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## Neutrality in the Modern World: Internet Regulation's Impact on Economics and Society

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## Neutrality in the Modern World: Internet Regulation's Impact on Economics and Society

### Cover Page Footnote

Juris Doctor Candidate, Notre Dame Law School, 2020. Bachelor of Arts in Political Science and Psychology, Vanderbilt University, 2014. I would like to thank the members of the Notre Dame Journal of International & Comparative Law for their review of this note in preparation for publication.

# NEUTRALITY IN THE MODERN WORLD: INTERNET REGULATION'S IMPACT ON ECONOMICS AND SOCIETY

SARAH DEAGOSTINO\*

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## INTRODUCTION

In 2017, under a new Federal Communications Commission (FCC) director, the FCC removed the current net neutrality regulations and developed a plan for protecting an open Internet with fewer regulations.<sup>1</sup> As of 2018, the former net neutrality regulations have officially been repealed. Many U.S. citizens and others around the world worry that this will have a negative impact on consumers and allow Internet service providers and Internet platforms to take advantage of consumers if left unregulated. While the current scheme in the United States is not centered around a highly regulated Internet, there are many countries that

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<sup>1</sup> FEDERAL COMMUNICATIONS COMMISSION, WC DOCKET NO. 17-108, FCC 17-166, DECLARATORY RULING, REP. AND ORDER (Jan. 4, 2018).

have taken a more rigorous stance on protecting neutrality on the Internet. Net neutrality and platform neutrality have more recently become prominent topics around the world.

This Note will examine the European Union's net neutrality regulations, France's recently adopted platform neutrality regulations, and the United States' current lack of Internet regulations. It will also discuss whether the United States should rethink its decision to abandon net neutrality and adopt either the European Union or French approach to Internet regulation. To understand how the regulations exist in their current state around the world, this Note will begin with the history of Internet regulation in the European Union, France, and the United States. This Note will then analyze the current regulations for net neutrality, platform neutrality, and a discriminatory Internet regime that lacks formal legal regulation. This Note will evaluate the effectiveness of each approach both from an economic standpoint and in terms of social impact. This Note will conclude with a recommendation for the United States moving forward in an Internet-driven world.

## I. HISTORY OF EUROPEAN INTERNET REGULATION AND THE CURRENT REGULATORY SCHEME

### A. *NET NEUTRALITY*

Since the early 1990s and the beginning of the surge in Internet usage, the European Union (EU) has been concerned with how Internet service providers should be regulated. In March of 2002, the EU passed Directive 2002/22/EC of the European Parliament and of the Council (the "Directive") on universal service and users' rights relating to electronic communications networks and services (Universal Service).<sup>2</sup> The Directive's intent was to define the type of universal service obligations of telecommunications and network services.<sup>3</sup> It stated that each member of the World Trade Organization (WTO) would be able to define the obligations of its universal service providers and that those obligations would not be viewed as anti-competitive, so long as they are administered in a transparent, non-discriminatory, and competitively neutral manner.<sup>4</sup> At the time the Directive was passed, the primary method of Internet service was through dial-up Internet connection that was directly linked to telephone networks.<sup>5</sup> Therefore, the Directive was linked to both forms of telecommunication. This was the first time the EU began addressing the issue of Internet neutrality. Various other regulations and directives were passed by the EU from 2003 through 2015. These include: Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic

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<sup>2</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services (Universal Service Directive), 2011 O.J., (L 108/51).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

communications sector, Regulation No. 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC), and Regulation No. 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (recast).<sup>6</sup>

In 2015, the EU passed its first regulation that directly addressed the issue of Internet neutrality and amended prior directives and regulations. Regulation No. 2015/2120 of the European Parliament and of the Council of 25 November 2015 set out the measures for regulating open Internet access.<sup>7</sup> Article 1 of the regulation defines the subject matter and scope of the regulation as “establish[ing] common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of Internet access services and related end-users’ rights.”<sup>8</sup> Article 2 provides definitions for the regulation.

Article 3 of the regulation discusses the safeguarding of open Internet access among the EU states and includes five restrictions. The first restriction states that Internet users have certain rights that include accessing and distributing information and content, using application services, and using one’s own choice of equipment to access the Internet.<sup>9</sup> These rights are not impeded by the Internet user’s location, the location of the Internet provider, or the location of the destination or origin of the information.<sup>10</sup> The second restriction deals with agreements between Internet users and providers of Internet access. This restriction states that the agreements dealing with conditions and characteristics of Internet services (for example, price, data volumes, speed) are not allowed to limit the rights given to Internet users in the first restriction.<sup>11</sup> The third restriction requires Internet service providers to treat all Internet traffic equally. This means that the Internet service provider may not discriminate, restrict or interfere with Internet traffic based on the sender or receiver, the content of the Internet activity, the applications used, or equipment used by Internet users.<sup>12</sup> However, this third restriction imposes limitations on its explanation of treating all Internet traffic equally. This restriction does not prevent an Internet service provider from implementing reasonable Internet traffic measures. The restriction goes on to explain reasonable Internet traffic measures as those that are transparent, non-discriminatory, proportionate, and based on objectively different service quality instead of commercial considerations.<sup>13</sup> The restriction

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<sup>6</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications), 2002 O.J. (L 201); Regulation No. 1211/2009 of the European Parliament and of the Council of 25 November 2009 Establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, 2002 O.J. (L 337); Regulation No. 531/2012 of the European Parliament and of the Council of 13 June 2012 on Roaming on Public Mobile Communications Networks Within the Union (Recast), 2012 O.J. (L 172/10).

<sup>7</sup> Regulation No. 2015/2120 of the European Parliament and of the Council of 25 November 2015 Laying Down Measures Concerning Open Internet Access and Amending Directive 2002/22/EC and Regulation No. 531/2012 on Roaming on Public Mobile Communications Networks Within the Union 531/2012, Official Journal of the European Communities, 2015 O.J. (L 310/1).

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

goes on to state that beyond the management measures set forth above, the Internet service providers shall not block, slow down, alter, restrict, interfere with, or degrade certain content or applications. However, they may except as made necessary to comply with EU legislative acts or national legislation that complies with EU law, to preserve the integrity and security of the network for Internet users, or to prevent network congestion as long as equivalent categories of Internet traffic are treated the same.<sup>14</sup> The fourth restriction requires that any Internet traffic management measure may only include processing of an Internet user's personal data if the processing of that data is necessary and proportionate to meet the objectives from the third restriction. It states that the processing of personal data may only occur in accordance with Directive 95/46/EC and Directive 2002/58/EC of the European Parliament and of the Council.<sup>15</sup> The fifth and final restriction in Article 3 states that Internet service providers are free to offer services in addition to Internet access services that optimize certain content, applications, or services, when it is necessary for a particular quality level for the Internet user.<sup>16</sup> However, those providers may only offer those additional services if the network has the capacity to do so without hurting the availability or quality of other users' Internet access.<sup>17</sup>

Article 4 of the regulation sets forth the transparency measures required by Internet service providers in their contracts for Internet service.<sup>18</sup> The contracts must set forth certain information, give clear and comprehensible explanations of the service relating to volume, speed, and services, available remedies for disputes, and publication of certain information.<sup>19</sup> Article 5 addresses the regulation and enforcement of Articles 3 and 4 which are to occur by national regulatory authorities with the guidance of BEREC.<sup>20</sup> Article 6 states that the penalties for failing to abide by the regulation will be defined individually by the member states and must be effective, proportionate and dissuasive enough so as to make sure the regulation is being properly implemented.<sup>21</sup>

In August of 2016, BEREC published guidelines for following Regulation No. 2015/2120.<sup>22</sup> Article 5(3) of Regulation No. 2015/2120 expressly gives BEREC the power to issue guidelines on net neutrality for reliance by national regulatory authorities.<sup>23</sup> The Regulation went into effect as of April 30, 2016 and remains in effect today.

