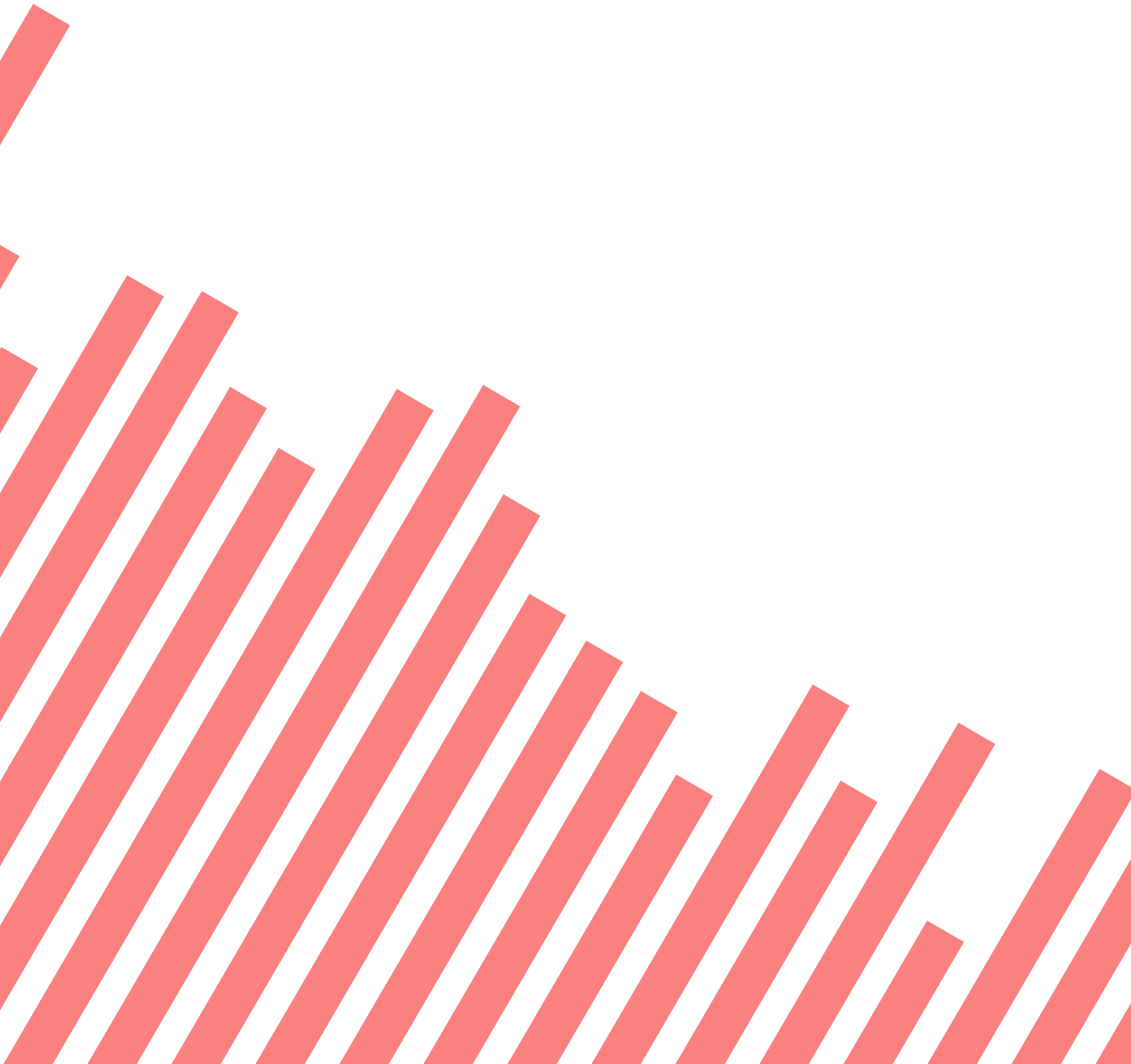
Research Library Issues

RLI 293

2018

ASSOCIATION OF RESEARCH LIBRARIES



In This Issue

Why Net Neutrality Matters and What Research Libraries Can Do about It

Mary Lee Kennedy, Executive Director, Association of Research Libraries

A portion of the United States Federal Communications Commission's reversal of its 2015 Open Internet Order—also known as net neutrality rules—is set to go into effect on April 23, 2018, with the remainder of the repeal to go into effect later this year after final approval by the Office of Management and Budget. The fundamental intent of the open internet is to encourage the free and open exchange of ideas—the very basis of a democratic society. Although the reversal appears imminent, there are efforts to stay or blunt it at the federal and state levels. The Association of Research Libraries (ARL) is part of these efforts, actively advocating for and acting in the interest of an open internet.

