SECURITIES & PRIVACY ROUNDTABLES | TECHNOLOGY RESOURCE GUIDE

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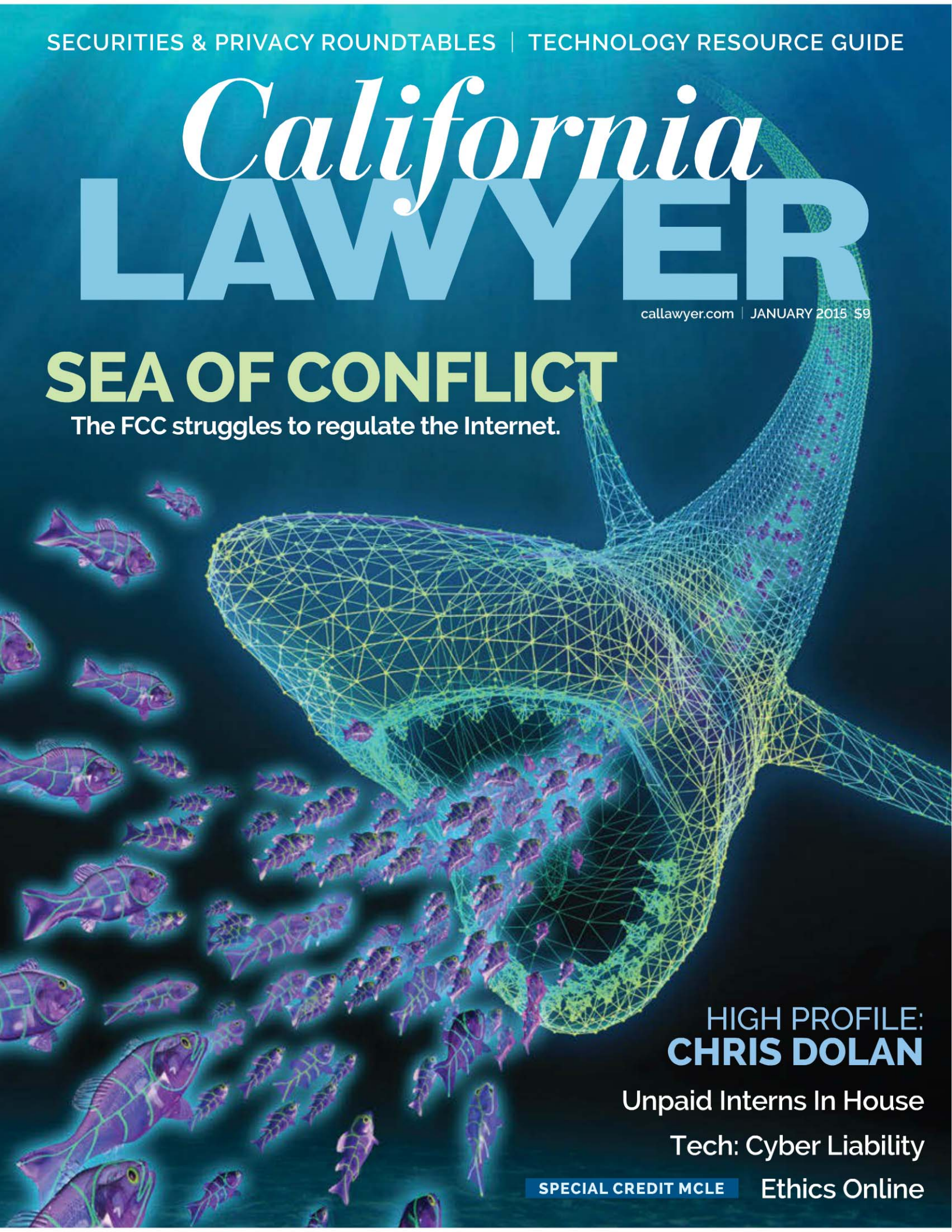
SEA OF CONFLICT

The FCC struggles to regulate the Internet.