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<sup>14</sup> *Id.* at 8–9.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.*

<sup>22</sup> Body of European Regulators for Electronic Communications (2016) *BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules*, BoR (16) 127, <https://berec.europa.eu/eng/netneutrality/>.

<sup>23</sup> *All You Need to Know about Net Neutrality Rules in the EU*, BEREC, <https://berec.europa.eu/eng/netneutrality/> (last visited Sept. 15, 2019).

## B. *PLATFORM NEUTRALITY*

The Internet neutrality regulations imposed by the EU are the minimum net neutrality restrictions that must be enforced by the member states. Certain member states have chosen to go beyond the limitations imposed by the EU and develop either stricter regulations for Internet neutrality or adopt other forms of Internet regulation of neutrality. France in particular has adopted laws for the implementation and regulation of platform neutrality.

The development of platform neutrality legislation began in May 2014, when the French National Digital Council (FNDC) published a report on platform neutrality.<sup>24</sup> The report laid out four sets of recommendations deemed as priority areas to ensure neutrality by and within the Internet and more particularly Internet platforms.<sup>25</sup> The first recommendation focused on bolstering the effectiveness of the law in relation to digital platforms. The FNDC recommended making better use of current laws and curbing legal and economic uncertainty, using rating agencies to gauge neutrality levels, getting transparency guarantees from platforms and making them available to users, and receiving guarantees from the platforms that their models are sustainable.<sup>26</sup> The next recommendation was to ensure data system fairness when used by platforms.<sup>27</sup> This means that platforms are benefiting from collecting personal data and digital footprints and this information needs to be organized and kept in compliance to guarantee sustainable development.<sup>28</sup> This can be done through introducing a general obligation of fair usage of all data that goes beyond the notion of final usage, giving users final control over the data concerning their online activities and the implication of the use of that data, fostering data fluidity, moving beyond personal data and developing a legal framework for digital footprints, creating heightened transparency and information requirements for platforms, and maintaining fairness between dominant platforms and their users.<sup>29</sup> The third recommendation was to invest in skills and knowledge to bolster competitiveness.<sup>30</sup> This means developing knowledge of the digital world in support of this overarching strategic approach to platform neutrality and using that knowledge to develop digital literacy for individuals, businesses, and the community.<sup>31</sup> The last recommendation of the FNDC was to set the proper conditions to allow alternative neutral platforms to emerge.<sup>32</sup> This is achieved by promoting an open digital development model and building a sustainable digital society by promoting these values and recommendations nationally to other countries.<sup>33</sup> After going through its recommendations, the report defines platform neutrality as the protection of the well-being of citizens

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<sup>24</sup> FRENCH DIGITAL COUNCIL, FRENCH DIGITAL COUNCIL REP. ON PLATFORM NEUTRALITY, OPINION NO. 2014-2 (2014).

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 7–8.

<sup>27</sup> *Id.* at 9–12.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 13.

<sup>31</sup> *Id.* at 13–14.

<sup>32</sup> *Id.* at 15–17.

<sup>33</sup> *Id.* at 15.

through ensuring that the Internet's role as a catalyst for innovation, creation, expression, and exchange is not undermined by development strategies that close it off.<sup>34</sup> Further, platform neutrality includes transparency and equity in collecting, processing, and retrieving information; non-discrimination between forms of expression and shared content; non-monopolization of information production means; non-discrimination in terms of socioeconomic status for access to platforms; and non-discrimination in the technical compatibility or interoperability requirements with platforms.<sup>35</sup> The EU did not adopt a platform neutrality approach following the publication of the FNDC's report but instead developed net neutrality regulations.

Following the EU's adoption of Regulation No. 2015/2120, France passed Law No. 2016-1321 for a Digital Republic of 7 October 2016, which defined the Internet as a public right similar to that of water and electricity and laid out the definition of an online platform operator.<sup>36</sup> The law imposed new obligations on companies that fell under the definition of online platform operator, which aims to ensure loyalty towards consumers by encouraging transparency and the respect of information duties.<sup>37</sup> About a year later, France passed three decrees that focused on the loyalty of online platform operators and worked to implement the law which had been set forth in Law No. 2016-1321 for a Digital Republic.<sup>38</sup> These decrees set forth rules for online platform providers to ensure that the webpages are providing consumers with fair, clear, and transparent information.<sup>39</sup> Discussion of the three decrees regarding platform neutrality follows.

### 1. Decree No. 2017-1434 of 29 September 2017

Decree No. 2017-1434 focuses on the information obligations of online platforms operators.<sup>40</sup> These obligations apply to Article L111-7 of the French Consumer Code and became enforceable as of January 1, 2018.<sup>41</sup> Article L111-7(I) of the French Consumer Code defines an online platform operator as any natural person or legal entity offering, on a professional basis, free of charge or against payment, an online communication service to the public, based on either: (1) the ranking or referencing, through the use of computerized algorithms, of contents, goods, or services offered or uploaded by third-parties; or (2) the bringing together of several parties for the sale of goods, the provision of

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<sup>34</sup> *Id.* at 19.

<sup>35</sup> *Id.* at 19.

<sup>36</sup> Julien-Alexis Defromont, *Obligations for Digital Platforms Under French Consumer Law: New Implementing Decrees Regarding Transparency and Loyalty Published*, FIELDFISHER TECH. AND OUTSOURCING BLOG, (Nov. 21, 2017), <https://technologyandoutsourcingblog.fieldfisher.com/2017/obligations-for-digital-platforms-under-french-consumer-law-new-implementing-decrees-regarding-transparency-and-loyalty-published>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; Décret 2017-1434 du 29 septembre 2017 relatif aux obligations d'information des opérateurs de plateformes numériques [Decree No. 2017-1434 of September Sept. 29, 2017 on the Information Obligations of Digital Platform Operators], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.], Sept. 29, 2017, <https://www.legifrance.gouv.fr/eli/decret/2017/9/29/ECOC1716647D/jo/texte>.



services, or the exchange or sharing of contents, goods, or services.<sup>42</sup> The information obligations of online platform operators includes providing information on the methods for referencing, dereferencing, and ranking content, disclosure of the existence of a capitalistic link or remuneration between the platform operator and the referenced provider, and additional obligations for those online platform operators whose activity falls within the scope of Article L111-7(I)(2) of the French Consumer Code.<sup>43</sup> Article L111-7(I)(2) includes online platform operators which function as a “marketplace” such that it brings together several parties for the sale of goods, the provision of services, or the exchange or sharing of contents, goods, or services.<sup>44</sup> The online platform operators which are contained in Article L111-7(I)(2) must make the following information available when applicable: (1) the capacity of the persons authorized to submit an offer of goods and services, including in particular their status as a professional or a consumer; (2) a description of the contact-intermediation service and the nature and purpose of the contracts that can be concluded under this service; (3) the price of the contact-intermediation service or the method used to calculate this price, as well as the price of any additional paid services, whenever the costs of these services are borne by the consumer; (4) the payment procedure for the financial transaction and the way it is managed, whether directly or by a third party; (5) the insurance and warranties offered by the platform operator; and (6) the dispute resolution process and the role of the platform operator in such process.<sup>45</sup>

## 2. Decree No. 2017-1435 of 29 September 2017

Decree No. 2017-1435 sets a connections threshold from which online platform operators shall develop and disseminate best practices to enhance the loyalty, clarity, and transparency of the information transmitted to consumers.<sup>46</sup> This regulation applies only to operators with more than five million unique users per month and became enforceable as of January 1, 2019.<sup>47</sup> This regulation is aimed at holding high volume online platform operators to a higher standard of transparency to its consumers.