Although the exact nature of the impact is not known, there is little doubt that the reversal of the net neutrality rules could reduce access to information used in research and education. The reversal opens up the possibility of internet service providers blocking, delaying, and prioritizing specific content, as well as tracking, recording, and reselling usage data. If the reversal does occur, it is clear that the pursuit of net neutrality is far from over.

This timely edition of *Research Library Issues* includes two companion pieces focused on why the reversal matters to research libraries, providing current facts and expert opinion from Clifford Lynch, the Coalition for Networked Information's executive director, and Krista Cox, ARL's director of public policy initiatives. Both articles detail the implications for research libraries if the reversal goes into effect and set out options for library leaders and their respective institutions to pursue in securing an open internet in the interests of all who seek to do research and learn.

Clifford Lynch calls attention to the potential practical implications for

research libraries and their institutions, presenting possible strategies to work around them. He outlines three scenarios: organization-to-organization access, home access, and access to small content providers. Although organization-to-organization traffic will likely be less impacted by the reversal, research and education institutions often need to reach users at home, where they are connected via "last-mile" internet service. Lynch states up front that the implications are "speculative," but he says that the reversal is "not encouraging" in light of past behaviors by these last-mile consumer-oriented internet service providers.

Krista Cox's article begins with the reversal of the 2015 Open Internet Order, outlining the legal and policy options for fighting the reversal, and grounding those options in the implications for research libraries and those who use them. Cox explores existing and potential avenues forward in the federal, state, and municipal arenas, and highlights how Canada addresses net neutrality. Further reference to other countries' approaches can be found in her endnotes. Her work emphasizes the importance of collective action at all levels of government and through legal challenge though the courts.

For ARL, the open internet is critical to producing fundamental research and achieving dreams.

I hope you will find both articles informing and useful as you consider how your library and institution will navigate the issues. Working with and on behalf of our members, the Association of Research Libraries remains committed to net neutrality. For ARL, the open internet is critical to producing fundamental research and achieving dreams. Throttling access will cut off unrealized potential—this seems counterintuitive to the pursuit of knowledge, let alone inconsistent with a democratic society.

To cite this article: Mary Lee Kennedy. "Why Net Neutrality Matters and What Research Libraries Can Do about It." *Research Library Issues*, no. 293 (2018): 3–5. https://doi.org/10.29242/rli.293.1.

Editor's note: This piece was revised slightly on April 23, 2018, to update information regarding the date the net neutrality rules will be repealed. A portion of the Federal Communications Commission's (FCC) order reversing the rules will go into effect today, 60 days after publication in the *Federal Register*, but the bulk of the new order that impacts net neutrality will not go into effect until the Office of Management and Budget (OMB) has approved the FCC's actions.

Practical Consequences of the Elimination of Net Neutrality for the Research & Education Community: A Speculation

Clifford A. Lynch, Executive Director, Coalition for Networked Information

On December 14, 2017, in a monumentally craven vote, the Federal Communications Commission (FCC) eliminated the net neutrality rules that had been in place for many years; after publication in the *Federal Register*, a portion of this action will go into effect on April 23, 2018, with the remainder of the repeal set to go into effect later this year after final approval by the Office of Management and Budget (OMB). In the companion piece in this issue of *Research Library Issues*, Krista Cox discusses the broader public policy implications of this decision, including the prospects for reversing it through legislative action or litigation by state attorneys general, or of at least mitigating some effects through state-level legislation or regulation. This brief and admittedly speculative piece will simply take the reversal of net neutrality as a starting point, and attempt to predict the practical, operational consequences for research and education (R&E) institutions, and consider some possible strategies to work around these consequences.

> **[Some] of these behaviors may be hard to detect, and under other circumstances might be considered as criminal activities or cyber-warfare.**

Fundamentally, the FCC's decision to eliminate net neutrality allows any internet service provider (ISP) to block traffic that transits that ISP's network, to delay or de-prioritize that traffic in preference to other traffic, or to monitor, record, and resell that traffic to anyone it pleases. The ISP can also attempt to modify traffic (for example, to insert advertising). To be clear, it remains to be seen which of these appalling practices various ISPs will choose to adopt, though the track record of some parts of the industry over the last decade or so is not encouraging. Note

that some of these behaviors may be hard to detect, and under other circumstances might be considered as criminal activities or cyber-warfare.

