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Broadband Regulatory Compliance Update

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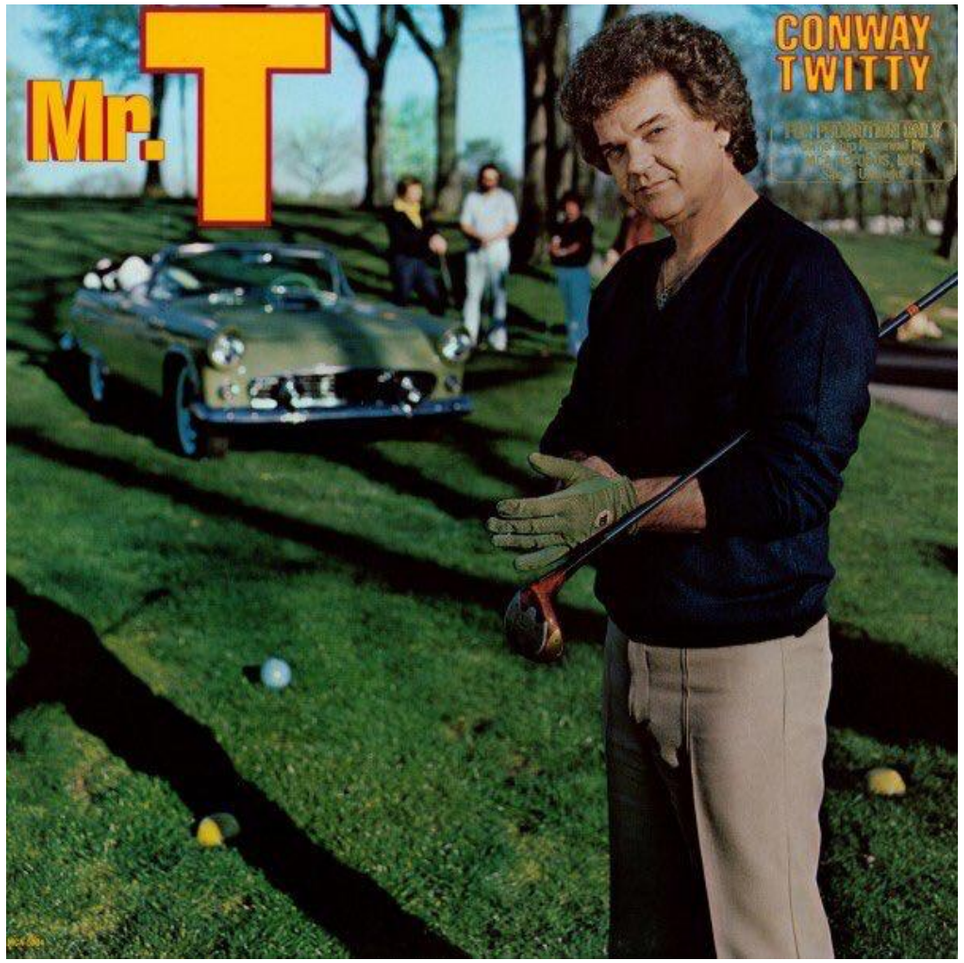
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Regulation of the Internet

- How did we get here?
- Where are we now?
- What do we need?
- Where are we going?

How did we get here?

- September 2005: FCC Internet Policy Statement

Internet Policy Statement

- To encourage broadband deployment and preserve and promote an open and interconnected public Internet:
  - consumers are entitled to access the lawful Internet content of their choice
  - consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement

Internet Policy Statement

- consumers are entitled to connect their choice of legal devices that do not harm the network
- consumers are entitled to competition among network providers, application and service providers, and content providers

How did we get here?

- August 2008: FCC votes (3-2) to punish Comcast for violations of the 2005 Internet Policy Statement
  - Comcast ordered to disclose its practices and to stop discriminating against BitTorrent traffic
  - FCC decided that it has the power to enforce the policy statement and announced an enforcement framework to be applied to future complaints

How did we get here?

- April 2010: *Comcast vs. FCC*
  - D.C. Circuit determines that FCC does <u>not</u> have ancillary jurisdiction over Comcast's Internet service
  - the Court vacated the 2008 FCC order that asserted jurisdiction over Comcast's network management policies

How did we get here?

- December 2010: FCC Open Internet Order

How did we get here?

- 3 principles derived from 2005 Internet Policy Statement
  - **Transparency**. Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services

How did we get here?

