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NOTE

NO GOOD DEED GOES UN-LITIGATED: THE PITFALLS OF THE TITLE II PRIVATE RIGHT OF ACTION IN A MARKET OF FIBER OPTIC INNOVATION†

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I. INTRODUCTION

A. Background on the Net Neutrality Debate

Net neutrality, a broad policy preference for legally barring Internet service providers (ISPs) from discriminating against or slowing down content that goes through their networks, has had a tumultuous regulatory history over the past five years.[1] Initially, the Federal Communications Commission (FCC) classified broadband Internet service as a Title I service under the 1934 Telecommunications Act, which gave the FCC very limited power to impose regulations on Internet companies.[2] Then, the FCC attempted to impose net neutrality rules using their limited Title I powers, a move that the federal courts rebuked.[3] After that, the FCC moved to reclassify broadband as a Title II Telecommunications Service via the 2015 Open Internet Order,[4] which is a much more powerful regulatory regime that allows the

1. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 159 (2003).

2. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (affirming FCC's decision).

3. *See, e.g.*, Verizon v. F.C.C., 740 F.3d 623 (D.C. Cir. 2014).

4. FED. COMMC'NS COMM'N, FCC 15-24, IN RE PROTECTING AND PROMOTING THE OPEN INTERNET ¶ 2 (Mar. 12, 2015) [hereinafter 2015 OPEN INTERNET ORDER].

FCC to impose taxes, fees, and stronger rules.[5] Finally, less than two years later, newly appointed FCC leadership reversed the decision to reclassify broadband and once again placed it under the limited Title I regulatory regime.[6]

The FCC's broadband regulation has changed at a dizzying pace. Although net neutrality regulation is unlikely to change drastically in the next three years, the policy will remain important for the foreseeable future for several reasons. First, the decision to reclassify broadband as a Title II service was popular,[7] while the decision to reverse that reclassification was not.[8] Second, net neutrality recently became an important part of the Democratic platform,[9] and members of Congress have introduced legislation to overturn the most recent FCC action.[10] And third, Internet content providers—also known as "edge providers"—like Netflix, Facebook, and Spotify, have shown that they are intensely invested in advocating for a return to net neutrality principles.[11] These large, important companies will guarantee that net neutrality regulations remain in the public spotlight.[12]

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5. Telecommunications Act of 1996, 47 U.S.C. § 228(c) (1996) (allowing for future regulations that set tariffs for pay-per-call services).

6. *See* FED. COMMC'NS COMM'N, FCC 17-166, IN RE RESTORING INTERNET FREEDOM (Dec. 14, 2017).

7. Bob Lannon, *What Can We Learn From 800,000 Public Comments on the FCC's Net Neutrality Plan?*, SUNLIGHT FOUND. (Sept. 2, 2014, 9:49 AM), https://sunlightfoundation.com/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan/ (stating that less than 1% of the submitted comments were clearly against the reclassification of broadband).

8. *SEE* PROGRAM FOR PUB. CONSULTATION, *OVERWHELMING BIPARTISAN MAJORITY OPPOSES REPEALING NET NEUTRALITY, SURVEY FINDS* (Dec. 12, 2017), https://www.prnewswire.com/news-releases/overwhelming-bipartisan-majority-opposes-repealing-net-neutrality-survey-finds-300569665.html (reporting that a recent poll revealed that over 83% of those polled opposed the FCC repeal of net neutrality).

9. *See* Raffi Krikorian, *DNC on Trump's Plan to Gut Net Neutrality*, DEMOCRATIC NAT'L COMM. (Nov. 21, 2017), https://www.democrats.org/Post/dnc-on-trumps-plan-to-gut-net-neutrality.

10. PENN WHARTON PUB. POL'Y INITIATIVE, *Senate Bill to Reverse Net Neutrality Repeal Will Reach Floor Vote* (Jan. 8, 2018), https://publicpolicy.wharton.upenn.edu/live/news/2288-senate-bill-to-reverse-net-neutrality-repeal-will.

11. Mallory Locklear, *Netflix, Google and Others Voice Frustration with Net Neutrality Vote*, ENGADGET (Dec. 14, 2017), https://www.engadget.com/2017/12/14/netflix-google-voice-frustration-net-neutrality-fcc/.

12. For example, many companies have openly advocated for net neutrality regulations. *See* Jackie Wattles, *Net Neutrality Repeal: Facebook, Amazon, Netflix, and Internet Providers React*, CNN TECH (Dec. 14, 2017, 6:18

Thus, it is highly likely that reclassification of broadband as a Title II service will reemerge as a regulatory priority of the FCC in the near future. Unfortunately, the effects of the Title II regulatory regime were never sufficiently measured due to the quick return to Title I. Even without this analysis, however, it is known that Title II classification poses some vexing problems. Most notably, Title II legislation and its associated regulations are based on the framework of the 1934 Communications Act, a statute written when direct-dialing telephony was still a groundbreaking technology and radio was a popular form of entertainment.[13] Many outlets have questioned whether such an antiquated piece of legislation can effectively regulate a modern invention.[14] To its credit, the FCC did its best to modernize regulations when it reclassified broadband into Title II in 2015. By using its forbearance authority, the FCC was able to eliminate some of the oldest and most inapposite regulations from being applied to broadband Internet service. However, as this Note will argue, the FCC was not able to remove all the potentially dangerous provisions in Title II. The Title II regulatory regime allowed for private lawsuits between economic competitors in ways that created perverse incentives for litigation. For those reasons, this Note will argue that if the FCC revisits net neutrality, it should be wary of reemploying Title II because of the built-in dangers with the Title II regulatory regime.

First, this Note will explain the net neutrality debate through an economic lens. Second, it will explain the technological and economic changes that were not fully noted in the reclassification order and the dangers those changes pose to the regulatory scheme. Third, it will discuss the types of behavior that can be the subject of unnecessary litigation under a Title II regulatory regime. Fourth, the Note will discuss the current barriers to unnecessary litigation and explain why they are insufficient to protect consumers from the harms of frivolous litigation. Last, the Note will offer suggestions for how future administrations can eliminate the problems caused by the Title II private right of action.

PM), http://money.cnn.com/2017/12/14/technology/business/fcc-net-neutrality-reactions/index.html.

13. JERRY FITZGERALD & ALAN DENNIS, BUSINESS DATA COMMUNICATIONS AND NETWORKING 6 (10th ed. 2009).

14. Daniel Fisher, *FCC's Net-Neutrality Proposal Brings the Internet into the Railroad Era,* FORBES (Feb. 5, 2015, 11:42 AM), https://www.forbes.com/sites/danielfishaer/2015/02/05/fccs-net-neutrality-railroad-era/#7f6b35db9219.

B. Net Neutrality as an Economic Fight over the Costs of Infrastructure Build-Out

In a purely economic context, a Title II regulatory regime is a huge victory for edge providers like Netflix. Setting aside politics for a moment, the debate can be recast as a high-stakes economic contest between service providers and edge providers over shouldering the massive economic burden of funding the much-needed improvement of broadband infrastructure.

Rudimentary Internet service piggybacked on existing telephone connections, which allowed the first ISPs, like America Online (AOL), to provide basic Internet service without large capital expenditures. Fortunately, we have outgrown the noisy era of dial-up Internet and moved to more advanced delivery systems that provide previously unimaginable speed and quality. Unfortunately, this means that ISPs are spending hundreds of billions of dollars building and improving broadband networks to keep up with consumers' thirst for more speed and bandwidth.[15]

The growth of consumer demand for increased network capacity has exploded. Driven by the popularity of data-intensive edge providers like Netflix, Hulu, and Spotify, ISPs have had to accommodate far greater amounts of data flowing through their networks. For example, the number of online videos viewed in the United States each month increased from 7.2 billion in January 2007 to 52.4 billion in December 2013.[16] Meanwhile, the segment of Americans who watch or download videos has grown from 69% of adult Internet users in 2009 to 78% in 2013.[17] This trend shows no signs of stopping.[18] In 2010, video streaming or downloading constituted around 35% of Internet traffic during evening hours; by 2015, it constituted over 70% of Internet traffic during evening hours.[19] With these trends likely to continue for the foreseeable

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15. 2015 OPEN INTERNET ORDER, *supra* note 4, ¶ 2 (stating that telecommunications companies spent an estimated $212 billion on infrastructure between 2011–2013).

16. Kristen Purcell, *Online Video 2013*, PEW RES. CTR. (Oct. 10, 2013), http://www.pewinternet.org/2013/10/10/online-video-2013/.

17. *Id.*

18. CISCO, CISCO VISUAL NETWORKING INDEX: GLOBAL MOBILE DATA TRAFFIC FORECAST UPDATE 2016–2021 (2017), https://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.pdf.

19. Jillian D'Onfro, *More Than 70% of Internet Traffic During Peak Hours Now Comes from Video and Music Streaming*, BUS. INSIDER (Dec. 7, 2015), http://www.businessinsider.com/sandvine-bandwidth-data-shows-70-of-internet-traffic-is-video-and-music-streaming-2015-12.

future, networks will require billions of dollars more in infrastructure upgrades at every node—local facilities that transport data to users (last mile facilities), infrastructure that transports data across long distances (middle mile facilities), and infrastructure that transfers data from edge providers' servers to the general network (interconnection facilities). The FCC's net neutrality regime largely decided who has to pay for all these upgrades.