HIGH PROFILE:
CHRIS DOLAN

Unpaid Interns In House

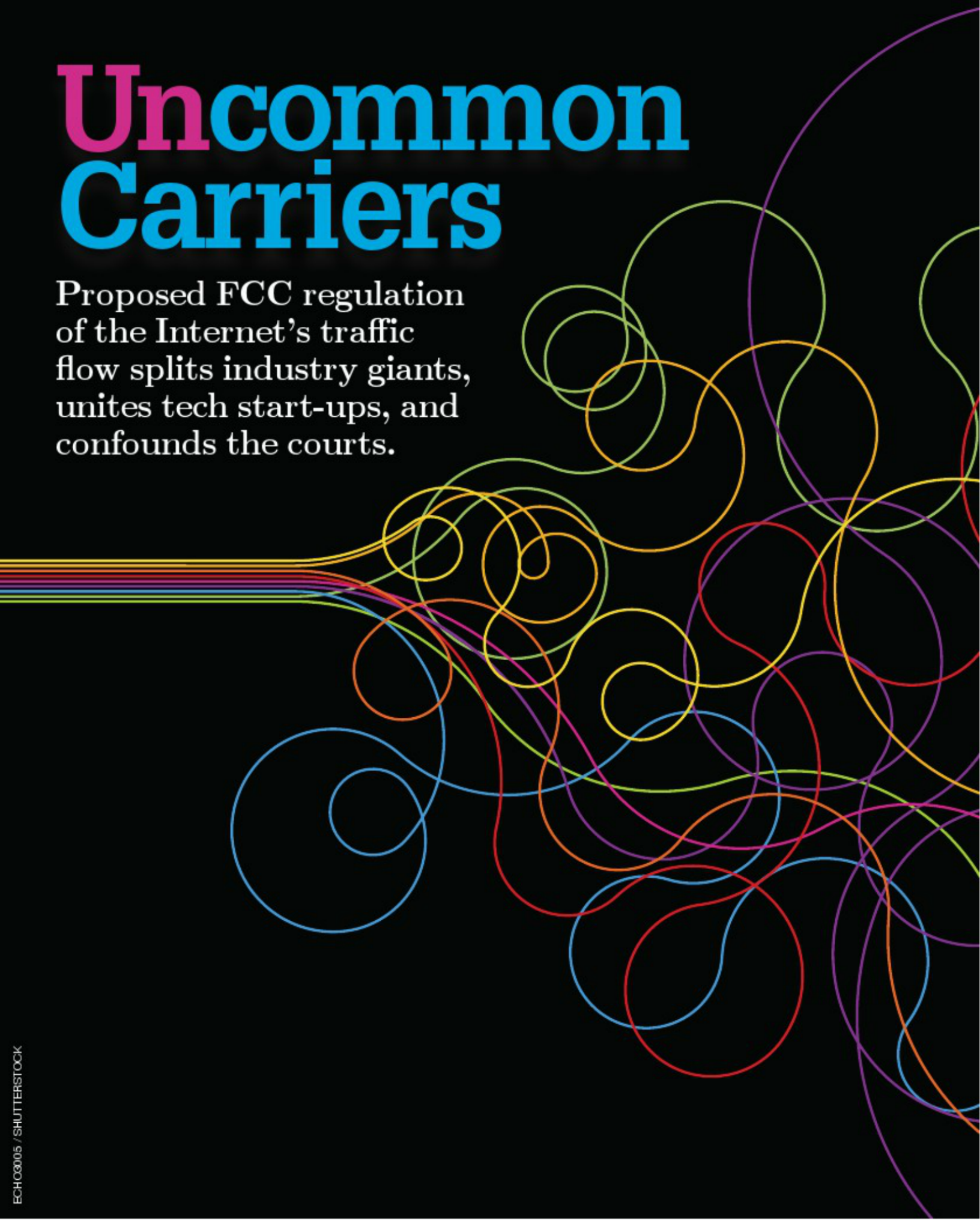
Tech: Cyber Liability

SPECIAL CREDIT MCLE

Ethics Online

Uncommon Carriers

Proposed FCC regulation of the Internet's traffic flow splits industry giants, unites tech start-ups, and confounds the courts.



ECHO0005 / SHUTTERSTOCK

by Michael Bobelian

Addressing the nation in a statement, along with a video posted on YouTube, President Barack Obama declared in November, "An open Internet is essential to the American economy, and increasingly to our very way of life." The surprising public announcement was a challenge to the Federal Communications Commission, which had proposed new broadband rules in May. The FCC's proposal satisfied no one, setting off furious public debate over the Internet's future. In all, more than 3.7 million comments had poured into the agency since the release, crashing its servers twice.

Not willing to stand on the sidelines, Obama injected himself into the controversy. His message was clear: " 'Net neutrality' has been built into the fabric of the Internet since its creation—but it is also a principle that we cannot take for granted," he said. "We cannot allow Internet service providers to restrict the best access or to pick winners and losers in the online marketplace for services and ideas."

Getting to the heart of the matter, Obama stated, "The time has come for the FCC to recognize that broadband service is of the same importance and must carry the same obligations as so many of the other vital services do." To accomplish that, he called for reclassifying information service providers under Title II of the Communications Act, which would subject them to common carrier regulation.

"Surprise! We agree with the President's principles on net neutrality."

—COMCAST STATEMENT

Coming less than a week after the midterm elections, Obama's unexpected endorsement of the Title II approach drew reactions from across the political spectrum. House Minority Leader Nancy Pelosi joined other Democrats in applauding it. Republican leaders of the House Energy and Commerce Committee that oversees the FCC jointly declared the president's plan a "mistake" that reveals "this administration simply doesn't know how to grow the economy."

The fact that Obama was openly lobbying FCC Chairman Tom Wheeler on agency rule making was unusual. "It definitely

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"If there has ever been any doubt, we are pro–open Internet here at the FCC."

—TOM WHEELER, COMMISSIONER

changed the scope and tenor of the debate," says Bennett L. Ross, a partner in the Washington, D.C., office of Wiley Rein, which litigates for telecom giants. "The president endorsed Title II not because it is good policy or even makes sense in [the] Internet age, but rather to appeal to his political base in anticipation of the 2016 elections, and to take a shot across the bow of the new Republican leadership in Congress."

Ross, former general counsel of BellSouth Telecommunications, contends that Obama's plan would backfire if broadband providers—most notably Comcast, AT&T, and Verizon—were heavily regulated like public utilities. The FCC has repeatedly declined to take that step in the past decade.

But net neutrality's biggest supporters—a loose coalition of content providers, tech developers, and civil liberties advocates—couldn't hold back their excitement. "Amazing!" tweeted Matt Wood of Free Press, an independent advocacy group that had been battling over this issue for years. "President calls for treating Internet access as the essential communications service it is."