So what does this mean in practice for the R&E community? I'll look at three situations: what it means on campus, what it means for R&E community members using networked resources at home, and what it means for smaller content providers that may be important to the R&E community.

The Impact on Campus

Universities, major corporations, government research labs, and other organizations negotiate for their commercial internet access wholesale in a very competitive market. In addition, they often use Internet2's backbone, perhaps through a regional optical network (RON) that is typically controlled by and accountable to the R&E community, to carry traffic to other members of the R&E community. It seems unlikely that any of these networks will indulge in the sort of bad practices that the elimination of net neutrality enables; such practices can be explicitly prohibited in contracts, and the highly competitive marketplace for the most part ensures that there won't be a problem. And certainly the R&E RONs and Internet2 are not going to engage in this sort of bad behavior. What this means is that the elimination of net neutrality is going to have very little effect indeed on **organization-to-organization** operations within the R&E community (and indeed well beyond—traffic to almost any large organization, including commercial and government sites should see little change). Note also that institutions with international campuses or other facilities are unlikely to see much impact from this decision, as it only covers US ISPs.

Reaching Members of the R&E Community at Home

R&E institutions frequently need to reach people at home who are connected through ISPs that service **consumers**—typically

cable companies like Comcast, or fiber-based or DSL services from telecommunications providers like AT&T or Verizon. Right now the data suggests that most consumers have just one medium-to-high-speed ISP that offers service to their home; sometimes there is actually a meaningful duopoly.[1] Within a five-year time horizon wireless 5G service will likely alter this picture somewhat, at least to the point where duopoly service rather that monopoly service will become much more commonplace, and a reasonable number of consumers will actually be able to choose from among a small oligopoly of vendors.

R&E institutions may need to interact with these individuals for lots of reasons: they may be students trying to access bandwidth-intensive video materials for remote coursework, students or faculty trying to work from home, interested members of the public trying to look at cultural materials from institutional libraries or museums, or streaming lectures or cultural events. Perhaps they are using telehealth applications involving a university medical center. While there's every reason to expect that non-real-time, non-bandwidth-intensive applications like electronic mail or most kinds of routine web browsing will continue to function more-or-less normally, bandwidth- or latency-sensitive applications may be more at risk (which might include video and some kinds of online instruction, or telehealth devices).

Further, the R&E community will need to educate users and promote additional practices such as the use of virtual private networks (VPNs) to ensure privacy when that is important. My guess is that performance and privacy will be the major areas of contention rather than outright blockage. Note that if consumers are able to establish a properly configured VPN connection, site blocking by the "last-mile" ISP ceases to be an issue; if the user at home can reach the university VPN server, he or she can route through there to anywhere on the internet without fear of last-mile ISP interference.

If the monopolistic or duopolistic consumer last-mile ISPs do choose to behave badly in terms of performance, the possible responses of the

R&E institutions that need to reach consumers connected by these ISPs are very limited. The ISPs that provide backbone access to the R&E institutions (including Internet2) could attempt to negotiate contracts with the consumer broadband providers to ensure faithful, private, and timely carriage. It's not clear whether the consumer broadband providers would be willing to do this, or what it would cost; further, while there are a fairly small number of major consumer broadband providers that cover the vast majority of homes in the US, there is also a long tail of smaller consumer last-mile providers that would need be to considered.

Additionally, there are all sorts of special arrangements currently in place between universities and ISPs serving the local consumer markets near major universities. Contractual arrangements involving Internet2 or a commercial tier 1 internet provider on a national scale may not be helpful here; the university will need to renegotiate terms with the local ISPs as part of their peering arrangements.

Another strategy would be to move bandwidth- or latency-sensitive materials to large-scale commercial services, which have the scale and the clout to negotiate with last-mile consumer services; for example video could be placed on YouTube or Vimeo, depending on what services were most effective in setting up good arrangements with the last-mile consumer ISPs. (There are issues about authentication, access control, and user privacy that need to be considered when using such video-hosting services, however.) Note also that very large vendors that provide bandwidth- or latency-sensitive materials to consumers (for example, large courseware providers) will likely negotiate with the last-mile ISPs to the consumer when necessary, or use strategies very similar to what have been outlined for R&E institutions.