On the one hand, Netflix, which is the paradigmatic example of an edge provider,[20] and other edge providers want the ISPs to pay for any required infrastructure upgrades.[21] They argue that they already pay their fair share by paying the costs to transport "data to [the] front door" of ISPs' networks.[22] Additionally, edge providers accuse ISPs of artificially congesting existing bottlenecks in the network as a means to extract special access fees for better service.[23] They also argue that the costs of accommodating the

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20. *See* David Post, *Does the FCC Really Not Get It About the Internet?*, WASH. POST (Oct. 31, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/31/does-the-fcc-really-not-get-it-about-the-internet/?utm_term=.96fe0cf9c615 (defining an "edge provider" as "any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.").

21. *See* Reed Hastings, *Internet Tolls and the Case for Strong Net Neutrality*, NETFLIX (Mar. 20, 2014), https://media.netflix.com/en/company-blog/internet-tolls-and-the-case-for-strong-net-neutrality ("[ISPs] must provide sufficient access to their network without charge").

22. OPEN TECH. INST., *"Beyond Frustrated": The Sweeping Consumer Harms as a Result of ISP Disputes*, 3 (Nov. 2014), https://static.newamerica.org/attachments/386-beyond-frustrated-the-sweeping-consumer-harms-as-a-result-of-isp-disputes/OTI_Beyond_Frustrated_Final.pdf ("Cogent and Netflix argued that they paid their fair share by bringing the data to Comcast's front door.").

23. Letter from Markham C. Erickson, Counsel to Netflix, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 2 (filed Aug. 1, 2014) [hereinafter Netflix *Ex Parte* Letter] (asserting that all the normal interconnections were always congested and the "only other available routes into Comcast's network were those where Comcast required an access fee."); Letter from Robert M. Cooper, Counsel to Cogent, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1 (filed Mar. 19, 2014) [hereinafter Cogent *Ex Parte* Letter]; Letter from Joseph C. Cavender, Vice President and Assistant General Counsel, Level 3, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1 (filed May 13, 2014) (asserting that "some of the biggest consumer broadband ISPs have allowed the interconnections between their networks and backbone providers like Level 3 to congest, causing packets to be dropped and harming their own users' Internet experiences").

large amounts of data in the system are not actually very high at all.[24]

On the other hand, ISPs want edge providers to help pay for the stress they put on the entire network.[25] They argue that paid-peering agreements (whereby a content delivery network and an ISP build a physical connection that bypasses all the normal chokepoints), special access fees, and other alternative payment systems allow ISPs to allocate some of the transportation costs back to the edge providers and ultimately to those specific consumers who actually use more bandwidth.[26] Relatedly, ISPs also argue that prohibiting special access fees would essentially impose the costs created by Netflix and other edge providers on all network users, regardless of whether they use any data-intensive sites.[27]

It is important to note, before moving on to the economic results of the net neutrality debate, that who pays for the infrastructure build-out is a question that may not have occurred to some consumers. Invariably, added costs are passed on to consumers, either through higher subscription fees for services like Netflix or higher monthly fees for Internet service. Some consumers who, like ISPs have argued,[28] do not use Netflix but could be forced to subsidize the cost of infrastructure build-out for those individuals who do use data-intensive services, may care about who shoulders the economic burden; however, most consumers—especially those who pay for Internet service and

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24. Cogent *Ex Parte* Letter, *supra* note 23, at 1 (asserting that "capital expenditures required to remedy congestion at interconnection points are extremely modest").

25. *See* Jim Cicconi, *Who Should Pay for Netflix?*, AT&T PUB. POL'Y (Mar. 21, 2014), https://www.attpublicpolicy.com/broadband/who-should-pay-for-netflix/ (asserting that the cost of building new infrastructure should be "a cost of doing business that gets incorporated into Netflix's subscription rate").

26. Letter from Craig A. Gilley, Counsel for Mediacom Communications Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, GN Docket No. 14-28 at 2 (filed Jun. 12, 2014) (stating that "if the large edge providers that benefit the most from the investment that Mediacom and other ISPs make in their broadband networks, then there should be nothing wrong with requiring them to bear their fair share of the burden of such upgrades").

27. *See id.* (arguing that without the ability to charge certain edge providers more, "all of an ISP's customers would have to pay more, even if they never use Netflix or stream movies at all"); *see also* Cicconi, *supra* note 25 (asserting that, "It's simply not fair for Mr. Hastings to demand that ISPs provide him with zero delivery costs—at the high quality he demands—for free. Nor is it fair that other Internet users, who couldn't care less about Netflix, be forced to subsidize the high costs and stresses its service places on all broadband networks").

28. *See* Cicconi, *supra* note 25.

content delivery services—are logically apathetic as to which one of their providers finances the necessary network improvements.[29] The real consequences of the economic battle between ISPs and edge providers are macroeconomic. Specifically, the battle will determine which set of companies has to assume the capital and logistical costs of financing the massive project of building network improvements. There is also a public perception battle between the two sets of companies. Most consumers do not know, or care, about why their bills go up; however, no consumer likes when that happens.[30] Because companies want to avoid drastically raising rates, especially if it does not improve their earnings, companies will fight amongst each other to avoid being the one forced to raise rates.

The reclassification of broadband as a Title II service was a giant economic success for edge providers. The FCC, by subjecting ISPs to "common carrier" regulation and outlawing practices like "throttling," transferred the financial burden of network build-out onto ISPs by law.[31] Similarly, the FCC entertained the possibility that edge providers would be forced by ISPs to help pay for infrastructure build-out when they repealed the reclassification. Whether or not one supports these changes depends on preferred policy positions, and scholars on both sides thoroughly commented on the debate.[32] More importantly, for the purposes of this Note, the model of net neutrality regulation would give edge providers an important regulatory weapon built into Title II—the private right of action. This regulatory weapon could threaten the basic fairness of the Internet marketplace and should be avoided if net neutrality is to be made law again.

II. ECONOMIC, TECHNOLOGICAL, AND POLITICAL CHANGES SINCE THE RELEASE OF THE 2015 OPEN INTERNET ORDER

This section outlines the engineering and economic transformations that were not properly noted when the FCC voted to reclassify broadband as a Title II service. Then, it describes the legal challenges engendered by those practical changes if the FCC ever were to return to a Title II regulatory scheme.

A. Technological Changes in ISP and Content Delivery Markets

29. *Id.*
30. *Id.*
31. *See generally id.*
32. *See* 2015 OPEN INTERNET ORDER, *supra* note 4, at 90 n.502–14.

Recent technological and economic changes have created a situation where edge providers and ISPs are likely to compete directly against each other, completely changing the current content delivery marketplace.

Large investments in telecommunications infrastructure have allowed new competitors to severely disrupt the cable oligopoly that originated in the 1950s. For the past decade, ISPs have shouldered the economic burden of making sure that American telecommunications infrastructure can keep up with a more data-intensive future. Changing consumer demands have necessitated changes in technology to keep up with changing preferences. For example, the expanding popularity of Video On Demand (VoD), both through new services like Netflix and more traditional providers like pay-per-view, has essentially signaled the end of the coaxial cable[33] as the dominant delivery technology.

VoD services require a lot more data than traditional broadcasting; specifically, a traditional broadcast can be carried over a 2 megabits-per-second (Mb/s) bandwidth connection without any delay or degradation of picture quality. This means that a full cable package with over 168 standard definition, high definition, and pay-per-view channels delivered to a whole area via broadcast requires a total of only 409.6 Mb/s of bandwidth.[34] By contrast, VoD services require much more bandwidth and 50,000 viewers subscribing to one movie each in a two-hour peak time window on a Saturday night generates 100 gigabits per second (Gb/s) of traffic. This requires more than 200 times the bandwidth than before. Additionally, "if 10 percent of the subscriptions are High Definition movies, the total bandwidth requirement becomes 140 Gb/s."[35]

Traditional coaxial cables are incapable of handling this sort of data transport, topping out at around 6 Mb/s.[36] Consequently,

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33. A coaxial cable is a copper-based wire that is the most basic and popular wire for cable television and broadband Internet. People with a basic cable connection that plugs directly into the back of their television or cable box would likely recognize it. For a technical description of what co-axial cable is and how it works, see Martin J. Van Der Burgt, *Coaxial Cables and Applications,* BELDEN ELECS. DIV. (2003), http://studylib.net/doc/8831583/coaxial-cables-and-applications#.

34. SUNAN HAN ET AL., *IPTV Transport Architecture Alternatives and Economic Considerations*, IEEE COMM. MAG. 70–71 (Feb. 2008), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.453.634&rep=rep1&type=pdf.