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<sup>42</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. 111-7 (Fr.); Flore Foyatier, *Handbook on the New Transparency and Fairness Requirements Imposed on Operators of Digital Platforms Since January 1, 2018*, SOULIER AVOCATS, (Jan. 30, 2018), <https://www.soulier-avocats.com/en/handbook-on-the-new-transparency-and-fairness-requirements-imposed-on-operators-of-digital-platforms-since-january-1-2018/>.

<sup>43</sup> See Foyatier, *supra* note 42.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; Décret n° 2017-1435 du 29 septembre 2017 relatif à la fixation d'un seuil de connexions à partir duquel les opérateurs de plateformes en ligne élaborent et diffusent des bonnes pratiques pour renforcer la loyauté, la clarté et la transparence des informations transmises aux consommateurs [Decree No. 2017-1435 of September 29, 2017 on the Determination of the Connection Threshold Above Which the Operators of Digital Platforms Must Establish and Make Available to Consumers Good Practices Guidelines Aimed at Strengthening the Fairness, Clarity and Transparency of the Information Provided to Consumers], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], (Oct. 5, 2017), <https://www.legifrance.gouv.fr/eli/decree/2017/9/29/ECOC1716648D/jo/texte>.

<sup>47</sup> Foyatier, *supra* note 42.

### 3. Decree No. 2017-1436 of 29 September 2017

Decree No. 2017-1436 sets forth the information requirements relating to online consumer notices.<sup>48</sup> This applies to Article L111-7-II of the French Consumer Code and became enforceable as of January 1, 2018.<sup>49</sup> These regulations for online consumer notices apply to any online platform operator whose primary or secondary purpose consists of the collection, moderation, or publication of online consumer reviews.<sup>50</sup> The decree defines online consumer reviews as the expression of the opinion of a consumer from his or her consumption experience based on either any qualitative or quantitative elements of evaluation.<sup>51</sup> It does not matter whether or not the consumer has bought the product or service which he or she is reviewing.<sup>52</sup> The following information must be available on the webpage near the reviews: (1) the existence or absence of a procedure to monitor the reviews; (2) the date of the publication of each review and the date of the consumer's experience described in the review; and (3) the criteria used for classifying the reviews, including the reviews that are just displayed in chronological order.<sup>53</sup> There are also additional requirements for information that must be made available on a specific easily accessible section of the webpage depending on whether the reviews are monitored or not. Regardless of whether the reviews are monitored or not, the platform operator must make available the existence or absence of compensation in exchange for a review and the maximum period of time the review is published and will stay online.<sup>54</sup> If the reviews are monitored by the online platform operator, then the following information requirements also apply: (1) the main features of the monitoring process at the time the reviews are collected, moderated, or published; (2) if applicable, the possibility to contact the consumer who wrote the review; (3) the possibility or impossibility to amend a review, and if applicable the procedure for amending a review; and (4) reasons why the publication of a review may be refused by the online platform operator.<sup>55</sup>

If not specified in the particular decree, the information referenced in the decrees must be published in a section of the platform's webpage.<sup>56</sup> It must be easily accessible from all pages on the webpage and the information must not require a user to identify him or herself in order to access the information.<sup>57</sup>

Article L131-4 of the French Consumer Code contains the penalties for non-compliance with the regulations for online platform operators.<sup>58</sup> Non-

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<sup>48</sup> *Id.*; Décret n° 2017-1436 du 29 septembre 2017 relatif aux obligations d'information relatives aux avis en ligne de consommateurs [Decree No. 2017-1436 of September 29, 2017 on Information Requirements Relating to Online Consumer Reviews], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.], (Sept. 29, 2017), <https://www.legifrance.gouv.fr/eli/decret/2017/9/29/ECOC1716649D/jo/texte>.

<sup>49</sup> Foyatier, *supra* note 42.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

compliance is punishable by an administrative fine of up to EUR 75,000 for natural persons and EUR 375,000 for legal entities.<sup>59</sup>

## II. U.S. NET NEUTRALITY HISTORY AND REVOCATION

### A. *THE HISTORICAL CONTEXT OF INTERNET REGULATION*

Internet regulation and net neutrality have a long history in the United States. To fully understand the history of Internet regulation, it is important to first look at how other forms of transmissions were regulated before the development of the Internet. In 1934, under President Franklin Delano Roosevelt, the Communications Act of 1934 was passed.<sup>60</sup> This Act regulated interstate and foreign communication by radio or wire.<sup>61</sup> The main development from this Act was replacing the Federal Radio Commission with the Federal Communications Commission (the “FCC”) and transferring regulation of telephone communications from the Interstate Commerce Commission to the FCC.<sup>62</sup> Therefore, under the Act, the FCC became the commission regulating and overseeing United States telephone, telegraph, television, and radio communications.<sup>63</sup> Additionally, the Act expanded the idea of common carriers to electronic communication, which was a novel concept at the time.<sup>64</sup> Under the Act, the electronic communication forms, defined as common carriers, were required to be end-to-end neutral in their transmission of data.<sup>65</sup> The seminal case in defining the end-to-end neutrality requirement of the Act was *Hush-A-Phone Corp. v. United States*.<sup>66</sup> In this case, the petitioner argued that the FCC’s ruling that its product was deleterious to the telephone system and injured the services rendered by the telephone service was incorrect and the petitioner’s complaint regarding the tariffs imposed by the telephone service should not have been dismissed by the FCC.<sup>67</sup> The Court of Appeals agreed with the petitioner and ruled that the FCC’s decision that the Hush-A-Phones were a public detriment was erroneous.<sup>68</sup> Therefore, Hush-A-Phone Corp’s product was being subjected to unwarranted tariffs by phone operators because the product’s utility was privately beneficial and had no public detriment.<sup>69</sup> The court remanded the case back to the FCC to review the tariffs imposed by the telephone service.

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<sup>59</sup> *Id.*

<sup>60</sup> Communications Act of 1934, 47 U.S.C. § 151 (2013).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Tyler Elliot Bettilyon, *Network Neutrality: A History of Common Carrier Laws 1884–2018*, MEDIUM (Dec. 12, 2017), <https://medium.com/@TebbaVonMathenstien/network-neutrality-a-history-of-common-carrier-laws-1884-2018-2b592f22ed2e>.