Small Content Providers Important to the R&E Community

Consider a website operated by a small, independent, scholarly or arts organization, or perhaps a small public interest organization. Often

the content provided by such organizations is important to the R&E community. The small organization's web server might well be running on a machine at someone's residence. If these kinds of organizations are using relatively inexpensive consumer connections, they may find that they cannot stream video material off the server, or that the video material is throttled. This might also apply to file-transfer archives or other kinds of bandwidth- and latency-sensitive materials. Limited access to these sites is certainly not in the interests of the R&E community, and the small organizations that provide them have little recourse except to convert to much more expensive commercial-grade ISP contracts—if they can even obtain them. Here the issue is more abstract; it is very much in the interest of the R&E community for such sites to flourish, and the elimination of net neutrality may make this much harder. It may be that the R&E community will want to reach out to some of these sites, when necessary, and offer to host them directly on R&E networks, or to provide ways to quickly move their traffic onto R&E networks.

[It] will be vital to carefully monitor the behavior of the consumer-oriented last-mile ISPs under the new, largely unregulated, regime...

Summary

In the near term, there are a few obvious steps. It is the home user who is most at risk. For privacy, the R&E community needs to make VPN-based connections from home much more commonplace. And it will be vital to carefully monitor the behavior of the consumer-oriented last-mile ISPs under the new, largely unregulated, regime, and to be prepared to take action as necessary.

Endnote

[1] Note that the Trump-era Federal Communications Commission has indulged in a great deal of manipulation and fabrication of data to try to argue that there is actually a genuine competitive marketplace

in consumer broadband in most of the United States as part of its justification for reversing net neutrality. See Jeff Dunn, "America Has an Internet Problem—But a Radical Change Could Solve It," *Business Insider*, April 23, 2017, http://www.businessinsider.com/internet-isps-competition-net-neutrality-ajit-pai-fcc-2017-4; and Jon Brodkin, "FCC Report Finds Almost No Broadband Competition at 100Mbps Speeds," *Ars Technica*, February 12, 2018, https://arstechnica.com/information-technology/2018/02/fcc-report-finds-almost-no-broadband-competition-at-100mbps-speeds/.

To cite this article: Clifford A. Lynch. "Practical Consequences of the Elimination of Net Neutrality for the Research & Education Community: A Speculation." *Research Library Issues*, no. 293 (2018): 6–11. https://doi.org/10.29242/rli.293.2.

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Implications of the Reversal of Net Neutrality Rules and Next Steps to Protect the Open Internet

Krista L. Cox, Director of Public Policy Initiatives, Association of Research Libraries

Introduction

Net neutrality is an important concept based on the principle that internet service providers (ISPs) should permit access to all lawful content, without favoring some content over other content. An open internet is fundamental to the mission of research libraries in providing access to information, including ensuring that users can access vast data sets, preserving and sharing our cultural record, providing interconnected research and learning, and facilitating discovery. Net neutrality, at its core, is a nondiscrimination law that promotes freedom of speech and allows the free and open exchange of ideas. Without an open internet, the community that research libraries serve could be encumbered, particularly in accessing information, applications, or materials that depend on high-bandwidth capacity.

At its meeting on December 14, 2017, the Federal Communications Commission (FCC) voted to reverse the strong net neutrality protections that had been put into place by the 2015 Open Internet Order. While the 2015 order included protections against blocking, throttling, and paid prioritization, after the January 2017 change in Administration, the FCC revoked its regulations and replaced net neutrality protections with a mere transparency rule requiring broadband providers to disclose that they may manipulate data.

The companion piece to this article, written by Clifford Lynch, focuses on the practical impacts for research and education institutions in a world without net neutrality regulations. This piece provides the legal and policy background to the FCC's 2015 rules protecting net neutrality and the FCC's complete reversal of this policy decision just two years later. This article then discusses various paths forward in trying to

restore open internet principles and protections, including through the courts, federal legislation, and state and local action.

Although portions of the FCC's reversal of its 2015 Open Internet Order will go into effect on April 23, 2018, with the remainder of the repeal set to go into effect later this year after final approval by the Office of Management and Budget (OMB), stakeholders on all sides of the net neutrality debate are pursuing multiple paths to overturn or blunt the agency's actions. The United States Court of Appeals for the District of Columbia Circuit (DC Circuit), which previously upheld the FCC's 2015 Open Internet Order, will hear the court case currently captioned as *Mozilla et al. v. FCC*, with plaintiffs including internet companies, associations, and states' attorneys general. This case challenges the FCC's most recent order and could stay the new rules from going into effect until after a decision on the merits. Another avenue that some are pursuing is legislative action to regain partial net neutrality protections through a rewrite of the Communications Act. A number of state governments have acted swiftly, as well, from filing court cases challenging the order, to issuing executive orders requiring ISPs who want state contracts to abide by net neutrality principles, to issuing their own bans against blocking, throttling, and paid prioritization (see "State Action" below for more on this). Activities are also happening at the local level, with calls for greater investment in public, municipal broadband which would not have the same incentives to prioritize some content over others.