35. *Id.*

36. *See* Louis E. Frenzel, *IPTV Makes Channel Surfing More Like Web Surfing*, ELEC. DESIGN (Oct. 8, 2008), http://www.electronicdesign.com/communications/iptv-makes-channel-surfing-more-web-surfing.

companies have undertaken the expensive task of creating fiber optic networks to handle new customer demands.[37] Because of the high costs of building a fiber optic cable network, non-traditional ISPs have entered the television and Internet service market. Companies like AT&T, with its Internet service (formally known as "U-verse"),[38] Google, with its Fiber service in certain American cities,[39] and Verizon, with FIOS,[40] are all new players in the market previously dominated by Time Warner, Charter, and Comcast.[41]

Companies have not only invested in infrastructure, but also new delivery systems. The best example is the creation of Internet Protocol television (IPTV) which delivers TV and Internet services across a fiber network much more efficiently and also has distinct

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37. Government reports indicate that laying fiber optic cable can cost upwards of $50,000 per mile and experts have estimated the costs of one company laying the entire country with fiber optic cable at upwards of $140 billion. *See Unit Cost Entries for Fiber Optic Cable Installation*, U.S. DEP'T OF TRANSP., https://www.itscosts.its.dot.gov/its/benecost.nsf/DisplayRUCByUnitCostElementUnadjusted?ReadForm&UnitCostElement=Fiber+Optic+Cable+Installation+&Subsystem=Roadside+Telecommunications+ (last accessed Mar. 1, 2018); *see* Mike Masnik, *Yes, It Would be Prohibitively Costly for Google to Offer Google Fiber Everywhere, But It Shouldn't Have To*, TECHDIRT (Dec. 12, 2012) https://www.techdirt.com/articles/20121210/00425421320/yes-it-would-be-prohibitively-costly-google-to-offer-google-fiber-everywhere-it-shouldnt-have-to.shtml (quoting a Goldman Sachs report stating that "even a 50mn household build out, which would represent less than half of all US homes, could cost as much as $70bn. We note that Jason Armstrong estimates Verizon has spent roughly $15bn to date building out its FiOS fiber network covering an area of approximately 17mn homes."); *see also* Jay Yarow, *How Much It Would Cost Google to Become a National Cable Company Like Comcast*, BUS. INSIDER (Dec. 7, 2012), http://www.businessinsider.com/how-much-it-would-cost-google-to-build-a-cable-network-2012-12 (alluding to a Goldman Sachs report on Google Fiber); David Goldman, *Huge Breakthrough in Blazing Fast Internet Speeds*, CNN TECH (May 16, 2016, 3:01 PM), http://money.cnn.com/2016/05/16/technology/gfast-internet-speeds/index.html (stating that bringing fiber from the street to one home can cost as much as $100,000).

38. *See AT&T U-verse Timeline*, AT&T, https://www.att.com/Common/files/pdf/att_u-verse_time_v10.pdf (last visited Apr. 13, 2018); Bernie Arnason, *AT&T Says Goodbye to U-verse*, TELECOMPETITOR (Sept. 19, 2016, 6:36 PM), http://www.telecompetitor.com/att-says-goodbye-to-u-verse/.

39. *See* Minnie Ingersoll & James Kelly, *Think Big with Gig: Our Experimental Fiber Network*, GOOGLE OFFICIAL BLOG (Feb. 10, 2010), https://fiber.googleblog.com/2010/02/think-big-with-gig-our-experimental.html.

40. *See* VERIZON, *The History of Verizon Communications* (Sept. 2016), https://www.verizon.com/about/sites/default/files/Verizon_History_0916.pdf.

41. Jack Shafer, *Who's Afraid of Comcast?*, REUTERS (Feb. 19, 2014), http://blogs.reuters.com/jackshafer/2014/02/19/whos-afraid-of-comcast/.

commercial advantages. In traditional Radio Frequency (RF) TV delivery systems, all channels are simultaneously delivered to cable boxes at the same time.[42] With IPTV and simulcasting, only the channels in use are actually sent to the user, and "each subscriber gets a different video/audio stream that's specifically just what the subscriber has selected."[43] This technology creates more efficient service providers, allowing more network bandwidth to be used for VoD and general Internet usage. The technological progress also gives companies commercial advantages like targeted advertising, more customization in TV/Internet packages, interactive content, and equal upload/download speeds for video-conferencing.[44] These advantages are simply not possible through traditional RF broadcasting and coaxial Internet services.[45]

Whereas ISPs and edge providers were previously independent of one another, recently the two sets of companies have become more likely to directly compete. Today, ISPs use the benefits of IPTV and fiber optics to deliver large amounts of VoD directly to their customers in direct competition with edge providers like Netflix. In fact, ISPs, like Comcast Xfinity and Verizon FIOS, already boast a superior number of VoD titles in their own systems.[46] Moreover, as partnerships between ISPs and edge providers continue to become more popular,[47] other edge providers could be left out in the cold.[48]

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42. *See generally* HAN ET AL., *supra* note 34.

43. Frenzel, *supra* note 36, at 37.

44. *See id.* (explaining targeted marketing with IPTV); Vamien McKalin, *Verizon Increases Upload Speed to Match Download Speed on Its FIOS Network: What Does This Mean for the Internet*, TECH TIMES (July 25, 2014, 12:13 AM), http://www.techtimes.com/articles/10981/20140725/verizon-increases-upload-speed-to-match-download-speed-on-its-fios-network-what-does-this-mean-for-the-internet.htm (explaining that in a fiber network, the same technology [lasers] is used to send the information "down" as "up," but, in a coaxial network, set top boxes cannot be made as powerful as the equipment used by the service provider).

45. *Id.*

46. *See* Matt Strauss, *Bringing More Video On Demand Choices to More Customers Through the Comcast-TWC Transaction*, COMCAST VOICES (Apr. 6, 2015), https://corporate.comcast.com/comcast-voices/bringing-more-video-on-demand-choices-to-more-customers-through-the-comcast-twc-transaction (stating that Xfinity service had over 50,000 on demand titles); Victor Luckerson, *The Number of Movies on Netflix Is Dropping Fast*, TIME (Mar. 25, 2016), http://time.com/4272360/the-number-of-movies-on-netflix-is-dropping-fast/ (stating that Netflix now offers only 4,335 movies and 1,609 TV shows).

47. *See* Mike Snider, *Watch Netflix Over Cable — Yes, It's Happening as Comcast X1 Deal Goes Live*, USA TODAY (Nov. 4, 2016, 11:01 AM),

B. Legal Issues Presented by Title II Regulation

A return to the Title II regulatory regime could undermine major technology advances and give edge providers a judicial remedy against their new ISP rivals. There are two short sections of the Communications Act that pose particularly tough legal and policy questions for the viability of Title II regulation of ISPs: sections 206 and 207.

Taken together, sections 206 and 207 create a private right of action for legal persons to recover against a party who violates the provisions of Title II.[49] In previous iterations, telecommunications providers—the predecessors of ISPs—used the sections to recover marginal, yet important, fees that were improperly withheld from local telecommunications companies.[50] Reviving net neutrality regulations and, specifically, the private right of action, could threaten to disrupt entire business models. The engineering and economic realities of new technologies may create situations where "violations" are impossible to avoid.

In particular, two separate aspects of the changing technological and economic landscape for Internet and television service providers may de facto violate net neutrality regulations. First, the throttling of data caused by ISPs and TV providers—both setting aside bandwidth for their own VoD—may violate the 2015 Open Internet Order's interpretation of "unjust" behavior.[51] Second, the popular practice of "paid peering" may violate section 201 and the discrimination clause in section 202 (discussed below).

The classification of broadband as a Title II service and the private right of action included in section 206 of Title II, coupled with the expansion of new fiber optic and VoD offerings by service

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https://www.usatoday.com/story/tech/news/2016/11/04/watch-netflix-over-cable-yes-s-happening-comcast-x1-deal-goes-live/93237570/.

48. This Note concentrates on the increased competition between ISPs and edge providers, including potential collaboration. The recent trend of service providers acquiring content *creators* (e.g., AT&T and Time Warner)—while related to increased competition in the sector—is beyond the scope of this Note.

49. *See* 47 U.S.C. §§ 206–207 (2018).

50. *See* Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45, 53 (2007) (using section 206 to recover lost "dial around" fees from payphones); N. Valley Commc'ns., LLC v. Sprint Commc'ns. Co. P'ship, 618 F. Supp. 2d 1076, 1082 (D.S.D. 2009) (using section 206 to recover fees for long-distance service fees); Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1170 (9th Cir. 2002) (using section 206 to recover charges that violated the tariffed rate filed with the FCC).

51. 47 U.S.C. § 201(b) (2018).

providers, are likely to spur litigation between edge providers and certain ISPs when net neutrality returns. The current barriers to this type of lawsuit are not enough to keep litigation from threatening the open marketplace for innovation, and, furthermore, the 2015 Open Internet Order required courts to intervene and impede pro-consumer competition. Going forward, the FCC should eliminate the private right of action in any regulatory regime it creates.

III. MARKET DEVELOPMENTS THAT COULD BE LITIGATED UNDER A TITLE II REGIME

There are two sets of practices mentioned in the 2015 Open Internet Order that could have led to litigation and liability under the net neutrality regime and may lead again to litigation in the future. Although they are different practices and would be evaluated independently of each other, both have the potential to create liability for service providers in cases without any demonstrated or intended nefariousness. Both would also force courts to get involved in determining which consumer-friendly innovations are neutral, and which are not—a process outside of the courts' expertise. The first is throttling and paid prioritization, and the second is paid peering. The final subsection will outline the legal basis for bringing a lawsuit for a violation of these behaviors and describe the problems these lawsuits could create.