<sup>65</sup> *Id.*

<sup>66</sup> *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956).

<sup>67</sup> *Id.* at 267.

<sup>68</sup> *Id.* at 269.

<sup>69</sup> *Id.*

### B. THE RISE OF THE INTERNET ERA

The Internet first emerged in the 1980's. Throughout the 1980's and early 1990's, the only form of connection to the Internet was dial-up through one's telephone service provider.<sup>70</sup> Based on this model, the Internet at the time qualified as a common carrier under the Communications Act of 1934.

The Telecommunications Act of 1996 (the "Telecom Act") was passed under President Bill Clinton.<sup>71</sup> The Telecom Act did not completely supplant the Communications Act of 1934 but made changes under Title II common carriers.<sup>72</sup> The goal of the Telecom Act was to promote competition in communication services by allowing anyone to enter the communications business while still ensuring that all citizens had access to advance communications systems at affordable prices.<sup>73</sup> The Telecom Act was the first piece of legislation in the United States to directly address Internet access.<sup>74</sup> It required that the FCC facilitate the deployment of broadband Internet capabilities to all Americans.<sup>75</sup>

In 2002, under President George W. Bush, the FCC adopted a declaratory ruling, which classified broadband Internet service providers as Title I information service providers under the Communications Act of 1934 instead of Title II common carriers or telecommunication services.<sup>76</sup> This resulted in the Internet becoming largely unregulated.<sup>77</sup> The FCC stated that its decision was promoted by policy goals that included encouraging the ubiquitous availability of broadband access to the Internet to all Americans, ensuring that broadband services exist in a minimal regulatory environment that promotes investment and innovation, and developing an analytical framework that is consistent across multiple platforms.<sup>78</sup> In 2005, various petitioners sought review of the FCC declaratory ruling by the United States Supreme Court. In *National Cable & Telecommunications Association v. Brand X Internet Services*, the United States Supreme Court ruled that the FCC's interpretation of the Telecommunications Act of 1996 classifying broadband Internet service providers as information service providers instead of telecommunications services was a reasonable interpretation.<sup>79</sup> The Court reasoned that the high-speed wire was used in connection with the information-processing capabilities provided by Internet access, and that transmission was a necessary Internet access component.<sup>80</sup>

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<sup>70</sup> Belle Mellor, *The Slow Death of Dial Up*, *ECONOMIST* (Mar. 10, 2007), <https://www.economist.com/technology-quarterly/2007/03/08/the-slow-death-of-dial-up>.

<sup>71</sup> Telecommunications Act of 1996, 47 U.S.C. § 151 (1996).

<sup>72</sup> Joseph Gattuso, *The United States Telecommunications Act of 1996*, *GLOBAL COMM'NS INTERACTIVE* (1998), <https://www.ntia.doc.gov/legacy/opadhome/overview.htm>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Hanlong Fu et al., *The Impact of the Telecommunications Act of 1996 in the Broadband Age*, 8 *COMM. ADVANCES IN COMM. AND MEDIA RES.* (2015).

<sup>76</sup> Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Proposed Rulemaking, FCC 02-77, 17 FCC Rcd. 4798 (2002).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 1000 (2005).

<sup>80</sup> *Id.* at 990.

### C. NET NEUTRALITY

The term “net neutrality” was initially coined by University of Virginia Professor of Law Tim Wu in 2003.<sup>81</sup> His paper examined the concept of net neutrality in telecommunications policy.<sup>82</sup> Wu’s paper was one of the first analyses of net neutrality and made a case for a broadband discrimination regime as an alternative to the structural regime of completely open access.<sup>83</sup>

In 2005, the FCC published its policy of new principles to preserve and promote the open and interconnected nature of public Internet.<sup>84</sup> It outlined the following principles that the FCC aimed to incorporate into its ongoing policymaking activities: (1) consumers are entitled to access lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>85</sup>

In 2007, various Comcast consumers began to notice that the company was limiting the usage of certain technologies such as BitTorrent over their Comcast broadband connections.<sup>86</sup> After various tests were done by organizations such as the *Associated Press*, it was revealed that Comcast was in fact targeting peer-to-peer Internet traffic.<sup>87</sup> *Free Press* filed a complaint with the FCC.<sup>88</sup> The FCC ruled that Comcast’s practices were in violation of the Telecom Act, and its policy was an unreasonable form of network regulation.<sup>89</sup> The FCC cited to Comcast selectively impeding and blocking certain types of applications such as BitTorrents.<sup>90</sup> It found that this disparate treatment directly opposed the goal of the Telecom Act and posed significant risks of anticompetitive abuses by companies.<sup>91</sup> Comcast was ordered to disclose to the FCC its network management practices, submit a new compliance strategy to describe its plan to transition from discriminatory practices to nondiscriminatory practices, and

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<sup>81</sup> Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003).

<sup>82</sup> *Id.* at 142.

<sup>83</sup> *Id.* at 142–43.

<sup>84</sup> FED. COMM’N, FCC ADOPTS POLICY STATEMENT: PRINCIPLES PRESERVE AND PROMOTE THE OPEN AND INTERCONNECTED NATURE OF PUB. INTERNET (2005).

<sup>85</sup> *Id.*

<sup>86</sup> Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management”, Memorandum Opinion and Order, FCC 08-183, 23 FCC Rcd. 13028 (2008); see, e.g., Ernesto Van der Sar, *Comcast Throttles BitTorrent Traffic, Seeding Impossible*, TORRENTFREAK (Aug. 17, 2007), <http://torrentfreak.com/comcast-throttles-bittorrent-traffic-seeding-impossible/> (last visited Jan. 29, 2019).

<sup>87</sup> Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management”, Memorandum and Order, *supra* note 85.

<sup>88</sup> *Id.* at 5.

<sup>89</sup> *Id.* at 1.

<sup>90</sup> *Id.* at 35.

<sup>91</sup> *Id.* at 28.

disclose to the FCC the details of the new network management system to be put into practice.<sup>92</sup> Comcast appealed the decision by the FCC, and the D.C. Court of Appeals in *Comcast Corp. v. FCC* ruled in favor of Comcast on the grounds that the FCC did not have the ancillary authority to regulate Comcast under the Telecom Act.<sup>93</sup>

In response to *Comcast v. FCC* and growing concern over an open and free Internet, the FCC developed more regulations in its Open Internet Order of 2010.<sup>94</sup> Adopted on December 21, 2010, the Open Internet Order set forth three basic rules: (i) transparency; (ii) no blocking; and (iii) no unreasonable discrimination.<sup>95</sup> Transparency regulations stated that fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services.<sup>96</sup> The no blocking rule applies to fixed broadband providers in that they may not block lawful content, applications, services, or non-harmful devices, and mobile broadband providers may not block lawful websites or block applications that compete with their voice or video telephony services.<sup>97</sup> The last rule of no unreasonable discrimination only applies to fixed broadband providers in that those providers may not unreasonably discriminate in transmitting lawful network traffic.<sup>98</sup>

In 2011, Verizon sued the FCC over its Open Internet Order, arguing that the order exceeded the FCC's authority.<sup>99</sup> In *Verizon v. FCC*, the D.C. Court of Appeals set out to determine whether the FCC's rules fell outside of the scope of its statutory authority.<sup>100</sup> The court ruled that the no blocking and no unreasonable discrimination provisions from the Open Internet Order could only be shown to apply to common carriers, and, therefore, since broadband providers are specifically separated from common carriers per the Telecom Act, the FCC could not impose those rules on broadband providers.<sup>101</sup>

In 2013, the Federal Trade Commission (the "FTC") updated its 2002 Letter that advised search engines about the potential for consumers to be deceived in violation of Section 5 of the FTC Act.<sup>102</sup> The letter advised search engines to ensure that consumers are able to distinguish natural search results from advertisements delivered by the search engine.<sup>103</sup>

Under the administration of President Obama in 2015, the FCC voted to regulate broadband Internet service as a public utility and adopt various rules in its Order on Remand, Declaratory Ruling, and Order (the "Net Neutrality

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<sup>92</sup> *Id.* at 1.