The Association of Research Libraries (ARL) continues to deeply engage in the net neutrality discussions at the federal level, including through the filing of amicus briefs in the courts and participation in coalitions of *amici*, parties and intervenors to the case, and in Congress to educate Senators and Representatives about the importance of net neutrality to research libraries and to advocate for strong protection of an open internet. All members of ARL would be affected by the Open Internet Order, particularly in serving researchers who must rely on internet service providers to connect to library resources.

The Importance of Net Neutrality

Net neutrality protects freedom of speech and supports innovation, by ensuring a level playing field online for all types of speech, ensuring that networks do not discriminate against particular information by slowing, blocking, or otherwise manipulating access to certain content. The internet has been called a "modern town square" because it provides a place for the free exchange of ideas and experiences. At its core, net neutrality acts as a nondiscrimination law, ensuring that marginalized viewpoints and nonprofit voices have an equal opportunity to reach audiences online.

"The public interest missions of research libraries in providing access to information depend on a neutral platform for carrying information to users..."

Research libraries depend on an open internet to fulfill their missions and serve their communities. The public interest missions of research libraries in providing access to information depend on a neutral platform for carrying information to users, including the numerous ways libraries support and provide access to vast data sets; preserve and share the cultural record; provide interconnected research and learning experiences; and facilitate discovery.[1] Large data sets and certain applications, such as those used for distance learning or telehealth, are particularly subject to latency and could be impacted in the absence of strong net neutrality protections.

The recent rollback of net neutrality provisions allows ISPs to engage in harmful behavior, breaking down the internet into fast lanes and slow lanes, provided that they disclose this information to their users. The Federal Trade Commission (FTC) will be tasked with enforcing the disclosure rules. The new order also preempts state regulatory authorities from enacting their own versions of net neutrality rules. The 3-2 vote, along party lines, to reverse the Open Internet Order was highly controversial for a number of reasons—both substantive and procedural—which are detailed below.

Issues with Reversal of the Open Internet Order

Although the FCC suggested that its transparency rule is an effective substitute for its prior regulation of ISPs under the theory that competition will protect consumers, in practice broadband providers are likely to engage in blocking, throttling, and paid prioritization without consequence. The vast majority of individuals in the United States only have one or two broadband options.[2] For example, users in remote or rural areas usually only have one ISP offering service because only one company has made the investment in that area. Individuals living in apartments may also only have a single option due to building structure and wiring requirements or management company rules and contracts.

“Without rules protecting net neutrality, ISPs have an incentive to slow down or block certain traffic or require content providers to pay extra to speed up their traffic.”

Without rules protecting net neutrality, ISPs have an incentive to slow down or block certain traffic or require content providers to pay extra to speed up their traffic. For example, Fox News might pay an ISP to speed delivery of their content, making access to Fox News’ coverage quicker than coverage from CNN or BBC. An ISP might throttle Netflix’s connection in favor of its own affiliated video services. Even in the absence of paid priority agreements or affiliated content, an ISP may block or throttle content with which it disagrees. For example, an ISP may make it more difficult to access a campaign site for a candidate that wants stronger regulations.

This categorical reversal of the 2015 net neutrality rules appeared to have a predetermined outcome without true engagement of public comment; FCC Chairman Pai previously vowed to take a “weed whacker” to the net neutrality regulations.[3] Most of the comments submitted to the FCC supported net neutrality (and this volume is supported by public polling data showing overwhelming public support for an open internet), but were largely ignored.

Critics of the repeal of the 2015 Open Internet Order also point to the fact that the FCC did not show a changed landscape justifying a complete rollback of its prior rule, other than a change in party in the Administration. The Administrative Procedures Act requires agencies to act in a reasoned manner to protect the public against the whims of a change in leadership, and agency actions therefore cannot be arbitrary and capricious. The FCC's new order does not appear to be grounded in solid evidence, making it vulnerable to challenges.

While the FCC's decision to abandon rules for net neutrality is concerning, the agency is not the final word on open internet protections.

Additionally, the dissenting FCC Commissioners and several members of Congress unsuccessfully pushed to delay the FCC's December vote after reports that millions of fake comments were submitted during the FCC's rulemaking process. These lawmakers argued that the FCC should not vote to change the rules which were, theoretically, grounded in comments received from the Notice of Proposed Rulemaking (NPRM), until an investigation into the fake comments, including half a million comments traced to Russian email accounts, had been initiated and concluded. Despite these concerns, the FCC went forward with its scheduled vote and net neutrality will no longer be protected unless courts or Congress intervene.