A. Throttling and Paid Prioritizing

Throttling is the process of slowing down, impairing, or degrading particular Internet traffic "on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management."[52] The term "throttling is not limited to the technique of slowing down or delaying Internet packets, but more broadly refers to methods that can be used to differentiate, or 'shape' Internet traffic."[53] Similarly, paid prioritization is the process of "accepting consideration . . . from a third party to manage the network in a manner that benefits particular content" or "arrangements where a provider manages its network in a manner that favors the content, applications, services or devices of an affiliated entity."[54] In other words, paid

52. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 119.
53. *Id.* at 52 n.273.
54. *Id.* ¶ 125.

prioritization is like a priority fast lane on a highway, on which certain customers pay additional fees to bypass traffic.

In addition to the "no-blocking" ban,[55] the throttling and prioritization bans were central prohibitions for the Title II concept of net neutrality. In the 2015 Open Internet Order, the FCC used its rulemaking authority [56] to declare these latter two practices to be "unjust and unreasonable"[57] and subject to "bright line" bans based on section 201(b) of the Communications Act.[58]

Bright-line rules can be much easier to administer and certainly have associated benefits. In this case, however, when the bright-line rules are combined with the changes in network structures and ISP economics, edge providers might use the judicial system to impede innovation by ISPs and use the courts as a way to ensure meritless economic victory. First, new technologies, especially VoD delivered through fiber systems like FIOS, may de facto throttle other content.[59] The engineering of these systems creates situations where "the transport of the VoD demand in the form of video streams must use dedicated bandwidth per subscriber."[60] This dedicated bandwidth creates a different "lane" for traffic from the ISP's own servers than from other edge providers.[61] Especially in times of high traffic, these different lanes could lead to different speeds, latency, and quality between the ISP's affiliated service and an unaffiliated edge service—something the 2015 Open Internet Order specifically mentions as a clear-cut example of a violation.[62]

Opponents of banning these practices argue that the rules are "hogwash" given the current state of the market.[63] More specifically, opponents of the bright-line rules against throttling and paid prioritization assert that customers would quickly abandon their ISPs if it became apparent that traffic was being slowed from

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55. *Id.* ¶ 15.

56. 47 U.S.C. §§ 201–205 (2018).

57. *Id.* § 201.

58. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 110.

59. *See* Erica Naone, *Bandwidth on Demand*, MIT TECH. REV. (Feb. 14, 2008), https://www.technologyreview.com/s/409540/bandwidth-on-demand/ ("[I]f the average person could set up a dedicated circuit on demand, it might be possible to hog resources that could interfere with other users' experience.").

60. HAN ET AL., *supra* note 34, at 70.

61. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 74 (listing the FCC's goals, one of which is to stop "fast lanes").

62. *Id.* ¶ 123 and 52 n.280.

63. C-SPAN Organizations, *Proposed Merger of Comcast and Time Warner Cable*, C-SPAN (Mar. 27, 2014), https://www.c-span.org/video/?318466-1/communicators-david-cohen.

popular sites like Netflix.[64] They point to the 2015 Open Internet Order's lack of actual examples of throttling[65] and assert that "existing antitrust laws would address discriminatory conduct of an anticompetitive nature."[66]

Proponents of these bright-line rules argue that throttling and paid prioritization are emblematic of recent developments in industry practices that threaten the very idea of an open Internet.[67] They contend that a world without clear, bright-line rules can lead to artificially congested networks and other intentional slowdowns as a means to bargain for access or prioritization fees.[68] Additionally, paid prioritization would be unavailable to smaller edge providers like "individual bloggers, libraries, schools, advocacy organizations, and other speakers who would be less able to pay for priority service."[69] Given the 2015 Open Internet Order's stated goals[70] and support for broadband reclassification,[71] the FCC's decision to implement bright-line rules made sense. The

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64. *ICLE & TechFreedom Policy Comments*, INT'L CTR. FOR LAW & ECON. (July 17, 2014), https://ecfsapi.fcc.gov/file/7521706121.pdf at 15–16. (Tech Freedom Comments) ("If [broadband providers] are truly nefarious . . . then public outcry by the affected subscribers should likely be sufficient to convince the ISP to change its practices.").

65. The 2015 Open Internet Order is bereft of many examples of ISPs slowing Internet traffic to pressure an edge provider to pay extra fees. However, it contains submissions from Internet research firms, which assert that Internet speeds slowed while Comcast was in negotiations with Cogent and Netflix; *see* Catherine Sandoval, Notice of Ex Parte Communication: Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Services, GN Docket No. 10-127, FCC (Oct. 14, 2014), ttps://ecfsapi.fcc.gov/file/60000972786.pdf (reporting slow connection speeds during the Comcast-Cogent traffic exchange dispute, and explaining that other applications that were affected included gaming, VPN, and VoIP (including compliance with 911 standards)); David D. Clark et al., *Measurement and Analysis of Internet Interconnection and Congestion*, 2014 TPRC CONF. PAPER (Sept. 9, 2014), https://ssrn.com/abstract=2417573.

66. *ICLE & TechFreedom Policy Comments*, *supra* note 64, at 39.

67. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 68 (Paid prioritization "'represented a significant departure from historical and current practice' that threatened 'great harm to innovation' online, particularly in connection with the market for new services by edge providers").

68. *Id.* ¶ 200; *see also* Netflix *Ex Parte* Letter, *supra* note 23.

69. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 68.

70. *See generally* 2015 OPEN INTERNET ORDER, *supra* note 4; Statement of Chairman Tom Wheeler, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (Mar. 12, 2015).

71. *See* Section II, *supra*, discussing the various parties that have an economic incentive to support measures that limit what ISPs can charge them for the stress they put on ISPs' networks.

2015 Open Internet Order failed, however, to consider the possible consequences of such regulation regarding specifically private litigation.

B. Paid Peering

Paid peering is the process by which edge providers and ISPs create physical links between their networks to create faster, more efficient connections.[72] For most edge providers, data is routed through a backbone provider that delivers data from one ISP or from an edge provider to another ISP. While the FCC stated that it was not going to include peering arrangements in its net neutrality regulations,[73] it did eventually institute a case-by-case review for policies of paid peering.[74] Unsurprisingly, given the fact that peering arrangements allow ISPs and edge providers to completely avoid their service, backbone providers and neutrality activists heralded the inclusion of this case-by-case review as a large victory.[75]

The difference between the two sets of practices—peering and throttling—is mostly a technical one, as ISPs do not treat the traffic any differently than normal traffic. Instead, ISPs create physical connections that allow traffic to bypass any congestion on the backbone networks.[76] While throttling can be analogized to creating a paid fast lane on the highway in order to get somewhere faster, peering is like building a home across the street from the destination so that one can avoid highways entirely. Generally, the

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72. *SEE* WILLIAM B. NORTON, THE INTERNET PEERING PLAYBOOK: CONNECTING TO THE CORE OF THE INTERNET (2011); William B. Norton, *The Emerging 21st Century Access Power Peering*, 84 COMM. & STRATEGIES 55 (2011), http://repec.idate.org/RePEc/idt/journl/CS8403/CS84_NORTON.pdf [hereinafter *Access Power*].

73. Brendan Sasso, *Netflix's Net-Neutrality Plea Gets Rejected by the FCC*, NAT'L J. (Apr. 1, 2014, 7:20 AM), https://www.nationaljournal.com/s/59861 (quoting FCC Chairman, Tom Wheeler) ("Peering and interconnection are not under consideration in the Open Internet proceeding, but we are monitoring the issues involved to see if any action is needed in any other context.").

74. *See* 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 135.

75. Ben Popper, *How Netflix Helped Change the FCC's Definition of Net Neutrality*, THE VERGE (Feb. 4, 2015, 2:21 PM), https://www.theverge.com/2015/2/4/7978647/fcc-enforcement-interconnection-peering-title-ii ("Interconnection is critical to meet the objectives of an open and free Internet the FCC and President Obama laid out.").

76. Sasso, *supra* note 73 ("By agreeing to give Netflix direct access to its network, Comcast helped to ensure higher quality video service, but it did not technically give preferential treatment to Netflix traffic as it flowed into subscribers' homes.").

case against paid peering is similar to the case against throttling and paid prioritization: the practice of paid peering disadvantages smaller edge providers who cannot pay for these direct connections and allows ISPs to hold edge providers hostage over paying for peering.[77]

Proponents, including the ISPs themselves, of these sorts of arrangements argue that paid peering is an economically beneficial and efficient practice[78] that reduces stress on backbone networks and allows specific high-bandwidth edge providers to bypass the congestion that they themselves create on backbone networks.[79] Additionally, proponents tout the fact that peering gives "the participants greater control over their traffic and any issues arising with the traffic exchange are limited to those parties, and not other parties over other interconnection links."[80] Lastly, these sorts of agreements are popular,[81] especially with bigger edge providers, which may explain why the FCC did not ban these agreements outright. Even a case-by-case review, however, presents problems, as regulatory uncertainty weighs down parties engaging in paid peering arrangements when considering whether to negotiate and build more peering arrangements.

C. Legal Bases for Lawsuits and the Issues with These Suits

77. *See* Popper, *supra* note 75 (quoting a Netflix representative).

