FCC, and use Title II to do so.

The FCC is set to act in February. It is an independent agency, and there is no telling what it will do. But in a telling sign, the Republican leadership of the Senate and the House has just unveiled its own net neutrality initiative. To ward off Title II classification, which the Republicans view as over-regulation, the draft bill would protect net neutrality by prohibiting pay-to-play. This is telling because, a year ago, even a few months ago, a prohibition on pay-to-play would have been anathema to conservative thinkers on the subject. But that was before the millions of voices were heard. The ground has shifted. The millions spoke and they have already changed the world.

But there are still many dangers for net neutrality. Two of them are: a view that the slogan is enough; and a view that complexity is necessary. Both views are misplaced. While Title II is a good refrain, there is a risk the resulting rules will not be satisfactory enough for the net neutrality proponents if they are confined to the four corners of Title II.

Title II may be necessary, but it is not enough. When the D.C. Circuit ruled that the net neutrality rules looked too much like common carrier rules, it did not focus on one important difference between the two. Common carrier rules normally say

to carriers: be reasonable, and do not discriminate between customers. You generally may not charge one customer \$10 and another customer \$12 for identical service without reason. But what they do not say is this: You must charge everyone zero. Yet this is what net neutrality requires: a prohibition on any pay-to-play arrangement.

This means that the Title II package must also include the broadband provision of the Communications Act, the so-called Section 706. This was the provision that, after a multi-year fight, was found by the D.C. Circuit to give the FCC authority for net neutrality rules. The FCC needs to marshal that provision as well for net neutrality to sing.

The second risk is complexity. To repeat, net neutrality is simple. Anyone who talks about "Byzantine," "arcane," or "labyrinthine" net neutrality questions is likely not a net neutrality fan. Labyrinths are more apt to mean loopholes and attempts to evade the rules. Keep it as simple as possible. Please remember: As explained by Bob Stanley in his excellent recent book, "Yeah! Yeah! Yeah! The Story of Pop Music from Bill Haley to Beyoncé," complexity made the rock n' roll of the 1960s degenerate into the progressive rock of the 1970s, aesthetically nuanced but not danceable by anyone, least of all by with-it millennials. Let us spare net neutrality that fate.

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