Soon Netflix chimed in. "The President is right," the video distributor responded on Twitter. " 'There should be no gatekeepers between you and your favorite online sites and services.' "

Netflix has reason to care about open-Internet rules: It uses some 35 percent of all the evening bandwidth in North America. The company's ongoing quarrels with Internet service providers (ISPs) spilled into public view last year when CEO Reed Hastings accused them of "extracting a toll" for maintaining an uninterrupted link to consumers. In February, Netflix agreed to pay Comcast to guarantee reliable video streaming—and in April it did the same with Verizon.

But Netflix's demand for "open access" isn't just about money, says the company's chief lobbyist, Chris Libertelli, the FCC's senior lawyer under former chairman Michael Powell. With more than $4 billion

in revenue in 2013, Netflix can afford to pay for fast lanes, Libertelli explains. What the company wants at the end of the day is "a bigger, faster, more ubiquitous Internet"—and it's pushing for major broadband carriers to upgrade the infrastructure.

Though Netflix is the most recognizable advocate of net neutrality, Etsy emerged as a more typical voice. An online marketplace for more than a million sellers of handmade items, the start-up from New York's Silicon Alley symbolizes a class of midsize firms that can't afford to buy their own congestion-free pipes. "Today the fight to protect the open Internet got a huge boost," Althea Erickson, its head of public policy, posted on the Etsy blog after Obama's YouTube message.

Meanwhile, the ISPs were appalled by the president's embrace of Title II. Powell, who now heads the National Cable and Telecommunications Association, appeared on *Fox Business* the following day to condemn the proposal. "All you have to look at is the state of utility infrastructure in the United States—with crumbling roads, breaking water pipes, and browning-out electrical grids—and ask yourselves, Is that a superior way to regulate the most dynamic infrastructure in world history?" he said. "And I think the obvious answer is no."

Powell reiterated the group's talking points: Title II would discourage investment in broadband and saddle the free-wheeling Internet with an outdated regulatory regime, all to address a phantom menace—monopoly control of broadband.

Indeed, the major ISPs quickly and publicly protested that they, too, were committed to an open Internet. "Surprise!" Comcast announced in an official statement. "We agree with the President's principles on net neutrality." Executive Vice President David L. Cohen asserted in a release that Comcast fully embraces the open-Internet principles espoused by the president and FCC Chairman Wheeler: transparency, nondiscrimination among content providers, no blocking of content, and no privileged "fast lanes."

In September, net neutrality advocates demonstrated in New York.

TIMOTHY KARR

The company's lone objection was to classification under Title II.

That was the peculiar thing about the controversy: *Everyone* claimed to be for net neutrality.

Nonetheless, the meaning of an "open Internet"—and how it's best achieved—remains the subject of furious lobbying at the FCC, with Title II the fulcrum of the disagreement. And both sides admit that any new rule will be challenged in the courts—pitting teams of veteran lawyers in another face-off over the future of the Internet.

Frames of Reference

The problem of net neutrality might be less confounding had Congress not been decades behind the curve in addressing the new technology. Its last legislative effort, the Telecommunications Act of 1996, updated the 1934 Communications Act governing interstate telephone services. (See Pub. L. No. 104-104, amending Pub. L. No. 73-416; 47 U.S.C. §§ 151–614.) Soon after the telecom legislation passed both houses of Congress by overwhelming majorities, however, cable and telephone companies began offering Internet services that the FCC was left to fit into the act's pre-digital structure. The agency had two options: It could classify the ISPs as "telecommunications carriers" under Title II of the 1934 act, or categorize the services they offer as "information services"—which fall under Title I and are largely exempt from regulation.

Sorting out the choices was no easy task. Title II telecommunications services cover only the pure transmission of data, such as connecting two parties on a phone call. Internet providers, on the other hand, permit their customers to manipulate transmissions by storing, processing, or transforming them in various ways—bookmarking a URL, for example, or forwarding an email to a third party. The tricky thing is that "every information service [also] contain[s] a transmission component," explains Wiley Rein's Ross. This means the two types of services often blend together. Indeed, most of the service bundles the ISPs offer for broadband access to the Internet also include email accounts, security firewalls, and data storage. From a regulatory standpoint, however, the difference between the two designations is stark. If the ISPs are reclassified under Title II of the Communications Act, they could face the kind of strict supervision normally accorded to public utilities, raising the specter of tariffs, price controls, and extensive monitoring. Title II common carriers are also obligated to charge customers at just and reasonable, nondiscriminatory rates. By contrast, ISPs are not currently subject to federal regulation, though the FCC could impose additional obligations under its Title I jurisdiction to regulate

"Putting Title II on the table ... is due to our efforts. I know we've moved the conversation quite a bit."

—MATT WOOD, FREE PRESS

interstate and foreign communications.

The Telecommunication Act's silence on broadband cable Internet service proved maddening to the FCC, leading to a decade-long legal battle over its authority to regulate the ISPs. In March 2002 the commission concluded that broadband Internet service provided by cable companies is an "information service" but not a "telecommunications service" under the Communications Act, and therefore not subject to Title II regulation.

Numerous parties petitioned for judicial review, challenging the commission's conclusion that cable modem service is not a telecommunications service. The Ninth Circuit Court of Appeals then vacated the FCC's Declaratory Ruling in part, and the court remanded the rule for further agency proceedings. But in 2005 the U.S. Supreme Court reversed, rejecting the Ninth Circuit's approach to the case and approving the FCC's action. (See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).)

The basis for the Court's 6–3 decision was the so-called *Chevron* deference to an agency's authority—a linchpin of modern regulatory law. (See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).)