78. *See* Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1864, 1900–04 (2006) (outlining the economic efficiency of properly allocating the costs of data transport to those users that are responsible for the increased bandwidth usage).

79. *See* Letter from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast, to Marlene H. Dortch, Secretary, FCC (Nov. 10, 2014), https://corporate.comcast.com/images/Comcast-Ex-Parte-11-10-14.pdf ("Certainly Netflix would not have entered into direct agreements with Comcast, Verizon, Time Warner Cable, and AT&T unless doing so provided economic advantages over paying middlemen to reach these same companies—and of course, these arrangements have in turn reduced Netflix's need for Cogent's and other transit providers' services, not only reducing Netflix's costs but freeing up transit capacity for other entities."); *see also* Clark et al., *supra* note 65 (showing that as soon as Netflix and Comcast came to a peering arrangement, congestion across backbone networks essentially disappeared).

80. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 198; *see also Access Power*, *supra* note 72 (stating that peering has the benefits of lower latency and better control over routing, and may therefore lead to lower packet loss).

81. 2015 OPEN INTERNET ORDER, *supra* note 4, at 88 n.495 [hereinafter Verizon Reply] ("In fact, today the majority of traffic destined for our end-user subscribers is delivered to Verizon over paid, direct connections with CDNs and large edge providers, not over connections with our traditional, settlement-free peering partners.").

Courts give considerable deference to interpretative regulations promulgated by administrative agencies to clarify ambiguities in statutes.[82] Additionally, courts have favored agency regulations, promulgated under statutory authority, that allow for private lawsuits, for which the regulations are reasonable statutory interpretations and are linked to a general private right of action.[83] In the 2015 Open Internet Order, the FCC interpreted paid prioritization and throttling to be "unjust or unreasonable" practices under section 201(b).[84] And given section 206's explicit grant of a private right of action to "the person or persons injured . . . in consequence of any such violation" that is "prohibited or declared to be unlawful,"[85] individuals or corporations affected by alleged violations of the 2015 Open Internet Order would have a cause of action in "any district court of the United States of competent jurisdiction."[86]

Ironically, in the context of fiber optic build-out and the benefits of IPTV, the biggest problem with these bright-line rules is that they are so clear. In other words, once throttling or paid prioritization has been established as an unjust or unreasonable practice by the FCC, it is a per se violation of Title II, regardless of whether the practice hurts consumers. The 2015 Open Internet Order, then, unambiguously compelled federal courts to require ISPs to pay damages to edge providers for alleged harms—even if those harms could not be attributed to disreputable ISP business practices. For example, prioritization of a company's own content

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82. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

83. Alexander v. Sandoval, 532 U.S. 275, 284 (2001) ("A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well."); Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45, 47–48 (2007) ("In our view, the FCC's application of § 201(b) to the carrier's refusal to pay compensation is a reasonable interpretation of the statute; hence it is lawful. And, given the linkage with § 207, we also conclude that § 207 authorizes this federal-court lawsuit.").

84. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 110 ("For the reasons described below, we find each of these practices is inherently unjust and unreasonable, in violation of section 201(b) of the Act."); 47 U.S.C. § 201(b) (2018).

85. 47 U.S.C. § 206 (2018).

86. 47 U.S.C. § 207 (2018).

is included in the definition of paid prioritization, so VoD content delivered to a user using dedicated bandwidth could be a violation of Title II subject to damages and even injunction.[87]

Additionally, in a Title II regulatory world, companies could face suits that invalidate entire business models centered on efficient systems of paid peering to deal with increased data usage.[88] Whereas the FCC imposed at least bright-line rules for throttling, the case-by-case approach meant that ISPs could never be certain whether the FCC would decide that one of their recent peering arrangements violated the 2015 Open Internet Order. This created regulatory uncertainty, which detrimentally affected negotiations on economically efficient paid peering deals between edge providers and ISPs.[89]

Even if an ISP could escape liability for its violation of section 201(b),[90] it would still have to cope with two more provisions in Title II. First, it would have to contend with section 202's prohibition on discrimination in service.[91] It would also have to deal with the 2015 Open Internet Order's catch-all "no unreasonable interference" section, which seems to be yet another interpretation of section 201 with which ISPs would have to contend.[92]

The several potential bases for a private right of action could allow competing edge providers to use the courts as a means to settle competitive business disputes. These private actions could threaten to create an economic atmosphere in which competitive

87. *See* discussion *infra* Section IV.

88. *See* Verizon Reply, *supra* note 81; *see also* Lyman Chapin & Chris Owens, *Interconnection and Peering Among Internet Service Providers*, INTERISLE CONSULTING GROUP (2005), http://www.interisle.net/sub/ISP%20Interconnection.pdf.

89. *See* B. Pablo Montagnes & Stephane Wolton, *Rule Versus Discretion: Regulatory Uncertainty, Firm Investment, and Bureaucratic Organization*, 79 J. OF POL. 2 (2017) ("As has been stressed in a large business and economics literature, regulatory uncertainty can discourage firm investment and, as a result, depress economic growth and social welfare."); *see also* Dalia Patiño-Echeverri et al., *Economic and Environmental Costs of Regulatory Uncertainty for Coal-Fired Power Plants*, 43 ENVTL. SCI. & TECH. 3, Feb. 2009, at 578–84 (reviewing regulatory uncertainly in terms of Energy Regulation); Kristen Wilson & Stan Veuger, *Information Frictions in Uncertain Regulatory Environments: Evidence from US Commercial Banks*, 79 OXFORD BULL. OF ECON. & STAT. 2, Jun. 25, 2016 (discussing the effects of regulatory uncertainly in American Commercial Banking).

90. *See* discussion *infra* Section IV.

91. 47 U.S.C. § 202 (2018).

92. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 133–37.

disputes are settled not on the economic and competitive merits, but in courtrooms adjudicated by judges without any particular expertise in high-level network engineering. As seen through other areas of the law,[93] courts should be hesitant to adjudicate business disputes in their courtrooms. These lawsuits would stem the tide of innovation that Internet companies have created through competition. There are some significant barriers to the successful filing and litigation of these suits, but the barriers are not sufficient to guarantee that the private right of action would not threaten the beneficial competition currently sweeping the content delivery marketplace.

IV. THE INSUFFICIENT BARRIERS TO SUITS

Current barriers to competition-based suits are insufficient to restrain the courts from impinging on innovation in the ISP arena, and the FCC must rethink the private right of action if it reinstitutes net neutrality regulations. Below is a discussion of the four main barriers to meritless lawsuits under the current rules and, following that, a description about the insufficiency of the current barriers.

A. Standing

The first barrier that any edge provider would have to surpass in order to bring suit is the standing requirement; however, this requirement would not significantly bar edge providers from pursuing a competition-based suit. Rule 12(b)(6) of the Federal Rules of Civil Procedure allows courts to dismiss suits that lack the proper standing.[94] Under sections 206 and 207, plaintiffs have a right to bring an action in federal district court "for the recovery of the damages for which such [Title II carrier] may be liable under the provisions of this Act."[95] Sections 201 and 202 arguably only create a cause of action that applies to plaintiffs who were directly damaged by the conduct of the defendant;[96] however, courts have

93. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 448 (1993) ("The purpose of the [Antitrust Laws] is not to protect business from the working of the market."); A.A Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989) ("Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare price down to cost, all in pursuit of more business.").

94. FED. R. CIV. P. 12(b)(6).

95. 47 U.S.C. §§ 206–207 (2018).

96. *See* Brief for Petitioner at 40, Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45 (2007) (No. 05-705) (using Conboy v. AT&T Corp., 241 F.3d 242, 250 (2d Cir. 2001) to argue that the interpretation

rejected the argument that section 206 should be construed narrowly and have allowed indirectly injured plaintiffs to sue companies that violated the Communications Act.[97]

In a suit between an edge provider and an ISP with its own content delivery platform, customers with slower connections would be the directly injured party, and the edge provider losing business to the ISP would be the indirectly injured party. Under a narrow interpretation of sections 206 and 207, suits would be limited to plaintiffs who were directly injured by a violation of the Act. This would be an incredibly limited private right of action. *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.* demonstrates that the "proper focus [of the right of action] is not [the substantive provision that was violated], but the Act's liability and damages provisions, sections 206 and 207."[98] Additionally, while specific provisions may require an inquiry into the direct or indirect violation to address culpability, those sections are not actually relevant to a question of standing because sections "206 and 207 of the Communications Act confer upon the plaintiff the right to bring an action to recover for its injuries," even if a "substantive provision may not provide the plaintiff with a particular right."[99]

Moreover, courts have specifically granted standing (and eventually damages) to a plaintiff through section 202's discrimination clause[100] when a telephone common carrier used its power to prioritize its own services over that of its competitors.[101] Although the *National Communications Association* decision involved long-distance telephone service, its principles would still

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of the Interstate Commerce Act requires the Court to dismiss an indirect claim under the Communications Act because the Communications Act was "expressly modeled" after the Interstate Commerce Act); Law Offices of Curtis V. Trinko, LLP. v. Bell Atl. Corp., 123 F. Supp. 2d 738, 745 (S.D.N.Y. 2000) (concluding that plaintiff's section 207 claim requires a direct violation of the Act); *see also* N. Valley Commc'ns, LLC v. Sprint Commc'ns Co. P'ship, 618 F. Supp. 2d 1076, 1083 (D.S.D. 2009) (summarizing Sprint's argument that the plaintiffs were not directly overcharged and thus did not have standing to bring a suit.).