<sup>93</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

<sup>94</sup> Preserving the Open Internet Broadband Industry Practices Report and Order, WC Docket No. 07-52, FCC 10-201 (rel. Dec. 23, 2010) (Order).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014).

<sup>100</sup> *Id.* at 634–35.

<sup>101</sup> *Id.* at 659.

<sup>102</sup> Letter from Mary K. Engle, Associate Director, Division of Advertising Practices, Bureau of Consumer Protection to Search Engines (June 24, 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf>.

<sup>103</sup> *Id.*

Order”).<sup>104</sup> Specifically, the FCC reclassified broadband Internet access service providers to fall under Title II of the Telecom Act.<sup>105</sup> The Net Neutrality Order defined broadband Internet access service as:

A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.<sup>106</sup>

In addition, the Net Neutrality Order set forth the following rules to protect consumers from tactics that threaten the open Internet:

### 1. *Clear, Bright-Line Rules*

The clear, bright-line rules adopted by the FCC included banning the use of blocking, throttling, and paid prioritization.<sup>107</sup> The no blocking rule protected the rights of consumers in that a consumer who subscribes to a retail broadband Internet service must get what he or she pays for.<sup>108</sup> The ban on blocking states, “[a] person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”<sup>109</sup> The no throttling rule guards against degradation targeted at specific uses of a customer’s broadband connection.<sup>110</sup> This rule protects against a broadband service from avoiding the no blocking rule by effectively but not actually blocking a website or application by degrading the Internet traffic to a point where the application or website is essentially unusable.<sup>111</sup> The order states, “[a] person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.”<sup>112</sup> The last rule prohibiting paid prioritization protected against the use of payment for a broadband Internet service provider to manage its network in a way that benefits particular services, content or devices.<sup>113</sup>

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<sup>104</sup> Protecting and Promoting the Open Internet Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24 (rel. Mar. 12, 2015) (Order).

<sup>105</sup> *Id.* at 143–44.

<sup>106</sup> *Id.* at 283.

<sup>107</sup> *Id.* at 3.

<sup>108</sup> *Id.* at 7.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

The rule states that a person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. ‘Paid prioritization’ refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through the use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.<sup>114</sup> Both the no blocking and no throttling rules are subject to an exception for “reasonable network management.”<sup>115</sup> Paid prioritization has no exception for reasonable network management because paid prioritization is a business practice and not a network management practice.<sup>116</sup> Reasonable network management is defined in the Net Neutrality Order as a practice that has a primarily technical network management justification, but does not include other business practices. 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.<sup>117</sup>

## *2. No Unreasonable Interference or Unreasonable Disadvantage to Consumers or Edge Providers*

As gatekeepers of information on the Internet, the FCC decided it is the duty of broadband Internet access providers to make sure they are not using that gatekeeping role to unreasonably interfere with or unreasonably disadvantage consumers or edge providers.<sup>118</sup> This rule acts as a catch all provision for anything that the clear, bright-line rules would not outright prohibit.<sup>119</sup>

The rule mentions that any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.<sup>120</sup>

## *3. Enhanced Transparency*

This rule from the Open Internet Order of 2010 remained in full effect and was not revised by the FCC in the Net Neutrality Order. The rule states that a person engaged in the provision of broadband Internet access service shall

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<sup>114</sup> *Id.* at 7–8.

<sup>115</sup> *Id.* at 7.

<sup>116</sup> *Id.* at 8.

<sup>117</sup> *Id.* at 11.

<sup>118</sup> *Id.* at 8.

<sup>119</sup> *Id.* at 9.

<sup>120</sup> *Id.* at 9.



publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.<sup>121</sup>

Shortly after the Net Neutrality Order was adopted, the issue of whether the FCC was able to reclassify broadband Internet access providers to fall under Title II was brought before the D.C. Court of Appeals.<sup>122</sup> In *U.S. Telecom Association v. FCC*, the D.C. Court of Appeals ruled that the FCC had statutory authority under § 706 of the Telecom Act to reclassify broadband as a telecommunication service.<sup>123</sup>

#### D. THE REPEAL OF NET NEUTRALITY

In 2017, under a new administration, the FCC voted 3-2 to repeal the Net Neutrality Order.<sup>124</sup> The repeal was adopted on December 14, 2017, with the publication of the FCC's Declaratory Ruling, Report and Order (the "Restoring Internet Freedom Order").<sup>125</sup> The repeal reversed the reclassification of broadband Internet access providers from telecommunications services back to information services.<sup>126</sup> The FCC additionally eliminated the rules created in the Net Neutrality Order.<sup>127</sup> The FCC also reverted the transparency requirements for Internet service providers back to what was required under the Open Internet Order of 2010.<sup>128</sup> The Restoring Internet Freedom Order stated the reasons for the repeal were that (i) the cost of the rules to innovation and investment outweigh any benefits, (ii) there is no identifiable source of legal authority to justify the conduct rules adopted under the Net Neutrality Order, and (iii) conduct rules are unnecessary because the transparency rule together with antitrust and consumer protection laws ensure that consumers have redress if any Internet service provider engages in behavior that is contrary to Internet freedom.<sup>129</sup>

In response to the repeal, several technology companies filed lawsuits in an attempt to preserve net neutrality protections.<sup>130</sup> Additionally, twenty-two state attorneys general filed lawsuits to preserve net neutrality.<sup>131</sup> The lawsuit, led by New York's attorney general, argues the Administrative Procedure Act

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<sup>121</sup> *Id.*

<sup>122</sup> *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

<sup>123</sup> *Id.* at 734.

<sup>124</sup> Restoring Internet Freedom Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC 17-166 (rel. Jan. 4, 2018) (Order).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 2.

<sup>127</sup> *Id.* at 3.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Ali Breland, *Six Tech Companies Filing Net Neutrality Lawsuit*, THE HILL (Mar. 5, 2018), <https://thehill.com/policy/technology/376794-kickstarter-etsy-others-file-net-neutrality-lawsuit>.