Writing for the majority, Justice Clarence Thomas clarified an issue that had been confounding lower courts: How does the *Chevron* doctrine interact with prior judicial constructions of a statute? Generally, under the *Chevron* standard courts defer to an agency's determination, particularly when the statutory language contains ambiguities and the agency in question has jurisdiction to administer the scheme enacted by Congress.

That analysis, however, can get complicated if a court's statutory interpretation preceded the agency's. In such instances, Thomas wrote, there is a limited exception: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Chevron*'s premise, the justice concluded, "is that it is for agencies, not courts, to fill statutory gaps." (*Brand X*, 545 U.S. at 982.)

In dissent, however, Justice Antonin Scalia argued that, *Chevron* notwithstanding, the services provided by the ISPs were better suited for coverage under Title II. "After all is said and done," he wrote, "and the smoke of agency expertise blown away, it remains perfectly clear that someone who sells cable-modem service is offering telecommunications." (*Brand X*, 545 U.S. at 1014.)

Scalia's point wasn't the only prescient one to emerge from the ruling. The majority opinion left the door open for the FCC to reconsider its position. "Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework," Thomas wrote, as long as the "agency adequately explains the reasons for a reversal of policy." (*Brand X*, 545 U.S. at 981.)

Both Thomas's reference to an agency's prerogative to reverse course—and Scalia's rationale in dissent—would provide ammunition for the current conflict. "*Brand X*," explains Netflix's Libertelli, "is the foundational event that set off this debate."

Splitting the Difference

Soon after the high court's *Brand X* ruling, the FCC issued an Internet Policy Statement espousing the principles that would come to serve as the bedrock of net neutrality. Having given up on Title II classification, the agency nonetheless asserted statutory authority to issue ISP guidelines under section 706 of the Telecommunications Act. That section directs the agency to "encourage the deployment … of advanced telecommunications capability to all Americans … by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." (47 U.S.C. § 1302(a).)

At the time, threats to net neutrality were largely hypothetical. But that changed in October 2007, when an Associated Press investigation exposed Comcast's obstruction of the BitTorrent website, a leading peer-to-peer file sharing system. Free Press and Public Knowledge (another advocacy group), later joined by public interest groups and law professors, filed a complaint with the FCC, which issued an order in August 2008 granting relief against Comcast for violating the agency's Internet Policy Statement. (Comcast Order, 23 F.C.C.R. 13,028 (2008).)

Comcast retaliated with a petition before the D.C. Circuit Court of Appeals challenging the FCC's authority to regulate an ISP's network-management practices. Amici urging the FCC to affirm its order included professors Jack M. Balkin at Yale Law School, James M. Chen at Brandeis

"That the agency cannot clearly identify a delegation of authority ... is powerful evidence that there is none."

—HELGI C. WALKER, GIBSON, DUNN & CRUTCHER

School of Law, Lawrence Lessig at Harvard Law School, Barbara van Schewick at Stanford Law School, and Timothy Wu at Columbia Law School. "In blocking BitTorrent, Comcast was using methods that deviate from the Internet standards," the professors asserted. "More precisely, using 'reset' packets to terminate BitTorrent connections represents *non-standard means of managing traffic* [italics original]. By adopting these strategies—and doing so in secret—Comcast is undermining the shared standardized practices and protocols that provide the foundation of the Internet's ability to spur innovation."

But Helgi C. Walker, then chair of Wiley Rein's appellate practice group in Washington, D.C., and counsel of record for Comcast, argued that the FCC's order was unlawful. "The Order plainly applied the unenforceable principles of the Policy Statement to Comcast's past conduct as enforceable standards of law—something no rational person with a basic understanding of administrative law would have thought permissible," Walker wrote in a scathing reply brief. "This Court recently reiterated that it will not abide this sort of administrative law bait-and-switch. (*Cohen v. United States*, 578 F.3d 1, 11 (D.C. Cir. 2009) (noting IRS 'chutzpah' in conflating policy statements with enforceable standards).)"

In April 2010 Judge David S. Tatel, writing for a unanimous panel, vacated the FCC's order. The commission "relies principally on several Congressional statements of policy, but under Supreme Court and D.C. Circuit case law statements of policy, by themselves, do not create 'statutorily mandated responsibilities,' " Tatel found. (*Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).) For Walker, who joined Gibson, Dunn & Crutcher's administrative law and regulatory practice group in 2013, it would be the first of two legal victories against the FCC before Judge Tatel.

To some extent, the FCC had undermined its own argument. In a 1998 ruling, the agency proclaimed that section 706 does "not constitute an independent grant of authority" but rather directed it "to use the authority granted in other provisions ... to encourage the deployment of advanced services." Tatel held that the FCC

was "bound by its earlier conclusion that section 706 grants no regulatory authority." (*Comcast Corp.* at 659.)