97. *See* Law Offices of Curtis V. Trinko, LLP. v. Bell Atl. Corp., 305 F.3d 89, 98 (2d Cir. 2002), *rev'd on other grounds sub nom.*, Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (invalidating the District Court's theory that the private right of action applies only to plaintiffs that were directly injured).

98. *Id.* at 98.

99. *Id.*

100. 47 U.S.C. § 202(a) (2018).

101. Nat'l Commc'ns Ass'n, Inc. v. AT&T, 238 F.3d 124, 127 (2d Cir. 2001).

apply to a potential case between an edge provider and an ISP using fiber to create a "fast-lane" for its own content. Courts have interpreted sections 206 and 207 as "broadly written."[102] Therefore, standing requirements pose no significant check on competition-based lawsuits.

B. Statutory Interpretation

Edge providers would also have to show that the ISP's conduct actually violated the Communications Act. This similarly would not sufficiently deter competition-based suits. There are three parts to determining whether an ISP's conduct violates the Communications Act. First, a court must decide whether the provider's conduct violates the 2015 Open Internet Order. Second, it must determine whether a violation of the 2015 Open Internet Order is a violation of the Act. Third, a court must determine whether any of the statutory exceptions apply to the behaviors.

1. Creating a Fast Lane Would Violate the 2015 Open Internet Order

As seen above, the development of fiber optic delivery systems, the creation of consumer-friendly VoD services, and the economic realities of transporting increasing amounts of data between edge providers and ISPs may have already created situations in which the provisions of the 2015 Open Internet Order are violated. This is especially true for bright-line rules against throttling and paid prioritization, which outlaw prioritizing provider-affiliated content.[103] Once a court determines that an ISP treats its own data differently, that behavior violates the 2015 Open Internet Order.

2. *Chevron* Deference and the Well-Defined Parameters of the 2015 Open Internet Order

The second part of determining whether conduct violates the Communications Act is deciding whether a violation of the 2015 Open Internet Order is a violation of the Act. Under longstanding precedent from *Chevron*, the courts defer to administrative agencies' interpretations of law when the agency has the authority to interpret a statute and that interpretation is not "arbitrary and

102. *Trinko*, 305 F.3d at 98.

103. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 125.

capricious, or manifestly contrary to the statute."[104] In this case, the FCC elaborated upon its interpretation of "unfair and unreasonable" in the 2015 Open Internet Order. Its reinterpretation does not create significant barriers for edge providers looking to sue ISPs. The Supreme Court in *Global Crossing* endorsed the idea that the FCC has the power, via its regulatory rulemaking authority and the specific statutory text, to declare certain practices "unjust or unreasonable."[105] Therefore, engaging in conduct it declares "unjust or unreasonable" could give rise to a private right of action.[106] The dissent in *Global Crossing* was troubled that the regulations at issue did not explicitly link to section 201(b)'s "unjust and unreasonable" clause, and thus should not have been subject to section 206's private right of action for a violation of the Act.[107] Over these objections, however, the majority ruled that the FCC's determination that a carrier's violation of a substantive regulation[108] constituted a violation of section 201(b) was "unreasonable, and thus lawful."[109]

In such a suit arising out of the 2015 Open Internet Order, there would be no question of whether the regulation was sufficiently linked to a provision in the Act because the FCC explicitly detailed the rules governing Internet network policies in an interpretative regulation. In other words, the 2015 Open Internet Order was a rulemaking device that sought to redefine an

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104. Chevron v. Nat'l Res. Def. Council, 467 U.S. 837, 843–44 (1984).

105. 42 U.S.C. § 201(b) (2018).

106. Glob. Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc., 550 U.S. 45, 46 (2007) (determining that the regulation "easily fits within the language of the statutory phrase" of sections 206 and 207).

107. *Id.* at 69–70 (Scalia, J., dissenting) (explaining that "substantive" regulations that seek to accomplish some governmental goals and "interpretive" regulations that interpret a statute are different and do not share the same private right of action– "that is why Congress has separately created private rights of action for violations of *certain* substantive regulations").

108. In this case, failure to properly pay mandated pay-phone fees is a violation of § 276. *See id.* at 59.

109. Glob. Crossing Telecomms., 550 U.S. at 46 (citing *Chevron*, 467 U.S. at 843–44) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); *see also* In the Matter of APCC Servs., Inc. et al., 21 F.C.C. Rcd. 10488, 10492 (2006) (explaining that a violation of any of the regulations is a violation of the Act).

ambiguous statutory term: "unjust or unreasonable."[110] The FCC explicitly determined that certain practices, like throttling, were unjust and unfair.[111] By unambiguously explaining that it was reinterpreting the definition of section 201, the FCC clearly instituted its interpretive authority under *Chevron*.

3. Reasonable Network Management

The third and most difficult part of determining whether conduct violated the Act is to determine whether the conduct fits into the 2015 Open Internet Order's exceptions. If a court finds that certain conduct falls into one of the exceptions, the ISPs using the technology would obtain dismissal of the suits because sections 206 and 207 only permit suits for violations of the Act. Unfortunately, given the 2015 Open Internet Order's language and system of exceptions, it is unlikely that an ISP's discriminating conduct would ever fit into one of the exceptions.

The most notable exception is for "Reasonable Network Management," which allows providers to "optimize overall network performance and maintain a consistent quality experience for consumers while carrying a variety of traffic over their networks."[112] The FCC outlined the boundaries of the exception, defining a network management practice as "a practice that has a primarily technical network management justification, but does not include other business practices."[113] Per the exception, "a network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."[114]

The FCC elaborated by specifying that the exception only applies if "the practice is primarily motivated by a technical network management justification rather than other business justifications."[115] Theoretically, whether the fast lane used to deliver content to customers via VoD is motivated by a business or technical network management justification should be a question of fact. This could potentially lead to a finding that the practice is a reasonable network management practice and thus should not be

110. 47 U.S.C. § 201(b) (2018).
111. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 110.
112. *Id.* ¶ 215.
113. *Id.*
114. *Id.*
115. *Id.* ¶ 216.

considered a violation. Unfortunately, the FCC concluded in the 2015 Open Internet Order that the Reasonable Network Management exception should not apply to paid prioritization because it "is not a network management practice because it does not primarily have a technical network management purpose."[116]

The problem is that the FCC included affiliated content in the definition of paid prioritization.[117] This definition of the exception takes the factual determination of whether conduct is primarily technical or business orientated out of judges' hands and necessitates that even if a factfinder found that a fiber VoD delivery system's use of a fast lane was required as part of the technical aspects of such a system, the practice would still be considered a violation of the Act subject to a private right of action. This provision in the 2015 Open Internet Order removed one of the primary ways a court could have prevented frivolous suits that are blatantly motivated by business competition, giving edge providers a means to attack their competitors' systems.

Additionally, it is unlikely that a paid peering arrangement, which was subject to case-by-case review, would receive preferential treatment under the Reasonable Network Management provision. First, the FCC record is filled with testimony that frames paid peering as a purely economic issue, not a network management issue, by focusing on alleged slowdowns of service during the Comcast-Cogent and Sprint-Cogent business disputes.[118] As a practical matter, it is hard to conceive of a contractual relationship between an edge provider and an ISP as anything other than a business relationship. This is especially true given that the new trend of paid peering arrangements breaks with the previous tradition of allowing traffic exchange without any financial settlement.[119] As discussed previously,[120] the days of settlement-free

116. *Id.* ¶ 217.

117. *See id.* at 100 n.561 (indicating that the FCC did not forget its definition of paid prioritization, as demonstrated by the inclusion of a footnote establishing that giving preferential treatment to affiliated content would not be subject to the exception).

118. *See id.* at 89 n.499–509.

119. *See* Kevin Werbach, *The Centripetal Network: How the Internet Holds Itself Together, and the Forces Tearing It Apart*, U.C. DAVIS L. REV. 342, 343 (2009) ("The assumption [was] that the networks gain roughly equal benefits from the relationship, and therefore metering and billing for traffic passing in each direction merely adds complexity and transaction costs to the relationship."); Michael Kende, *The Digital Handshake: Connecting Internet Backbones* 5 (F.C.C., Working Paper No. 32, 2000) ("The second distinctive characteristic of peering is that peering partners exchange traffic on a settlements-free basis. The only costs that backbones incur to peer is that each

peering are gone. Paid peering arrangements, which are both efficient and popular, are here to stay. However, because the network management exception requires that a practice be primarily motivated by a technical issue, rather than a business justification,[121] it is unlikely that the exception would capture paid peering arrangements if subject to review by the courts.

C. FCC Action

The third hurdle a plaintiff edge provider would have to overcome is the potential unilateral action of the FCC to prevent lawsuits. Even with substantial authority, however, all basic FCC actions would be ineffectual in solving the private right of action problem.