<sup>131</sup> Ali Breland, *Democratic State Attorneys General Sue to Preserve Net Neutrality Rules*, THE HILL (Feb. 22, 2018), <https://thehill.com/policy/technology/375166-democratic-state-attorneys-general-sue-to-preserve-net-neutrality-rules>.

prohibits the FCC from “arbitrary and capricious” redactions to existing policies.<sup>132</sup>

Many states have adopted legislation to reinstate the net neutrality rules within their borders. California adopted net neutrality legislation as of August 2018.<sup>133</sup> Governors in several states, including Montana, New York, and Hawaii, have signed executive orders requiring Internet service providers that do business with the state to adhere to net neutrality principles.<sup>134</sup>

### III. BALANCING THE ECONOMIC AND SOCIAL IMPACT OF INTERNET REGULATION

The history and current rules for three forms of Internet regulation across the globe have now been reviewed. The EU adheres to net neutrality regulations, France enforces platform neutrality regulations, and the United States regulates the Internet through transparency rules along with general antitrust and consumer protection laws. A comparison and determination of which regulation method is preferable may take many different factors into account. For this analysis, the two primary factors that will be evaluated are economic impact and social impact.

#### A. NET NEUTRALITY

The EU’s current net neutrality regulations have been in place for several years. However, in this short period of time, various scholarly articles have been written on whether the EU should keep the current regulations, add platform neutrality regulations, or let the market regulate itself. The European Parliament stated in 2017 that “the need for net neutrality and fair and non-discriminatory access to online platforms is a prerequisite for innovation and a truly competitive market.”<sup>135</sup> Yet, innovation and a competitive market are arguably more in line with less regulation. Thus, net neutrality prioritizes the prevention of negative social impacts but fails to have a positive economic impact on Internet service providers, platforms, or consumers.

From an economic standpoint, studies have shown that innovation and a competitive market actually benefit from a discriminatory Internet access regime

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<sup>132</sup> *Id.*; see also Protective Petition for Review, State of New York et al. v. FCC, No. 17-18-1013 (U.S. App. D.C. Jan. 16, 2018), [https://cdn.ballotpedia.org/images/c/c3/States\\_v\\_FCC\\_petition\\_filed.pdf](https://cdn.ballotpedia.org/images/c/c3/States_v_FCC_petition_filed.pdf).

<sup>133</sup> Communications: Broadband Internet Access Service Act, C.A.S. 822, [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB822](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822).

<sup>134</sup> See, e.g., Mont. Exec. Order No. 3-2018 (Jan. 22, 2018), [https://cdn.ballotpedia.org/images/0/0a/MT\\_EO-03-2018.pdf](https://cdn.ballotpedia.org/images/0/0a/MT_EO-03-2018.pdf); N.Y. Exec. Order No. 175 (Jan. 24, 2018), [https://cdn.ballotpedia.org/images/7/75/NY\\_EO\\_175.pdf](https://cdn.ballotpedia.org/images/7/75/NY_EO_175.pdf); Haw. Exec. Order No. 18-02 (Feb. 5, 2018), <https://cdn.ballotpedia.org/images/6/64/Executive-Order-No.-18-02-Net-Neutrality-Signed.pdf>.

<sup>135</sup> Jan Kramer & Daniel Schnurr, *Is There a Need for Platform Neutrality in the EU?*, TELECOMM. POL’Y (June 2018), citing EUR. PARL. DOC. (A8-0204/2017), *Report on Online Platforms and the Digital Single Market (2016/2276(INI))*.

instead of a net neutrality regime.<sup>136</sup> A purely economic view supports that a discriminatory regime is more beneficial in terms of investments, innovation, and total welfare.<sup>137</sup> When Internet service providers are allowed to differentiate between Internet traffic speeds and access, the investment by both platforms and Internet users increases.<sup>138</sup> However, while this increases total welfare, it can disproportionately harm certain groups. These investments negatively impact platform profits. Additionally, more research is needed on whether a user's utility in higher broadband speeds is commensurate with the investment made by that user.<sup>139</sup>

In terms of social impact, the regulation of Internet service providers under net neutrality allows users to exercise their rights to access and distribute information.<sup>140</sup> Net neutrality also enables businesses to reach consumers. Therefore, neutral Internet access can be said to be essential for competition and innovation on the Internet as it relates to platforms and consumers. Additionally, a discriminatory regime disproportionately and negatively impacts small platforms.<sup>141</sup> Smaller platforms may not have the capacity to invest in higher broadband speeds which would stifle innovation if the platform required those speeds to function properly. Lastly, under a net neutrality regime, there is little to no risk of sabotage by Internet service providers to platforms.<sup>142</sup> Internet service providers have no benefit to slowing down Internet speeds or blocking access if the principles of net neutrality are in place.

Therefore, net neutrality lacks certain economic benefits but has a positive social impact. It lacks the total economic benefits that a discriminatory regime may have but takes important steps to protect society and its right to access and distribute information. The EU's net neutrality regulations have various social benefits but may not be the perfect fit for the United States which has a tendency to prioritize economic incentives over social concerns.

## B. PLATFORM NEUTRALITY

France's recent platform neutrality laws have sparked many discussions. While the long-term effects and challenges to these laws have not yet been realized, various scholars have begun to predict what will occur under the platform neutrality regime. Platform neutrality goes a step further at regulating the Internet by focusing on the neutrality of platforms that the Internet service providers give consumers access to. In its purest form, platform neutrality has economic benefits and a positive social impact. However, while France has taken the most substantial steps of any country toward adopting pure platform neutrality, it is practically impossible for Internet platforms to be completely neutral. Some form of a ranking system must necessarily be used any time

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<sup>136</sup> Marc Bourreau, Frago Kourandi & Tommaso Valletti, *Net Neutrality with Competing Internet Platforms* 30 (Tor Vergata Univ. Ctr. for Econ. and Int'l Studies, Working Paper No. 307, 2014).

<sup>137</sup> *Id.* at 34.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 35.

<sup>140</sup> Jan Kramer, Daniel Schnurr & Alexandre de Streel, *Internet Platforms and Non-Discrimination: Project Report*, CTR. ON REG. IN EUR. (Dec. 5, 2017), <http://www.crid.be/pdf/public/8194.pdf>.

<sup>141</sup> Bourreau et al, *supra* note 136, at 35.

<sup>142</sup> *Id.*

content is listed. France's platform neutrality rules focus on ensuring that Internet platforms provide consumers with fair, clear, and transparent information.

In regard to economic impact, the platform neutrality principles differ from those seen in net neutrality. The total welfare is lower when search platforms use a sponsored ranking system for content or products that are equal in quality.<sup>143</sup> The sponsored ranking system is a form of discriminatory regime that France's platform neutrality rules do not explicitly ban. Instead, France addresses the issue of a sponsored ranking system by requiring clear and transparent information regarding how items, websites, and the like are ranked or listed by a platform. In a sponsored ranking system, the top position in the sponsored rank is the most valuable.<sup>144</sup> The value of this position means that the provider of the product in this position pays a search platform for this top ranked position, but in order to make a profit, it will then have to charge more for its product.<sup>145</sup> Therefore, the search platform will profit to the detriment of both the consumer and the provider of products.<sup>146</sup> The consumer will be left worse off because their choice will be factually limited.<sup>147</sup> Consumers also will not consider the less prominent product or content providers, and they will be directed to higher-priced or less relevant content or products.<sup>148</sup> France's platform neutrality principles guard against the consumer confusion that occurs in a sponsored ranking system.