Ultimately, the general public will be harmed by the FCC's elimination of net neutrality protections and the companion piece in this *RLI* issue suggests what some of the practical consequences will be for the research and education community, should the new FCC order remain in place. While the FCC's decision to abandon rules for net neutrality is concerning, the agency is not the final word on open internet protections. Multiple avenues for pursuing an open internet remain, both at the federal and state levels.

Litigation

Litigation appears to be the most likely avenue to regain strong protections for an open internet. Almost immediately following the FCC's publication of its reversal of the 2015 Open Internet Order, numerous lawsuits were filed against the agency. Technology companies, state attorneys general of 21 states and the District of Columbia, and public interest groups were among those filing lawsuits in the Courts of Appeals for the DC Circuit and the Ninth Circuit. An unopposed motion to move the *Mozilla et al. v. FCC* case back to the DC Circuit, the court that upheld the 2015 Open Internet Order, was granted in March 2018.

The benefit of the DC Circuit's jurisdiction over *Mozilla et al. v. FCC* is that the DC Circuit already has a clear record to rely on, from its 2014 opinion in which it rejected the FCC's 2010 Open Internet Order (because the FCC used common carrier regulations despite the fact that the agency had previously declined to classify ISPs as common carriers)[4] to its 2016 decision upholding the FCC's 2015 Order Internet Order (including reclassification of ISPs as Title II common carriers, reclassification of mobile broadband service, a ban on paid prioritization, and a General Conduct Rule to protect against future harms).[5] The DC Circuit will likely point to its 2016 opinion and scrutinize the FCC's complete reversal just one year later. Indeed, the DC Circuit's 2016 opinion notes that the court's role is "to ensure that an agency['s] . . . action is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Court review of an agency's decision is not to make policy decisions, but to ensure that the agency is acting within its authority. Additionally, the record before the DC Circuit demonstrates a clear need for regulations to protect against paid prioritization and blocking. Even in the 2014 case, in which the DC Circuit rejected the FCC's 2010 Open Internet Order, the opinion found that ISPs had an incentive to discriminate against certain content and that the FCC's findings were not "pure speculation," as Verizon had asserted, but instead "based firmly in

common sense and economic reality."

Briefings before the DC Circuit will likely be due during the summer of 2018 with oral arguments to follow. Proponents of net neutrality provisions, including the parties themselves or intervenors, may request a stay from the DC Circuit, which would leave the 2015 Open Internet Order in place until a decision is reached on the merits of the case. In order for such a stay to be granted, proponents will need to demonstrate irreparable harm.

As in the previous round of litigation over the 2015 Open Internet Order in the DC Circuit, ARL will file an amicus brief with other organizations to highlight the importance of net neutrality to the higher education and research community. Library organizations and higher education associations offer a unique, noncommercial voice in the litigation proceedings, distinct from the large telecommunications companies and the internet companies that have dominated the long history of the net neutrality debate.

Congress

In addition to litigation, net neutrality advocates might seek legislative relief. Efforts to reverse the FCC's decision could take two approaches in Congress. The first is for Congress to overturn the decision through the Congressional Review Act, a process under which Congress can reverse an agency's decision through a simple majority vote in both houses within 60 legislative days of publication of the agency's decision in the *Federal Register*. Even if this resolution passes both houses, it also requires the signature of the President.

Democrats in both the Senate and the House of Representatives, with the efforts led by Senator Markey (D-MA) and Representative Doyle (D-PA), have advocated for the use of the Congressional Review Act here. Fifty senators have co-sponsored the resolution to repeal the FCC's decision, including all forty-nine members of the

Democratic caucus plus Senator Collins (R-ME). The resolution has already surpassed the minimum number to force a vote on the floor in the Senate, which Minority Leader Schumer (D-NY) has stated an intention to do. Since reaching fifty co-sponsors, proponents of net neutrality have launched a #OneMoreVote campaign, targeting Republicans who have indicated openness to supporting the resolution or who are perceived as vulnerable in the upcoming elections.

While a vote is expected in the Senate, the House may choose not to bring the resolution to the floor. Although it has 150 co-sponsors, Democrats cannot force a vote, though passage in the Senate may put pressure on the House to act. However, even if the resolution were to pass both houses of Congress, President Trump is already on record opposing net neutrality and would likely not sign it. Democrats may still use this effort to make net neutrality a key issue during the upcoming midterm elections in the United States.