Specifically, the FCC could pursue two types of actions to limit suits between edge providers and ISPs. First, it might use its forbearance authority to attempt to bar certain types of regulations on specific providers, as it did in the 2015 Open Internet Order. Second, the FCC might start a new rulemaking procedure to specifically exempt providers from requirements in special circumstances (e.g., VoD fiber optic delivery systems). However, neither of these are real solutions as the FCC lacks the authority to prevent the private right of action, and there exists a variety of practical problems, including arbitrary line-drawing and the political implausibility of such a compromise.

1. Forbearance

The FCC under any sort of Title II regulatory scheme would not be able to forbear the private right of action. The FCC has broad authority to decline to enforce certain regulations and code provisions if forbearance is in the public interest.[122] Moreover, the

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partner pays for its own equipment and the transmission capacity needed for the two peers to meet at each peering point.").

120. *See* Section III.B, *supra*.

121. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 216.

122. 47 U.S.C. § 160(a) (2018) ("In making the determination under subsection (a)(3) [that forbearance is in the public interest], the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.").

most recent update of the Communications Act, the Telecommunications Act of 1996, gave the FCC further instructions on how to use its forbearance authority, "explicitly directing the FCC to 'utiliz[e]' forbearance to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'"[123] Given the possible harms of allowing suits between edge providers and ISPs,[124] and the potential effects those suits could have on fiber optic build-out, investment, and innovation, it would be good policy to curtail the ability of certain individuals to bring private suits. Unfortunately, the FCC simply does not have the authority to do so.

Notably, the FCC originally declined to forbear any part of sections 206 or 207 in the 2015 Open Internet Order. The FCC argued that such forbearance "'would eviscerate the protections of section 208' because '[w]ithout the possibility of obtaining redress through collection of damages, the complaint remedy is virtually meaningless.'"[125] Even if the FCC elects to use its forbearance authority, it is unlikely that the FCC would be able to curtail a private right of action. Sections 206 and 207 were specifically included in the Communications Act to serve as a private law enforcement mechanism to allow customers to recover against carriers that unfairly overcharged them.[126] Even though the FCC has broad rulemaking and forbearance authority, these powers would not extend to contravening such an explicit provision in the Act. Using forbearance to essentially delete a significant portion of the Communications Act would contradict the FCC's obligation to "give effect to the unambiguously expressed intent of Congress."[127]

The Supreme Court in *MCI Telecommunications v. AT&T* is commonly interpreted to stand for the proposition that "an agency

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123. Earthlink v. FCC, 462 F.3d 1, 8–9 (D.C. Cir. 2006) (quoting section 706 of the Telecommunications Act of 1996).

124. *See* Section II, *supra*.

125. See 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 453 (quoting In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411, 1482 ¶ 16 (1994)).

126. Sections 206 and 207 originate from § 9 of the Interstate Commerce Act, which was enacted during the monopoly era in order to allow customers to recover from railroads that overcharged them. *See Regulation of Interstate and Foreign Communication by Wire or Radio, and for Other Purposes: Hearings on H.R. 8301 Before the H. Comm. on the Interstate and Foreign Commerce*, 73rd Cong. 5 (1984) (statement of William P. Cole, Jr., Member, H. Comm. on the Interstate and Foreign Commerce).

127. Nat'l Ass'n of Home Builders v. Def. of Wildlife, 551 U.S. 644, 665 (2007) (quoting Chevron v. Nat'l Res. Def. Council, 467 U.S. 837, 843 (1984)).

may not exercise forbearance authority unless Congress has granted it that authority using relatively clear language . . . at least where forbearance would result in a 'fundamental revision' of the regulatory scheme enacted by Congress."[128] The intention behind such a flat prohibition against forbearance that fundamentally changes a statute is to preserve the separation of powers[129] and to prevent unauthorized "backdoor-repeal[s]."[130] This prohibition applies equally to administrative actions that seek to implement legitimate and uncontroversial policy goals, even those that courts determine to be a "good idea."[131] No matter what the purpose of the forbearance is, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."[132]

In this case, sections 206 and 207 unambiguously give individuals injured by Communications Act violations a remedy in the district court of their choice.[133] Even though forbearing the private right of action may be good policy, administrative law prevents the FCC from barring these types of lawsuits via forbearance order.

2. New Rulemaking Procedure

There is not a flat prohibition on a new rulemaking procedure to redefine key terms to exempt certain services, like fiber optic VoD or efficient paid peering agreements; however, a litany of legal, practical, and political barriers would make it difficult to use this new rulemaking procedure to deal with frivolous FCC suits. A new rulemaking procedure could, for example, define broadband to exclude VoD fiber optic services, or define paid prioritization to exclude VoD content from receiving priority because of the

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128. Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1606–07 (2016) (quoting MCI Telecomms. v. AT&T, 512 U.S. 218, 231 (1994)).

129. *See* Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427, 2446 (2014) (quoting U.S. Const., Art. II, § 3) ("[allowing a fundamental change to a statute] would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them.").

130. Deacon, *supra* note 131, at 1607.

131. *See MCI Telecomms. Corp.*, 512 U.S. at 232 (ruling that a forbearance action that sought to remove rate regulation for some carriers was illegal because congress mandated rate regulation for all carriers and did not include forbearance authority).

132. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2445.

133. 47 U.S.C. §§ 206–207 (2018).

technology's technical aspects. Any redefinition of rulemaking procedure, however, would face considerable opposition.

From a legal standpoint, a rulemaking procedure that exempts some ISPs but leaves others completely covered (i.e., those without fiber optic VoD offerings) would require some arbitrary line-drawing. Whether it would rise to the "arbitrary and capricious" standard from the Administrative Procedure Act (APA) that is required for a reviewing court to overturn an administrative ruling is another question,[134] given how deferential of a standard "arbitrary and capricious" has become, especially in the FCC context.[135]

Regardless of whether a potential rulemaking would be considered arbitrary in an APA context, the practical problems of an order that redefined key terms predominate any legal issues. As a general matter, it would be hard to reconcile the 2015 Open Internet Order's stated goal[136] with a regime that is biased towards certain types of services. As previously stated, government agencies are reluctant to become the final arbiter of business success, and giving one type of ISP a regulatory advantage over others would be just as problematic as allowing edge providers to use the courts as an arbiter in competitive business disputes with competing ISPs.

When put in the context of the economic and political disagreements that drove the net neutrality debate,[137] this solution would satisfy very few. Edge providers would still face discrimination, and some ISPs would be at a huge disadvantage. It is hard to imagine the FCC granting any market advantage to ISPs and competitors of popular streaming services.

D. Damages and Causation

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134. 5 U.S.C. § 706 (2018).

135. *See* Louis Virelli, *Deconstructing Arbitrary and Capricious Review*, 93 N.C. L. REV. 721, 729 (2014) (explaining that the Supreme Court has rarely ruled against agencies using the arbitrary and capricious review standard, citing two cases: Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (holding that the Secretary of Transportation's decision to build a highway through a park was arbitrary and capricious because there was no "fulsome review" of the entire administrative record) and Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983) (holding, in part, that the NHTSA's removal of certain safety regulations was arbitrary and capricious because the agency "submitted no reasons at all" for its decision); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 512–13 (2009) (holding that the FCC's change in rules about expletives was not arbitrary and capricious because it was "entirely rational").

136. *See* 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶¶ 1–15.

137. *See* Part I, *supra*.

The last and biggest roadblock facing an edge provider in attempting to bring a section 206 suit is showing damages and causation. The practical difficulties of assessing damages, the tediousness of showing causation, and the potential for other penalties like legal fees and injunctions all pose significant, but ultimately insufficient, challenges for motivated edge providers craving suits motivated purely by competition.

1. Damages

First, damages pose a significant but insufficient hurdle to unnecessary suits because, although sections 206 and 207 broadly grant plaintiffs to pursue actions for any violation of the Act, these sections require plaintiffs to show actual damages.[138] Courts initially refused to allow presumed damages[139] even in cases of rate or service discrimination,[140] and have refused to increase damage awards as authorized by the 1996 amendments to the Act.[141] Plaintiffs, accordingly, have to show with significant evidence that they suffered economic harm attributable to a defendant's violation of the Act.

Showing damages would have been difficult in previous generations of communications technology because of the information asymmetry between individual claimants and large telecommunications companies. Today, technology makes it much easier to show such damages. Services like Google Analytics, for example, allow websites to track the quantity and demographics of

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138. Exch. Network Facilities for Interstate Access Allnet Commc'ns Serv., Inc., 1 F.C.C. Rcd. 618 (1986) ("The measure of damages is not the difference between the discriminatory rate to customers and a just and reasonable rate, but *actual* damage to the complainant by virtue of the unlawful preference, or profits lost because of the ability of the favored customer to control the market price of complainant's goods or services.") (emphasis added). *See* Interstate Commerce Comm'n v. United States ex. Rel. Campbell, 289 U.S. 385, 390 (1933) ("Recovery cannot be had unless it is shown, that as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted." (quoting Keogh v. C. & N.W.R. Co., 260 U.S. 156, 165 (1922))).

139. *See* Commc'ns Satellite Corp., 97 F.C.C.2d 82 (1984) ("[I]t is beyond doubt that under both Title II of the Communications Act and its predecessor, the Interstate Commerce Act (ICA), damages are not presumed to flow from violations of the Acts."); *see also Interstate Commerce Comm'n*, 289 U.S. at 390.