The social impact of platform neutrality takes the strictest approach of the three to protecting freedom of speech and transparency. Current legal frameworks are unable to account for Internet platforms' unique role in the world which necessitate the rules for platform neutrality. Dominant platforms on the Internet have taken on a utility-like role that comes with various obligations, including as an infrastructure for freedom of expression.<sup>149</sup> Unlike a physical store, platforms have an endless amount of diverse information available.<sup>150</sup> Because of this new role, platform neutrality is adding information to search platforms and limiting the power of those platforms to censor information.<sup>151</sup> Additionally, platform neutrality guards against the distortion of a level playing field for competing products or content providers and the deterioration of content quality and content variety displayed on platforms.<sup>152</sup> As discussed under economic impact, competing products in a sponsored ranking system that are on all practical accounts equal will not be treated equally on the platform and ultimately by the consumer. This will mislead the consumer in purchases and in his or her perception of product prices and availability.<sup>153</sup> Deterioration of the market may occur because product and content providers

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<sup>143</sup> KRAMER & SCHNURR, *supra* note 135, at 13.

<sup>144</sup> *Id.* at 14.

<sup>145</sup> *Id.* at 13.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 20.

<sup>148</sup> *Id.* at 13.

<sup>149</sup> Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES IN L. 487, 500 (2016).

<sup>150</sup> *Id.* at 499–500.

<sup>151</sup> *Id.* at 501.

<sup>152</sup> KRAMER & SCHNURR, *supra* note 135, at 20.

<sup>153</sup> *Id.*

who do not receive priority will be at a disadvantage and be forced to exit the market.<sup>154</sup> Under France's platform neutrality rules, these issues will not occur. The goal of France's law is to force Internet platforms to provide fair, clear, and transparent information to consumers. By enforcing these requirements, France will avoid the negative social impacts that occur without platform neutrality.

Therefore, platform neutrality has positive economic and social impacts. Regulating platforms maximizes total welfare and ensures the protections of freedom of speech and transparency. In addition, platform neutrality protects consumers and ensures that platforms are not pushed out of the market unfairly.

### C. A DISCRIMINATORY REGIME

The United States' Restoring Internet Freedom Order focused on removing the net neutrality rules. The current state of the Internet is a discriminatory regime that is regulated through the transparency principle stated by the Restoring Internet Freedom Order and general antitrust and consumer protection rules and regulations. Proponents of this view have many arguments for why this is the correct way to monitor the Internet. Some argue that there should not be specific laws governing complex areas in need of regulation and that instead the Internet should be assessed by general legal principles that have always existed.<sup>155</sup> On the other side of the argument, authors argue that a new regulatory framework needs to be developed because the current legal framework, including antitrust and consumer protection laws, are not sufficient for the specific needs of Internet regulation.<sup>156</sup> While acknowledging both sides of the argument, we will focus our review of a discriminatory regime in terms of economic and social impact. A discriminatory regime has a predominantly positive economic impact but has negative social consequences.

A discriminatory regime for the Internet is economically beneficial.<sup>157</sup> Marc Bourreau compared net neutrality regimes and discriminatory regimes from a purely economic standpoint.<sup>158</sup> In this analysis, he used the idea of Internet service providers that had two "lanes" of Internet traffic; a priority or fast lane and a regular lane.<sup>159</sup> In this economic analysis, he concluded that a discriminatory regime is more beneficial in terms of investments, innovation, and total welfare.<sup>160</sup> In terms of investments, a discriminatory regime that includes priority and non-priority Internet speeds will have platforms investing in increased broadband capacity.<sup>161</sup> By allowing platforms to invest in higher Internet speeds, the Internet service providers are receiving additional revenues from the fees associated with the higher speeds.<sup>162</sup> An increase in broadband

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<sup>154</sup> *Id.*

<sup>155</sup> Friso Boeston, *Neutrality, Fairness or Freedom? Principles for Platform Regulation*, 7 INTERNET POL'Y REV. 1, 2 (2018), citing F. Easterbrook, *Cyberspace and the Law of the Horse*, U. CHI. L. FORUM, 207-216 (1996).

<sup>156</sup> *Id.*

<sup>157</sup> Bourreau et al., *supra* note 136, at 3.

<sup>158</sup> *Id.* at 2-3.

<sup>159</sup> *Id.* at 3.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

capacity increases demand and the costs but also leads to an increase in the revenues an Internet service provider can receive.<sup>163</sup> Innovation increases with a discriminatory regime because certain platforms are not able to effectively work on the “regular lane” or general Internet speed and would be left out of the market without the ability to invest in the priority Internet speeds.<sup>164</sup> Internet service providers invest more in capacity in a discriminatory regime so that the total number of active platforms is greater.<sup>165</sup> The total welfare is increased by a discriminatory regime although the exact impact on welfare to the individual parties cannot be calculated as a practical matter.<sup>166</sup> The overall effect on the economy in a discriminatory regime is always positive in that prioritization leads to a more efficient system.<sup>167</sup> The total congestion of Internet traffic is lowered by a discriminatory regime because Internet service providers are better able to manage Internet traffic when there are multiple “lanes” of traffic.<sup>168</sup> Therefore, from an economic standpoint, there is the most to gain from having an open Internet based on a discriminatory regime.

However, looking at the social impact of a discriminatory regime, there are a variety of problematic areas. There must be some monitoring of the Internet to make sure that smaller platforms are not being disproportionately and negatively impacted. Additionally, in a discriminatory regime, Internet service providers are more readily able to sabotage or manipulate both platforms and consumers.<sup>169</sup> Sabotage or manipulation can occur by Internet service providers in various ways. First, there is the fear of degradation of the non-priority access “lanes” in order to extract higher profits from priority access users. By lowering the broadband access of the non-priority “lane,” Internet service providers can force platforms to upgrade to the high priority “lane” out of necessity to ensure consumers are able to access their platform which leads to profits for the Internet service provider.<sup>170</sup> Internet service providers may also sabotage access to certain platforms. This leaves consumers worse off in that they are not given access to all of the information that should be readily available to them on the Internet. In turn, this will lead to the deterioration of content quality and variety because platforms will leave the market if they are being disadvantaged by Internet service providers and unable to make a profit.<sup>171</sup> Manipulation of consumers may also occur by platforms in a discriminatory regime. Platforms act as the gatekeepers of content and may use profiling practices to gain an advantage over consumers.<sup>172</sup> Platforms may use consumer data to restrict certain products or content available to them. This may result in discriminatory categorizations of consumers that can perpetuate existing inequalities.<sup>173</sup>

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<sup>163</sup> *Id.* at 21.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 22.

<sup>166</sup> *Id.* at 26.

<sup>167</sup> *Id.* at 27.

<sup>168</sup> *Id.* at 23.

<sup>169</sup> *Id.* at 29.

<sup>170</sup> *Id.* at 36.

<sup>171</sup> *Id.* at 35.

<sup>172</sup> Orla Lynskey, *Regulating ‘Platform Power’*, L. SOC’Y & ECON. WORKING PAPERS 1, 19 (2017).

<sup>173</sup> *Id.* at 22.

While the United States' discriminatory regime is economically efficient, it lacks some of the social protections that are desirable for a society. A discriminatory regime benefits investment, innovation, and the overall welfare of society but at a cost to the freedom and growth of consumers and platforms.