Alternatively, Congress could rewrite the Communications Act and change the scope of the FCC's current rule. Under this process, it is more likely that a compromise bill would result—if enough members of Congress could agree—rather than the strong protections that the 2015 Open Internet Order reclassifying broadband as a common carrier provided. Several bills and discussion drafts have circulated in Congress during the many years of FCC consideration of these rules.

Any "compromise" resulting in paid priority agreements, is one that net neutrality advocates, including ARL and other higher education and library associations, have strongly opposed.

Senator John Kennedy (R-LA), for example, introduced the Open Internet Preservation Act, a bill identical to Representative Marsha Blackburn's (R-TN) bill filed in the House that would prohibit ISPs from blocking or throttling content, but would allow for paid prioritization. Any "compromise" resulting in paid priority agreements, is one that net neutrality advocates, including ARL and other higher

education and library associations, have strongly opposed. Paid prioritization, by definition, prioritizes voices of those who are willing and able to pay higher fees, disadvantaging not-for-profit speech, a range of diverse opinions, and potentially hindering new innovations.

One additional risk of legislative action is that a law regulating net neutrality principles would likely result in preemption, meaning that states willing to go farther than the US Congress is could be prohibited from enacting their own state-level net neutrality rules.

State Action

Even though the FCC's rollback of enforceable net neutrality rules contains explicit state preemption provisions designed to prevent states from enacting their own regulations, a number of states have taken executive or legislative action to blunt or thwart the FCC's rules. Montana became the first state to issue an executive order to diminish the effect of the FCC's rules within its state. The executive order requires that for an ISP to receive a contract with the state of Montana, the ISP must abide by net neutrality principles and cannot block lawful content, throttle or degrade transmissions, or engage in paid prioritization. Because the executive order deals with a procurement agreement rather than a regulation, preemption would not apply. Under the executive order, the state of Montana is simply issuing contract terms that ISPs must agree to. Hawaii, New Jersey, New York, and Vermont followed suit with their own executive orders requiring ISPs with state contracts to abide by net neutrality principles.

Washington and Oregon have passed laws requiring ISPs within the state to offer net neutrality protections and a number of other state legislatures are considering similar laws. These laws are likely to be challenged by ISPs on the grounds that the FCC's preemption provisions take precedent and that states may not act in this space.

However, Washington was careful in enacting its law to make it

enforceable under the Consumer Protection Act, which arguably takes it out of a regulatory action and into a consumer protection field, an attempt to circumvent the FCC's preemption. Additionally, some legal scholars have argued that in the FCC's repeal of net neutrality rules, the agency claimed that Congress actually **withheld** authority over broadband from the FCC. From that assertion, it follows that if the FCC does not have the power to regulate broadband, it also does not have the power to preempt state authority over broadband.[6]

In total, more than half of the US states have legislation pending to protect net neutrality, either to codify requirements for state procurement contracts or to legislate direct net neutrality protections. These states include: Alaska, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wisconsin.

Municipal Broadband

In addition to state laws, some net neutrality proponents have advocated for local municipalities to develop their own broadband networks that would not be subject to the same tactics as private ISP companies looking to maximize their own profits or those of their affiliated networks. The creation of alternative networks are not subject to FCC preemption or scrutiny because municipalities would simply be providing residents a different network. In turn, the creation of public municipal broadband networks may create sufficient competition with private ISP networks that, at least in those municipalities, ISPs would not be able to engage in blocking, throttling, or paid prioritization.

Unfortunately, this strategy will not work for all municipalities, either because of costs or state laws. According to an American Civil Liberties Union report, 22 states prohibit local municipalities from building public networks.[7]

Conclusion

Ultimately, the best outcome for strong net neutrality protections would be for the DC Circuit—and the Supreme Court, should it agree to review whatever decision comes out of the lower court—to overturn the FCC's repeal of its Open Internet Order. Even if Congress acts under the Congressional Review Act, President Trump would certainly not sign the resolution, making repeal of the FCC's new order through that mechanism highly unlikely. Any legislative solution in Congress, while it may provide stronger protections than the FCC's new approach, is unlikely to reach the full extent of protections from the 2015 order. Additionally, although states and municipalities can blunt the effect of the FCC's repudiation of net neutrality regulations, this approach offers a mere piecemeal solution that will result in, at best, a patchwork of net neutrality rules that protects users in some states, but not in others.