140. Ill. Bell Tel. Co. et al. v. Amer. Telephone & Telegraph Co. et al., 4 F.C.C. Rcd. 5268 (1989) (applying the actual damages requirement to cases of discrimination under section 202(a)).

141. Conboy v. AT&T Corp., 241 F.3d 242, 251 (2d Cir. 2001) ("When Congress enacted Section 222 in 1996, it provided no evidence that it intended to expand the scope of recoverable damages under Sections 206 and 207.").

site visitors and many of these services even allow predictive analysis.[142] Google offers introductory versions of the software for free,[143] so even small edge providers considering suing might easily show, for example, how subscribers have dropped.

2. Causation

Causation creates another problem for potential plaintiffs. Edge providers will have difficulty showing that an ISP's discriminatory actions proximately caused any losses in subscribership.[144] However, such a determination would be based on the acquisition of market data that is much easier to obtain now. Importantly, lawsuits can affect competition through more and other modes than judgments. Questions of damages are brought up after a determination of liability, long after motions to dismiss have been denied. If granted, dismissal would save litigants the time, effort, and money needed to defend a suit from a competitor.

E. Current Barriers to Frivolous Suits Are Insufficient

Title II's private right of action and the broad provisions of the 2015 Open Internet Order essentially transfer the power of deciding which practices to outlaw from the FCC to the courts. The practical and legal difficulties of instituting a rulemaking or forbearance procedure to exempt certain practices would make such a strategy supremely difficult for the FCC to undertake. Even if the FCC decided that certain practices, like fiber optic paid prioritization or peering arrangements, were in the public interest, it would struggle to allow such practices given the language of the 2015 Open Internet Order. The general protections—standing and strict statutory interpretation—that courts put in place to stop frivolous suits would not keep them from advancing.

Courts have already denied injunctive relief to plaintiffs who seek it against ISPs violating the 2015 Open Internet Order.[145]

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142. *See Analytics Overview*, GOOGLE ANALYTICS SOLUTIONS, https://www.google.com/analytics/analytics/overview/ (last visited Apr. 13, 2018).

143. A limited version of the software, suitable for small sites, is available for free, while the premium version of the tools starts at $150,000 a year. *Id.*

144. No court has held that proximate cause is a requirement of section 206, however such a discussion is outside the scope of this paper. *See* Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp., 305 F.3d 89, 100 (2d Cir. 2002) ("[W]e have not held that Sections 206 and 207 of the Communications Act contain a requirement of proximate cause").

145. *See Conboy*, 241 F.3d at 256 (denying injunctive relief for a violation of section 222); *see also* N. Valley Commc'ns, LLC v. Sprint Commc'ns Co.

Although no court has specifically denied injunctive relief under section 201, the reasoning of the *Conboy* court, which denied injunctive relief for a violation of section 222, in conjunction with the other sections of the code that specifically allow for injunctive relief,[146] provide that injunctive relief does not apply to violations of section 201.[147] Even without the threat of a court-ordered injunction, edge providers can wield litigation as a powerful tool to disrupt competitors' business models. First, although courts would certainly avoid imposing injunctions, the FCC explicitly left the injunctive remedy available for cases it hears.[148] Second, section 206 explicitly awards attorneys' fees to successful plaintiffs,[149] which could subsidize edge provider suits even without large damages awards. Third, the economic power of potential lawsuits should not be underestimated, especially in a sector with low barriers to entry and remarkably low marginal returns.[150] Moreover, because edge providers and ISPs are constantly

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P'ship, 618 F. Supp. 2d 1076, 1084–85 (D.S.D. 2009) (denying injunctive relief for a violation of section 202).

146. For example, sections 401(a) and 401(b) of the Act permit federal courts to grant injunctive relief but only upon application of the Attorney General of the United States to enforce certain orders of the FCC. *See id.* at 1084.

147. *Id.* ("The fact that the Communications Act is not silent as to the remedies available for violation of its provisions suggests that Congress did not intend the full range of remedies, specifically equitable relief, to be available."); Franklin v. Gwinnett City Pub. Sch., 503 U.S. 60, 68 (1992) ("[A]ll appropriate relief is available in an action brought to vindicate a federal right when Congress has given *no indication* of its purpose with respect to remedies.") (emphasis added).

148. *See* 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 245.

149. 47 U.S.C.A. § 206 (2016).

150. NYU STERN BUSINESS SCHOOL, OPERATING MARGINS BY SECTOR: TELECOMMUNICATIONS (WIRELESS), (2017), http://people.stern.nyu.edu/adamodar/New_Home_Page/dataarchived.html (showing an average return of -2.34% on Wireless companies). *See also* Saul Hansell, *A Bear Speaks: Why Verizon's Pricey Fios Bet Won't Pay Off*, N.Y. TIMES (Aug. 19, 2008), https://bits.blogs.nytimes.com/2008/08/19/a-bear-speaks-why-verizons-pricey-fios-bet-wont-pay-off (showing that, Verizon Fios—the prototypical fiber delivery service—has suffered an unimpressive return from their FIOS investments, and the wireless telecommunications sector as a whole has achieved lower than average marginal returns); Brendan Greeley, *America's 10 Year Experiment in Broadband Investment Has Failed,* BLOOMBERG (Feb. 20, 2014), https://www.bloomberg.com/news/articles/2014-02-20/americas-10-year-experiment-in-broadband-investment-has-failed; Susan Crawford, *Google Fiber Was Doomed from the Start*, WIRED (Mar. 14, 2017), https://www.wired.com/2017/03/google-fiber-was-doomed-from-the-start/ (detailing the financial issues that forced Google to "pause" its fiber program).

negotiating about data usage and potential partnerships,[151] the private right of action serves as an arbitrary bargaining chip for edge providers that both the courts and the FCC are unable to prevent using current roadblocks.

V. CONCLUSION

On January 23, 2016, newly elected President Trump appointed Ajit Pai as the new FCC Chairman.[152] Chairman Pai successfully led the FCC to repeal the Title II reclassification in 2017.[153] Although Chairman Pai and his opponents disagree on Internet regulation, they all believe that the Internet is an incredibly dynamic and important system that must be preserved.[154]

The content delivery marketplace is a rapidly changing and incredibly innovative sector of the economy. For example, Netflix started offering streaming services less than ten years ago and now it faces unprecedented competition from other edge providers and even ISPs. The FCC's decision to reclassify broadband to stop discrimination and keep the Internet "open for consumers and for the innovation created by applications developers and content companies"[155] threatened the same innovation the FCC was attempting to protect. Although the 2015 Open Internet Order is no longer in effect, the enthusiasm for net neutrality portends that a future FCC will seek to reinstitute some sort of net neutrality regulations. Given this eventuality, it is important to consider the potential harms of the 2015 Open Internet Order's version of regulation.

The private right of action built into Title II would allow edge providers, who have been on the cutting edge of the innovation curve for the past ten years, to chill competitive innovation. The private right of action also creates a regulatory scheme whereby

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151. *See* Edward Wyatt & Noam Cohen, *Comcast and Netflix Reach a Deal on Service*, N.Y. TIMES (Feb. 23, 2014), https://www.nytimes.com/2014/02/24/business/media/comcast-and-netflix-reach-a-streaming-agreement.html.

152. Harold Furchtgott-Roth, *President Trump Designates Ajit Pai as Chairman of FCC*, FORBES (Jan. 22, 2017), https://www.forbes.com/sites/haroldfurchtgottroth/2017/01/22/president-trump-designates-ajit-pai-as-chairman-of-fcc/#75ee1f651577.

153. Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html.

154. *Id.*

155. 2015 OPEN INTERNET ORDER, *supra* note 4, at ¶ 1.

courts could subsidize the cost of economic change for losing companies. Changes in delivery technology could make these issues moot by eliminating the paid prioritization and throttling issues entirely;[156] however, it is essential that technologies be free to compete based on quality and pricing, rather than pressured to complete based on access to lawyers and lobbyists.

The FCC, under both its current and future leadership, should strongly consider the problems of Title II regulation as it revisits the issue in the years to come. First, as seen above, a private right of action could create anti-competitive effects that negatively impact the scope and scale of innovation. Second, as cases become more technical, courts are struggling with a lack of expertise,[157] raising questions about whether the federal courts are the most suitable authority to direct network architecture policies. When dealing with issues of network architecture and electrical engineering, the FCC is by far the most capable arbiter for Internet-based companies and consumers. If net neutrality is a policy that the FCC wishes to pursue, it should limit its regulatory ambit and keep cases in the administrative sphere, making sure that well-meaning rulemaking does not end up spoiling the meritocracy of the innovative marketplace.

156. *See* Shicong Meng, Ling Liu & Jianwei Yin, *A Collaborative and Scalable Platform for On-Demand IPTV Services*, 6 IEEE TRANSACTIONS ON SERVICES COMPUTING 358 (2013) (proposing a new collaborative system that could make VoD more efficient to transport); Elias Granja Jr. et al., *Managing QoS Constraints in a P2P-Cloud Video on Demand System,* IEEE 9TH INTERNATIONAL CONFERENCE ON CLOUD COMPUTING (2016) (using P-2-P technology to make VoD delivery more efficient).

157. *See generally* Stephen Breyer, *Science in the Courtroom*, 16 ISSUES IN SCIENCE AND TECHNOLOGY 52 (2000).