- **No blocking**.
  - Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices
  - Mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services

How did we get here?

- **No unreasonable discrimination**. Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic

How did we get here?

- January 2014: *Verizon v. FCC*
  - D.C. circuit vacated the **No blocking** and **No unreasonable discrimination** rules of the Open Internet Order
  - Court upheld the **Transparency** rule
  - Court provided a "road map" for Title II regulation of ISPs

How did we get here?

- February 2015: FCC Net Neutrality Order

How did we get here?

- FCC announces new rules, following D.C. Circuit's *Verizon* road map
  - BIAS reclassified as a telecommunications service subject to Title II common carrier regulation
    - **No blocking**
    - **No throttling**
    - **No paid prioritization**

How did we get here?

- **General conduct rule**: ISPs may not unreasonably interfere with or unreasonably disadvantage (a) end users' ability to select, access, and use BIAS or the lawful Internet content, applications, services, or devices of their choice, or (b) edge providers' ability to make lawful content, applications, services, or devices available to end users
- **Enhanced transparency rules**

How did we get here?

- June 2016: *U.S. Telecom Assn. v. FCC*
  - D.C. Circuit upholds 2015 Net Neutrality Order

How did we get here?

How did we get here?

- December 2017: FCC Restoring Internet Freedom Order rolls back most 2015 Net Neutrality rules

Where are we?

- RIFO requirements
  - Transparency: FTC & FCC
  - Privacy: FTC
  - Preemption of state regulation
  - RIFO eliminates the position of Open Internet ombudsman, formal complaint rules and advisory opinions established under the 2015 Order

What do we need?

- ISP Transparency Disclosures
  - A broadband provider must disclose (1) **network management practices**, (2) **performance characteristics**, and (3) **commercial terms** by publishing such information (A) on an easily accessible public website or (B) by transmitting it to the FCC via online portal

Network Management Practices

- Blocking
- Throttling
- Affiliated prioritization
- Paid prioritization
- Congestion management
- Application-specific behavior
- Device attachment rules
- Security practices

Performance Characteristics

- Service technology
- Expected speed
- Actual speed
- Latency
- The suitability of the service for real-time applications
- Impact of non-BIAS service on performance of data service

Commercial Terms

- Price
- Privacy policies
- Redress options

Public Disclosure

- A publicly available, easily accessible website
  - May be website of the ISP's choosing, including the ISP's own website
- Disclosures need <u>not</u> be in consumer contracts or provided at the point of sale
  - Must be able to direct consumers to the website or other location where they can review the required disclosures

Public Disclosure

- ISPs may upload a word document or PDF with the required disclosures to the FCC portal
- Document should be accessible to persons with disabilities

What do we need?

- ISP Transparency Disclosure
- Acceptable Use Policy
- End User Privacy Policy
- Terms of Service/Service Contract

What do we need?

- **Acceptable Use Policy**
  - Identify unacceptable uses of the network
  - Identify any limitations on acceptable uses of the network
  - Identify consequences for violations
  - Disclaimers and limitations on liability
  - DMCA notice and takedown processes
  - Customer redress options

What do we need?

- **End User Privacy Policy**
  - What information is collected
  - How information is collected and used
  - How long the information is kept
  - How the information is protected
  - Whether (and with whom) the information may be shared
  - Can the customer limit the use or sharing

What do we need?

- Customer right to access and correct information
- Specific federal statements or disclosures
- Redress options

What do we need?

- **Terms of Service/Service Contract**
  - Legally binding? … Enforceable?
  - Companies can enforce terms by refusing service
  - Customers can enforce terms by filing a suit or arbitration if they can show they were actually harmed by a breach of the terms
  - Consumer issues (FTC and IA AG)

What do we need?

- Changes to terms?
- Special construction or equipment
- Disclaimers and limitations on liability
  - Un-businesslike aversion to risk?

Where are we going?

- November 2018: Supreme Court refuses to void 2015 Net Neutrality Rules
- February 2019: *Mozilla Corp. v. FCC*
  - D.C. Cir. hears challenge to Restoring Internet Freedom Order

Where are we going?

- ISPs
  - Comcast, AT&T, Verizon …
- Internet Companies
  - Google, Netflix, Facebook, Amazon ..
- Congress ???

Where are we going?

- Customer-facing documents
  - ISP Transparency Disclosure
  - Acceptable Use Policy
  - End User Privacy Policy
  - Terms of Service/Service Contract
- Update ISP transparency disclosures as changes occur

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