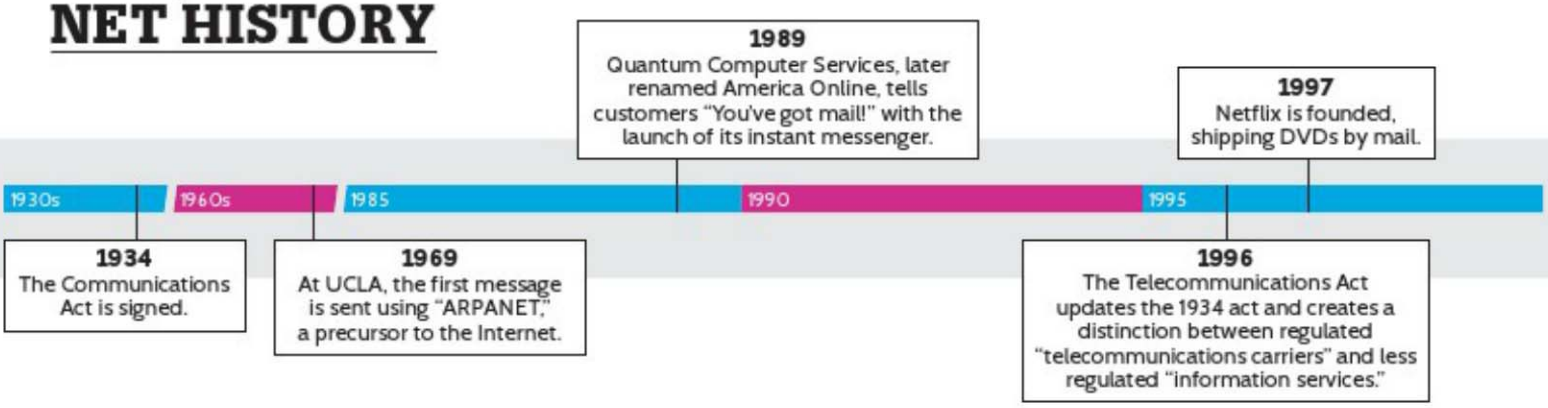
Tatel's opinion attracted the interest of Congress. Nearly a dozen "net neutrality" bills had been introduced since 2006, but none was enacted. In December 2010 the FCC—anxious that it needed to quickly resolve "significant uncertainty" about its authority—adopted new rules governing "broadband Internet access service."

The so-called Open Internet Order (OIO) explicitly banned ISPs from charging providers of online content or services for delivering traffic to or carrying traffic from broadband providers' end-user consumers. It expressly reserved the right to regulate the prices that broadband providers charge their own end users. It prohibited fixed broadband providers from "unreasonable discrimination in transmitting lawful network traffic." And it established a "transparency" rule that required all broadband providers to "publicly disclose" their network-management practices, performance characteristics, and commercial terms.

For authority to enact Internet regulations, the FCC stated that Congress "expressed its instructions in multiple sections [of the communications laws] which, viewed as a whole, provide broad authority" to adopt the rules. The commission again relied on section 706, which it maintained was a "specific delegation of legislative authority." And as a precaution, it reversed the 1998 order that Judge Tatel had referenced in *Comcast*. (See *In re Preserving the Open Internet*, 25 F.C.C.R. 17,905 (2010).)

Once again Wiley Rein's Walker, this time representing Verizon, led the ISPs' challenge to the FCC's authority. "The Order lumps together approximately 24 different statutory provisions into one undifferentiated mass, theorizing that Congress delegated 'broad authority' for the rules 'in multiple sections' of the communications laws," Walker wrote in a joint brief. "That the agency cannot clearly identify a delegation

Key Events in **NET HISTORY**



of authority over this revolutionary mode of communication is powerful evidence that there is none—Congress does not, after all, 'hide elephants in mouseholes.' "

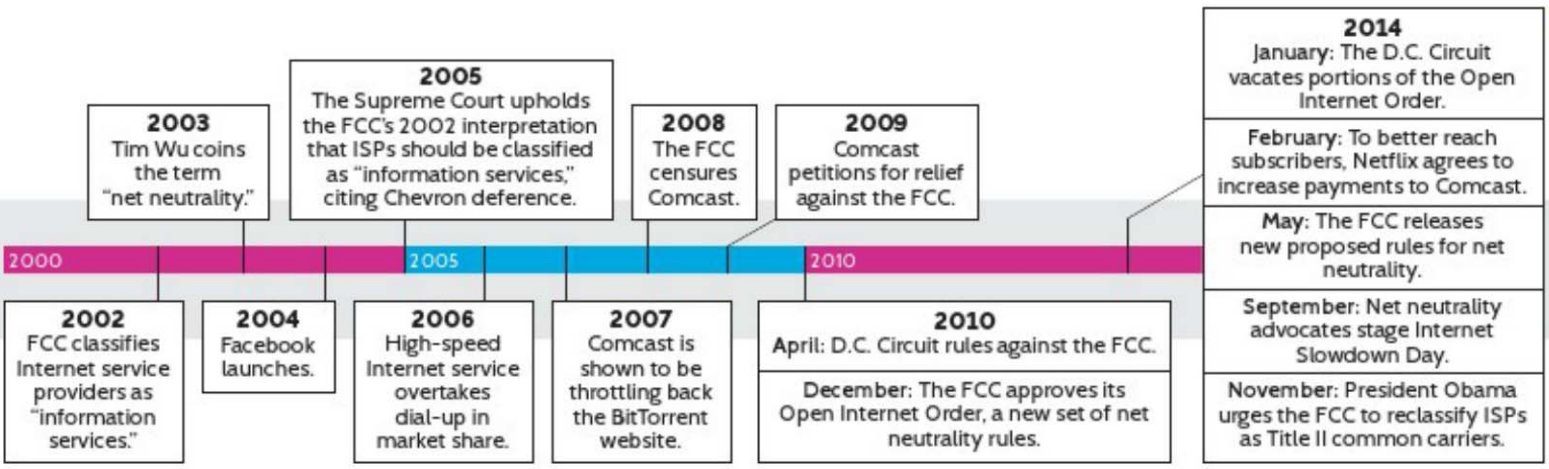
Last January Judge Tatel again located that authority in section 706, which he found did "apply directly to broadband providers ... but also seeks to promote the very goal that Congress explicitly sought to promote." Nonetheless, the 2–1 panel majority barred the FCC from applying restrictions—such as anti-blocking and antidiscrimination rules—that it said fell under Title II. "We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers," Tatel wrote, given the commission's "still-binding decision to classify broadband providers not as providers of 'telecommunications services' but instead as providers of 'information services.' " (*Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014).)