While the FCC has reversed itself on regulating and protecting an open internet, it is worth noting that many other countries retain strong protections.[8] In Canada, for example, the Canadian Radio-Television and Telecommunications Commission has a robust framework in place to protect an open internet, including prohibiting the prioritization or favoring of affiliated content and evaluating internet traffic management by ISPs to protect against discriminatory conduct. Hopefully, the FCC's departure from strongly protecting net neutrality will be brief and the United States will once again be a leader in ensuring that the internet continues to function as it has, flourishing as an open platform.

> **"ARL provides a unique, non-commercial perspective on net neutrality, speaking on behalf of thousands of students, faculty, and other scholars who use the internet via research institutions."**

ARL will continue to engage in net neutrality advocacy, individually as well as in various coalitions involving higher education, libraries,

and public interest groups more broadly. As one FCC Commissioner made clear, ARL provides a unique, noncommercial perspective on net neutrality, speaking on behalf of thousands of students, faculty, and other scholars who use the internet via research institutions.

Endnotes

[1] See *Reply Comments of the Association of Research Libraries, In the matter of Restoring Internet Freedom, WC Docket No. 17-108 before the Federal Communications Commission,* August 29, 2017, http://www.arl.org/storage/documents/2017.08.29-Reply-Comments-Net-Neutrality.pdf.

[2] A 2016 report, based on the National Broadband Map that had been maintained by the FCC and the National Telecommunications and Information Administration, which is apparently no longer being maintained, noted, "Statistics from the FCC indicate nearly 30 percent of Americans don't have a choice when it comes to their Internet provider. Another large portion of the public, which estimates place at 37 percent, only have two options." See Kaz Weida, "Why Can I Only Get a Few Internet Providers?," HighSpeedInternet.com, April 26, 2016, https://www.highspeedinternet.com/resources/why-can-i-only-get-a-few-internet-providers/.

[3] See, for example, Alina Selyukh, "Trump's Telecom Chief Is Ajit Pai, Critic of Net Neutrality Rules," *The Two-Way: Breaking News from NPR*, January 23, 2017, https://www.npr.org/sections/thetwo-way/2017/01/23/510844936/trumps-telecom-chief-is-ajit-pai-critic-of-net-neutrality-rules.

[4] Verizon Communications, Inc. v. Federal Communications Comm'n, 740 F.3d 623 (D.C. Cir. 2014).

[5] United States Telecom Ass'n v. Federal Communications Comm'n, (D.C. Cir. 2016).

[6] See, for example, Harold Feld, "Can the States Really Pass Their Own Net Neutrality Laws? Here's Why I Think Yes," *Wetmachine*, February

6, 2018, http://www.wetmachine.com/tales-of-the-sausage-factory/can-the-states-really-pass-their-own-net-neutrality-laws-heres-why-i-think-yes/. See also State of Montana, "Fact Sheet: Why Isn't Montana's Executive Order Preempted?," accessed April 17, 2018, http://governor.mt.gov/Portals/16/docs/2018/For%20Circulation%20-%20Preemption%20High%20Level.pdf?ver=2018-01-24-151114-170. ("Even if Montana did compel ISPs through a state law, the FCC's claims to preemption are a stretch. Preemption is a question of congressional intent. There's no statutory basis for preemption under Title I. Remember: the FCC felt it needed to reclassify broadband under Title II to protect net neutrality principles. So when the FCC retreated back to Title I in December, it's unclear how the FCC can simultaneously claim it doesn't have the power to impose net neutrality principles under Title I yet preempt states from doing the same.")

[7] American Civil Liberties Union (ACLU), *The Public Internet Option: How Local Governments Can Provide Network Neutrality, Privacy, and Access for All* (New York: ACLU, March 2018), https://www.aclu.org/report/public-internet-option.

[8] See Sascha Meinrath and Nathalia Foditsch, "How Other Countries Deal with Net Neutrality," *Smithsonian Magazine*, December 15, 2017, https://www.smithsonianmag.com/innovation/how-other-countries-deal-net-neutrality-180967558/.

To cite this article: Krista L. Cox. "Implications of the Reversal of Net Neutrality Rules and Next Steps to Protect the Open Internet." *Research Library Issues*, no. 293 (2018): 12–25. https://doi.org/10.29242/rli.293.3.

Editor's note: This piece was revised slightly on April 23, 2018, to update information regarding the date the net neutrality rules will be repealed. A portion of the Federal Communications Commission's (FCC) order reversing the rules will go into effect today, 60 days after publication in the *Federal Register*, but the bulk of the new order that impacts net neutrality will not go into effect until the Office of Management and Budget (OMB) has approved the FCC's actions.

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ISSN 1947-4911 https://doi.org/10.29242/rli

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