#### IV. THE PUSH TOWARD NEUTRALITY: IS A DISCRIMINATORY REGIME GOOD ENOUGH?

While the discriminatory regime is the most economically efficient of the three methods, it should be applied in conjunction with specific net neutrality rules and more transparency regulations for both Internet service providers and Internet platforms. As previously stated, a discriminatory regime that includes limited transparency rules relating to Internet service providers and general antitrust and consumer protection laws is not enough to protect against the social concerns that arise in a discriminatory Internet regime.

General antitrust and consumer protection laws are not properly tailored to be effective methods of Internet protection. The FTC has broad authority to police conduct that goes against fair competition or that harms consumers.<sup>174</sup> However, the FTC has taken little action to protect consumers, platforms, or even Internet service providers relating to Internet usage. Because the FTC is a primarily reactive agency and is not engaged in rulemaking, it is extremely difficult for the FTC to understand the principles guiding improper Internet activity as it falls under antitrust or consumer protection laws.<sup>175</sup> The FTC is not an appropriate group to police Internet usage absent guidelines from another authority. Therefore, antitrust and consumer protection laws in their current form are not effective means for regulating the Internet, and other steps must be taken.

The United States' transparency rule takes a step to mitigate negative social impacts but does not go far enough. The current rule for transparency states that an Internet service provider must publicly disclose information about its network management practices, performance characteristics, and commercial terms of its broadband Internet access services.<sup>176</sup> Transparency in and of itself does not limit the behavior of the Internet service providers, and therefore, further steps should be taken. First, the transparency rules for Internet service providers should be reviewed and revised so as to ensure Internet service providers are not taking advantage of consumers or platforms. Next, the United States should look at France's platform neutrality regulations to begin adopting transparency requirements for platforms within the United States. While the word platform neutrality may conjure up images of a platform that is void of all preference and completely neutral, this is not a plausible or correct reading of France's regulations which are labeled as platform neutrality laws. France's platform neutrality laws are primarily laws of transparency; enforcing platforms to

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<sup>174</sup> Michael Santorelli, *After Net Neutrality: The FTC is the Sheriff of Tech Again. Is it Up to the Task?*, FORBES (Dec. 15, 2017), <https://www.forbes.com/sites/washingtonbytes/2017/12/15/the-game-is-on-the-ftc-tech-regulation-post-net-neutrality/#7b757cbb575a>.

<sup>175</sup> *Id.*

<sup>176</sup> 47 C.F.R. § 8.1 (2018).

disclose the practices that are being used that are not substantively neutral. Platforms should be required to acknowledge their active role in managing content and products, and this can be done through strict transparency guidelines similar to those of France.

Additionally, the FCC should adopt net neutrality rules. While the EU's net neutrality rules are comprehensive, the negative economic impact that would occur from implementing the same standards should incentivize the United States to develop more specific and streamlined rules. The FCC should review the net neutrality rules imposed in 2015 under the Net Neutrality Order and consider revisions and then reinstate the rules. The clear bright-line rules from the Net Neutrality Order all correlate to the social concerns that a discriminatory regime brings to light. Blocking and degradation are two prominent concerns from a social impact standpoint that were directly addressed by the Net Neutrality Order. Reinstatement of specific net neutrality rules and more comprehensive transparency rules for Internet service providers and platforms would allow for positive economic growth while still limiting that growth to account for social concerns.

A discriminatory Internet regime with limited transparency rules and general antitrust and consumer protection laws do not go far enough to protect society. Therefore, the current discriminatory regime in place in the United States must be paired with additional transparency rules that include Internet platforms and net neutrality rules that prevent Internet service providers from engaging in sabotage of either consumers or platforms.

## CONCLUSION

After close examination of the EU's net neutrality regulations, France's recent platform neutrality regulations, and the United States' current discriminatory regime that imposes transparency requirements on Internet service providers, it is clear that there is no "one size fits all" model for regulation of the Internet. Each country has a different history for how its own regulatory scheme has progressed and the policy initiatives that the country deems important in regulating the Internet. The EU's use of net neutrality takes a strong stance on protecting social welfare but does not necessarily take the best approach towards economic optimization of the Internet. Platform neutrality utilized by France takes the United States' transparency rules for Internet service providers a step further by enforcing platforms to abide by transparency standards and imposing fines for the failure to do so. The United States' discriminatory Internet regime, which incorporates transparency requirements for Internet service providers, is the most economically beneficial model for regulation but fails to protect from the negative impacts on society. By looking to France's use of platform neutrality and the United States' former Net Neutrality Order, the United States can implement certain rules that will help protect society without stifling the economic benefits of a discriminatory Internet regime.

Looking forward to the future of Internet regulation, there are almost certainly still changes on the horizon. The EU's net neutrality laws may change as soon as 2019. BEREC has been tasked with reviewing and revising the



guidelines it published in 2016. While the Regulation takes precedent over the national law of member states, the guidelines present very detailed recommendations of what net neutrality means and should look like throughout Europe.<sup>177</sup> The Regulation gives independent national telecom regulators the power and the mandate to protect net neutrality in their respective countries.<sup>178</sup> To do this, the independent regulators are told to take the utmost account of the guidelines issued by BEREC.<sup>179</sup> Various telecom companies in the EU have been arguing for BEREC to loosen its guidelines to make the use of 5G phone network service more viable and economically impactful.<sup>180</sup>

In France, Decree No. 2017-1435 of 29 September 2017 became enforceable as of January 1, 2019. In the coming years, the decrees for platform neutrality, including their enforcement and revisions, should be monitored both for economic and social impacts. The long-term impacts of platform neutrality regulations should be reviewed in depth as more is learned from observing the enforcement or lack thereof of these decrees.

In the United States, the battle over how the Internet should be regulated continues. More than half of the states have found one way or another to oppose the most recent act of repealing net neutrality by the FCC.<sup>181</sup> The issue seems to fall across party border lines with Democrats in favor of net neutrality rules and regulations and Republicans favoring less regulation.<sup>182</sup> States have taken opposition through suing the FCC, introducing state legislation, and enhancing requirements for companies receiving state or government grants.<sup>183</sup> However, the FCC is fighting back. The Department of Justice sued California in late 2018 for its law regarding net neutrality based on the federal government's jurisdiction over interstate commerce.<sup>184</sup> While no judgments have been rendered in these cases, the decisions should be monitored as they will have an impact on the future of Internet regulation. Additionally, the 2020 presidential election may bring about more changes in Internet regulation.

Further research should be done on the different forms of Internet regulation's specific economic and social impact. In addition, there are other methods of measuring the effectiveness of forms of Internet regulation that were not addressed in this Note. Further consideration of other measurements should be taken into account when moving forward with revisions to Internet regulation.

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<sup>177</sup> *Net Neutrality vs. 5G: What to Expect from the Upcoming EU Review?*, EDRI (Dec. 5, 2018), <https://edri.org/net-neutrality-vs-5g-what-to-expect-from-the-upcoming-eu-review/>.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Kendra Chamberlain, *State-by State-Net Neutrality Laws Breakdown*, BROADBAND NOW (Feb. 25, 2018), <https://broadbandnow.com/report/net-neutrality-state-laws/>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Dina Kesbeh, *Justice Department Sues California Over Net Neutrality Law*, NPR (Oct. 1, 2018), <https://www.npr.org/2018/10/01/653216821/u-s-justice-department-sues-california-over-net-neutrality-law>.