The only part of the OIO to survive were rules on disclosure of network-management practices. The message was clear: If the FCC wants to regulate the ISPs like common carriers, it should classify them as such under Title II.

Building a Coalition

Chastened, the FCC declined to appeal the *Verizon* ruling and set about devising yet another set of ISP guidelines—once again based on section 706. But when the *Wall Street Journal* published a leaked draft of the proposed rules in April, net neutrality supporters were shocked to learn that the FCC was considering letting ISPs charge websites for preferential treatment on "commercially reasonable" terms—a clear contravention of the ban on discrimination that the agency had issued in 2010 as part of its ill-fated OIO. (See Notice of Proposed Rulemaking, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (FCC May 15, 2014).)

Fear that the FCC was about to cave in



"The ISPs have institutionalized power; we're fighting back with grassroots power—3.7 million comments are impossible to ignore."

—ALTHEA ERICKSON, ETSY

on net neutrality principles inspired free speech and civil liberties advocates, academics, economists, experts from think tanks, and tech company executives to act. "Coalition advocacy works through addition—not subtraction," explains Todd O'Boyle of Common Cause, a member of the group. Free Press, Public Knowledge, and a handful of other groups held the coalition together. When other groups, such as the ACLU, added net neutrality to their existing agendas, the number of organizations involved totaled more than 50.

Law professors from elite universities—including Columbia's Tim Wu, credited with coining the phrase "net neutrality"—provided institutional firepower. Lastly, numerous tech companies and various trade groups provided additional talent, lobbying, and an economic perspective. "It's not just the nonprofits versus the ISPs," says O'Boyle.

Indeed, 150 Web companies ranging from giants such as Netflix, eBay, and Twitter to smaller outfits like Etsy sent a letter to the FCC's Wheeler bemoaning the "grave threat to the Internet" posed by paid prioritization. More than 120 of the nation's leading angel investors and venture capitalists also warned the FCC of the potential for the new rules to "stifle innovation."

Relying on listservs, emails, phone calls, and weekly meetings, coalition leaders coordinated activities among the disparate organizations. Members mobilized their respective constituents through at least 20 distinct letter-writing campaigns. It was more successful than anyone could have imagined. According to an analysis by the Sunlight Foundation, less than 1 percent of the millions of comments received by the FCC opposed net neutrality.

"We can't manufacture that kind of passion," says Michael Weinberg of Public Knowledge. Libertelli concurs: "I have never seen this level of engagement." And Erickson adds, "The ISPs have institutionalized power; we're fighting back with grassroots power—3.7 million comments are impossible to ignore."

Among the largest of the coalition members, Netflix focused its advocacy on access at interconnection points—the "first mile"

of the Internet—rather than on user concerns over paid prioritization at the "last mile." In a comment to the FCC in September, Netflix stated that when an ISP "allows interconnection links to its network to consistently congest, a consumer does not get the broadband access service that she pays for."

Comcast, Verizon, and the other ISPs refute the charge, claiming that any slowing of traffic was caused by intermediaries Netflix uses to deliver its content to the ISP on its way to consumers. "Internet interconnection has nothing to do with net neutrality," Comcast asserted. "It's all about Netflix wanting to unfairly shift its costs from its customers to all Internet customers."

But Netflix lobbyist Libertelli doesn't accept that. "Let's just call a spade a spade," he says. "Comcast was congesting pathways into their network so they could charge us … for access to their network. … When we saw that degradation of performance, we found it intolerable—so we paid our way around congestion."

With its titanic bandwidth requirements, Netflix is clearly a beneficiary of open-Internet rules. But other tech heavyweights that also would benefit—such as Google, Apple, and Microsoft—have kept a low profile in the debate. Their posture may reflect their ability to pay for fast lanes, and the fact that some of their interests are now aligned with the ISPs. "Large Internet companies that can afford access are going to have a huge advantage," says Evan Engstrom, policy director at Engine, an organization that supports Internet start-ups.

Despite the range of viewpoints within the net neutrality coalition, the members agree almost unanimously on the need to reclassify the ISPs as common carriers. "Title II has acquired this almost mythic quality," says Harold Feld, senior vice president at Public Knowledge and a lawyer who worked on both the *Comcast* and *Verizon* cases. "It's become a religious issue."

Indeed, Title II seems to provide a solution for every concern: It would afford the FCC the authority to address public policy concerns, as well as safeguard a level playing field for smaller Internet businesses. And coalition members believe that Title II reclassification can survive judicial scrutiny—unlike rules based on section 706 that have been overturned by the courts.

Legally, it also appears to be the only viable alternative. The large ISPs monopolize most local telecom markets, an economic reality likely to be exacerbated if the pending mergers of Comcast with Time Warner Cable and AT&T with DirecTV are approved. Technologically, nothing on the horizon will threaten their stranglehold on the connections between content providers and end users.

Antitrust regulators have found few opportunities to prevent economic concen-

tration in the telecom industry or to guard against abuse. "Unfortunately, issues like protecting an open society or safeguarding the political process are not, I'd suggest, ones that the Federal Trade Commission was designed to deal with," Professor Wu told a House judiciary subcommittee last June. "Making the [FTC] the new guardian of an open Internet might require the agency equivalent of a brain transplant," said Wu, who served as a senior advisor to the commission in 2011–12.

