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Don't tread on the Internet

By Bennett Ross and Brett Shumate

Just like the wall that defends the northern border of the Seven Kingdoms in "Game of Thrones," the line between information services (such as computer processing) and telecommunications services has stood for decades as an impregnable fortress designed to protect the computing industry and the Internet from wildlings innocuously dressed as regulators. At the urging of President Barack Obama, however, the Federal Communications Commission may be poised to breach that wall by subjecting broadband services to the same regulations that apply to traditional telephone services under Title II of the Communications Act of 1934. The result would be the loss of the ability of the Internet ecosystem to operate and thrive free from government oversight.

Some have argued that Title II regulation is necessary in order for the FCC to adopt enforceable net neutrality rules. This is untrue. The court in *Verizon v. FCC* laid out a road map for the FCC to follow in adopting rules that would ensure an open Internet by relying upon its authority under Section 706 of the act. The FCC's proposed net neutrality rules largely follow that map. However, some net neutrality advocates want more — namely, intrusive government regulation of the Internet. That would be the inevitable result of applying Title II to broadband services, even though some proponents either naively or intentionally claim otherwise.

Title II and the Unregulated Internet

The FCC has long exercised regulatory authority over telecommunications services under Title II of the Communications Act. Title II allows the FCC to regulate prices, prohibit unreasonable discrimination, and impose a host of other regulatory obligations on telecommunications carriers. The regulatory model for Title II was the Interstate Commerce Act of 1887, which governed the regulation of the railroads.

In its *Computer Inquiry* proceedings, which began in the 1960s, the FCC grappled with the appropriate framework to encourage the growth of new data processing services that interacted with the telephone network. The FCC established a category of so-called enhanced services, such as voice mail, which it distinguished from basic transmission provided by telecommunications carriers. Providers of enhanced services were treated as end users and not regulated under Title II, even though their offerings included network capacity purchased from carriers. By contrast, carriers like AT&T and its successor local telephone companies were required to offer basic transmission pursuant to tariff under Title II and were restricted in their ability to offer enhanced services.

This dichotomy between unregulated enhanced services and regulated telecommunications services was largely preserved in the Telecommunications Act of 1996, although Congress used the term "information services" rather than enhanced services in describing the category of services not subject to FCC regulation. In embracing this dichotomy, Congress found that the "Internet and other interactive computer services have flourished … with a minimum of government regulation" and sought to "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."

In the wake of the 1996 act, a bipartisan Congress supported keeping Internet access services free of Title II regulation. Democrat Sens. Ron Wyden and John Kerry wrote to the FCC that "nothing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services." They specifically urged the FCC to resist calls "to reclassify certain information service providers, specifically Internet Service Providers (ISPs), as telecommunications carriers." Sen. John McCain agreed that "[n]othing in the 1996 Act or the legislative history supports the view that Congress intended to subject information services providers to the current regulatory scheme applicable to common carriers which is, if anything, too intrusive and burdensome."

For more than a decade, the FCC adhered to Congress' intent, consistently treating broadband Internet access services as information services exempt from Title II regulation. The entire Internet ecosystem benefited from a virtuous cycle of investment, innovation and consumer demand — all of which occurred without the overhang of government regulation.

Impact of Title II on the Internet Ecosystem

In the context of the net neutrality debate, the FCC has been asked to abandon its historic treatment of broadband services and instead regulate such services under Title II — a position recently endorsed by Obama. There are a host of legal problems with this approach, as have been explained elsewhere. "The next steps for net neutrality," *Daily Journal* (July 24, 2014).

In addition to being unlawful, Title II regulation of broadband services would be bad policy. First, it would subject broadband services to rules developed for a monopoly-era telephone system, which would interfere with broadband investment and harm economic growth. Second, treating broadband services as Title II telecommunications services would empower the 50 states to regulate broadband, which would lead to the balkanization of the Internet. Third, Title II regulation would expose broadband services to a host of state and local taxes as well as universal service fees that would increase their cost, which would undermine efforts to promote broadband adoption. Fourth, any decision by the FCC to subject broadband to Title II regulation would have serious unintended international consequences, emboldening foreign countries to apply their legacy regulatory frameworks to the Internet and otherwise regulate the Internet in far more restrictive ways.

Extending Title II regulation to broadband also would eliminate the long-standing information services/telecommunications services dichotomy. This regulatory approach has been instrumental to facilitating the growth of data processing services and the commercial Internet. With the elimination of this demarcation line, regulatory uncertainty would certainly ensue, as distinguishing Internet services that are free from regulation from those subject to regulation would become increasingly more difficult. As any entrepreneur can attest, regulatory uncertainty does nothing to promote innovation or investment.

Net neutrality advocates have argued that Title II would subject broadband network operators to regulation while insulating application and content providers from government oversight. However, this argument ignores that many Internet providers maintain broadband infrastructure and thus themselves are broadband network operators. Every "information service" by definition includes a "telecommunications" component; thus it would fall to regulators to decide the degree of "telecommunications" sufficient to subject any particular Internet service to Title II regulation.

That government regulation of the Internet would be the inevitable result of Title II regulation was candidly conceded by Columbia Law School professor Tim Wu, who some claim first coined the term "net neutrality." Appearing recently on C-SPAN's "The Communicators," Wu predicted that Title II would provide an "easy route" for the government to regulate broadband prices as well as to require broadband operators to open their networks to competitors.

But with Title II, the same authority to regulate broadband is just as easily extended to Internet applications as well. Thus, if the Internet falls within the purview of Title II, an overzealous FCC could seek to regulate the prices of or competitive access to any Internet application that it may decide to classify as a telecommunications service.

If broadband providers are subject to onerous Title II regulation while the rest of the Internet is unregulated, broadband providers may have no choice but to seek broader Internet regulation to level the competitive playing field. The pitting of Internet participants against one another would threaten the virtuous cycle that has been the hallmark of the Internet ecosystem, which ultimately would harm consumers.

Title II may have served a purpose in regulating the traditional telephone network in a bygone monopoly era. But Title II and its resulting government regulation have no place in today's Internet world.

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