The coalition's momentum reached its apogee on September 10—Internet Slowdown Day. Organized by Free Press, Engine, Fight for the Future, and Demand Progress, the event marked the biggest Web-based protest since the Stop Online Piracy Act demonstrations of 2012. Participants contacted Congress through more than 2.3 million calls and emails, and filed 722,364 comments with the FCC, crashing its servers. More than 10,000 websites—including Foursquare, Tumblr, Kickstarter, and Netflix—mobilized followers and posted the "loading" Web page icon to suggest what paid prioritization portends.

The impact was undeniable. "The public discourse has strongly moved in our favor," says Erickson at Etsy. "At first, Title II was seen as politically unfeasible. I [now] feel more hopeful."

Within weeks Title II reclassification went from being a wish to a real possibility. The FCC's Wheeler proposed a "hybrid" approach to regulation that would categorize ISP services under *both* section 706 and Title II, selectively applying the many obligations of common carriers.

At a September roundtable of experts in the FCC's meeting room, Wheeler told the assembly in opening remarks: "If there has ever been any doubt, we are pro–open Internet here at the FCC."

New Wine in Old Bottles

Broadband carriers have their own obsession with Title II. It's just that their arguments about common carrier status are diametrically opposed to those of the net neutrality coalition.

The ISPs' primary contention is that Title II would discourage investment in the broadband infrastructure. According to the National Cable and Telecommunications Association (NCTA), $1.2 trillion has been poured into broadband investments since 1996. "Broadband providers in the United States are investing more than twice as much as their counterparts in the European Union on a per-household basis," the association wrote in its rule-making comments to the FCC.

The NCTA explained the disparity this way: "Several analysts have directly linked the superior levels of broadband investment in the U.S. to the Commission's restrained regulatory approach as compared to the European

model, which has treated broadband providers as public utilities."

To the broadband carriers, many Title II provisions are simply unworkable in the modern world. Despite President Obama's assurance of regulatory forbearance, as common carriers the ISPs' rate schedules could be subject to FCC approval, and intrastate regulation of broadband might apply. "Free Press and Public Knowledge don't want to discuss the negative aspects of Title II regulation because they need it to achieve their ultimate objective, which is FCC regulation of the rates, terms, and conditions of broadband service," asserts Wiley Rein's Ross. "They view broadband providers as monopolists, or at the very least, duopolists."

ISP lawyers also interpret the *Verizon* ruling differently from net neutrality advocates. "The decision could have been 30 pages shorter," comments Ross. The D.C. Circuit Court of Appeals went to great lengths only to give the FCC a road map to safeguarding net neutrality under section 706, he contends.

Under CEO Reed Hastings, Netflix pays Comcast and Verizon to guarantee reliable video streaming.

Nothing in the legislative history of Title II suggests that Congress intended it to cover ISPs, Ross continues. And he says that after more than a decade of regulating broadband carriers under Title I, a turnabout would take "regulatory and legal jujitsu"—especially after 2005, when the FCC itself argued for Title I authority in *Brand X*.

Besides, the ISPs point out, why should they have to underwrite the massive use of their infrastructure by content providers such as Netflix? "Everybody's got a variety of routes to deliver their traffic," says AT&T's senior vice president for external and legislative affairs, James W. Cicconi. "All of them cost money and everybody

"Let's just call a spade a spade: Comcast was congesting pathways into their network so they could charge us for access to their network."

—CHRIS LIBERTELLI, NETFLIX

accepts that. And by the way," he adds, "the only company out there arguing for free [access] is Netflix."

The ISPs have largely relied on litigation and on lobbying of lawmakers and regulators. According to the Sunlight Foundation, from 2005 to 2013 the ISPs spent five times as much as opponents lobbying Congress on net neutrality. Comcast, AT&T, Verizon, and the NCTA spent a total of $45 million on lobbying last year, according to Open Secrets, and all 4 ranked among the top 20 spenders in the country.

The ISPs were also princely campaign donors, serving as major contributors to House Energy and Commerce Committee members Rep. Greg Walden (R-Ore.) and Rep. Fred Upton (R-Mich.), its chair. Both legislators have repeatedly voiced their opposition to Title II reclassification. And though the FCC as an agency of the executive branch is independent of Congress, it is the source of the agency's budget. In addition, FCC actions could ultimately be overturned through the Congressional Review Act (5 U.S.C. §§ 801–808), which the House invoked in an unsuccessful attempt to supersede the OIO in 2011.

"The eighth floor is always aware of what happens in Congress," says O'Boyle of Common Cause, referring to the offices of the FCC commissioners.

Still, Obama's announcement on YouTube was a clear indicator that the ISPs lack unanimous support in Washington. Their ultimate success may lie in steering the net neutrality narrative toward a libertarian framework. Their ability to convince policymakers that Title II regulation is an audacious and dangerous undertaking has helped block efforts by FCC chairs in two administrations to bolster an open Internet.

More important, a libertarian ethos prevails among members of Congress charged with overseeing the FCC. "The modern communications landscape bears no resemblance to the world Title II was meant to regulate," Rep. Walden said during his committee hearings in May. "Worse still, the practical consequences of reclassification are to give the bureaucrats at the FCC the authority to second-guess business decisions and to regulate every possible aspect of the Internet."

A similar mindset may have encouraged Silicon Valley's biggest companies to stay on the sidelines of the debate on Internet regulation. In a tweet last February, Marc Andreessen, the libertarian co-founder of Netscape, counseled against a heavy-handed approach to securing an open Internet. "Strict net neutrality = Internet version of Marxism," he wrote. "Sounds great; problematic consequences."

Degrees of Deference

With the FCC split along party lines, the agency's two Republican commissioners—Michael O'Rielly and Ajit Pai—have vowed

"The modern communications landscape bears no resemblance to the world Title II was meant to regulate."

—REP. GREG WALDEN (R-ORE.)

to fight any form of Internet regulation. So all of the current lobbying efforts are aimed at three people who will serve as the commission's arbiters on net neutrality: Chairman Wheeler and his two fellow Democrats, Jessica Rosenworcel and Mignon Clyburn.

Obama's announcement was clearly intended to sway Wheeler's vote. Ross speculates that Obama spoke out of a fear that the FCC might rely on section 706. "That's why the president chopped the chairman at the knees," Ross says.

Adds VP Feld of Public Knowledge, "When your president tells you 'I'd really like you to do this,' that has an impact." The move also gives the commission political cover, Feld explains. "This frees the agency to take a course that would antagonize a Republican Congress."

Wheeler, who at 68 is unlikely to continue a long political career, may not be the president's only target. "The other two Democrats on the commission have substantial political careers ahead of them," Feld says, "and they understand that from a political perspective, it wouldn't look good to go against the president."

Clyburn, who has publicly supported Title II reclassification, spent eleven years on South Carolina's Public Service Commission before arriving at the FCC in 2009. Rosenworcel, the only lawyer among the three Democrats, served as a legal advisor to former FCC commissioner Michael Copps—a big supporter of net neutrality—before her appointment to the agency in 2012.

However, no matter what the FCC decides, it won't be the last word. "If Title II is anywhere in the FCC's order," Ross says, "it certainly will be appealed vociferously." Even with "a lot of clever lawyering" to undo the handicap of more than a decade of regulation under Title I, Ross gives Title II designation less than a 40 percent chance of success. He says his estimate goes that high "only because of *Chevron*." If the FCC decides to pursue a so-called hybrid approach—regulating access for content providers like Netflix under Title II but invoking section 706 to regulate retail broadband services—Ross gives the agency less than a 20 percent chance of prevailing on appeal.

The anticipated legal challenges will

Proponents need Title II reclassification "to achieve their ultimate objective, which is FCC regulation of the rates, terms, and conditions of broadband service."

—BENNETT L. ROSS, WILEY REIN

likely target the FCC's rule-making authority to change direction, relying on either the *Chevron* standard or the Administrative Procedure Act (APA) (5 U.S.C. §§ 500–596). Just four years after its decision in *Brand X*, the Supreme Court held that the FCC had not acted arbitrarily when it changed its long-standing policy on obscenity—overruling two appellate courts that had applied a heightened standard to reviewing agency rules when it overturns a previous policy. The Court based its decision on the APA. (*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).).

"We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review," Justice Scalia wrote for a 5–4 majority. "The Act mentions no such heightened standard."

All an agency needs to do under the APA is articulate a satisfactory explanation and examine relevant data. "We have made clear," Scalia wrote, "that 'a court is not to substitute its judgment for that of the agency,' and should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' " (*Fox Television*, 556 U.S. at 514.)

Then in 2013, the Court applied the *Chevron* framework to the FCC's interpretation of a statutory ambiguity concerning the scope of the agency's authority. In other words, the Court said that an agency must receive *Chevron* deference in determining its own jurisdiction. (*City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).)

City of Arlington comes into play in net neutrality because a Title II designation is, in a way, a jurisdictional issue that will determine the scope of the FCC's authority. The argument against deference rests on the premise that two distinct classes of agency interpretations exist: Some—the big, important ones, presumably—define the agency's jurisdiction. Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has.

According to Scalia's 6–3 majority opinion, that premise is false, because the distinction between "jurisdictional" and "non-juris-

dictional" interpretations is a mirage. "No matter how it is framed," Scalia wrote, "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." (*City of Arlington*, 133 S. Ct. at 1868 [emphasis by the Court].)

Scalia concluded, "In sum, judges should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statutory provision is 'jurisdictional' or 'non-jurisdictional.' Once those labels are sheared away, it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." (133 S. Ct. at 1870.)

But in dissent, Chief Justice John G. Roberts—joined by Justices Samuel Alito and Anthony Kennedy—made a separation-of-powers argument that limits an agency's statutory authority. An agency interpretation warrants deference, Roberts wrote, "only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner. ... We do not defer to an agency's interpretation of an ambiguous provision unless Congress wants us to." (*City of Arlington*, 133 S. Ct. at 1883.)

On such legal arcana hangs the fate of Title II reclassification of the ISPs. Despite the warning from the chief justice, however, Scalia's majority opinion contains a promising omen for advocates of Title II: To illustrate a point, Scalia chose as an example whether the FCC has the power to categorize ISPs as common carriers—the very term used under Title II. (See *City of Arlington*, 133 S. Ct. at 1869.) His comment was in the form of dicta, because it was not the issue in the case.

Nonetheless, it was an eerie choice. The same reasoning Scalia used in *Fox Television* and *City of Arlington* would presumably apply to the FCC's potential move to reverse course on Title II. The net neutrality coalition—and President Obama—may finally secure a set of open-Internet rules capable of winning in the courts. CL

"After all is said and done and the smoke of agency expertise blown away, it remains perfectly clear that someone who sells cable-modem service is offering telecommunications."

—JUSTICE ANTONIN SCALIA