

10 Things To Know About Net Neutrality And Class Actions

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Internet service providers of all sizes should be aware that violations of the Federal Communications Commission's "net neutrality" rules could lead to class action complaints seeking up to millions of dollars in damages. As FCC Commissioner Ajit Pai has observed, the net neutrality rules are a "gift to the plaintiffs' bar" because they "deputize trial lawyers to file class-action lawsuits if they contend that any of these rules are being violated."^[1] Now that a federal court has sustained the FCC's net neutrality rules,^[2] here are 10 things you need to know to be prepared for class actions involving net neutrality.

1. The net neutrality rules permit only reasonable network management practices. ISPs cannot block or throttle lawful content and applications, but they are permitted to engage in reasonable network management.^[3] "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."^[4] Although the FCC has provided some guidance regarding what practices constitute reasonable network management,^[5] the ambiguity surrounding which network management practices are "reasonable" could open the door to complaints alleging that a particular practice constitutes a net neutrality violation.

2. The net neutrality rules also include a transparency requirement with an express safe harbor format. The transparency rule requires ISPs to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its

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broadband Internet access services.”[6] In 2016, the FCC approved broadband labels, which resemble nutrition labels on food products, to provide consumers with “an easy way to understand provider prices, performance, and network practices.”[7] While ISPs are not required to use the labels, ISPs “that voluntarily adopt this format will be presumed to be in compliance with the requirement to make transparency disclosures in a format that meets the needs of consumers.”[8] If the content of an ISP’s label is inaccurate or misleading, however, the ISP could still be in violation of the transparency rule.

3. ISPs are also subject to Title II of the Communications Act. In addition to adopting net neutrality rules, the FCC reclassified ISPs as common carriers subject to Title II of the Communications Act.[9] Although the FCC declined to apply many provisions of Title II, ISPs remain subject to Sections 201 and 202 of Title II.[10] Section 201(b) states that common carriers cannot engage in any “unjust or unreasonable” practices.[11] Section 202 (a) prohibits “any unjust or unreasonable discrimination” in charges or practices.[12]

4. The net neutrality rules represent the FCC’s view of reasonable ISP practices under Title II. In adopting the net neutrality rules, the FCC relied upon Sections 201 and 202 of Title II in addition to Section 706 of the Telecommunications Act of 1996.[13] As the FCC explained, the net neutrality rules represent the FCC’s “interpretation of sections 201 and 202 in the broadband Internet access context.”[14] Therefore, a violation of the net neutrality rules could also be considered a violation of Section 201 and/or Section 202.

5. The threat of class action complaints comes from Title II. Title II allows a plaintiff to seek relief against common carriers in federal court,[15] and common carriers are often sued in class actions alleging their conduct violates Sections 201 and 202 or an FCC rule. ISPs could face similar class action complaints in federal court alleging violations of the net neutrality rules or Title II.

6. The transparency rule creates the greatest risk of class action litigation. The transparency rule operates similar to a consumer protection statute. Its sheer complexity will give creative plaintiffs counsel numerous ways to allege that ISPs have adopted misleading or confusing disclosures. The FCC has already enforced the transparency rule against large ISPs,[16] and class actions were filed soon thereafter.[17] ISPs must ensure their advertisements and marketing materials are accurate and not misleading.

7. Interconnection disputes could also spawn consumer class actions. In order for an ISP to provide full internet service, it must be able to “interconnect” with other ISPs and connecting networks. As traffic volume continues to increase, the taxing of the capacity of the interconnection points could increase the likelihood of disputes between ISPs and other network operators.[18] In the event such disputes lead to a termination of service to certain ISPs, substantial degradation of service or increased prices, the door may be open for a consumer class action. Although the FCC declined to apply the net neutrality rules to interconnection practices, the FCC expressly stated that “commercial arrangements” for interconnection are governed by Title II, specifically Sections 201 and 202.[19] To the extent an ISP or network operator finds itself in a commercial dispute over interconnection capacity, it must take into account this potentially costly collateral result.

8. ISPs likely cannot challenge the net neutrality rules as a defense to a class action. Courts have generally not permitted defendants to argue that an FCC rule is unlawful or unconstitutional as a defense to a class action.[20] Such collateral attacks on FCC rules are generally prohibited because the validity of FCC rules must be challenged in the courts of appeals in a petition for review.[21] Therefore, ISPs probably cannot argue that the FCC's net neutrality rules are invalid as a defense to a class action.

9. Class actions may be referred to the FCC. Courts often stay or refer cases involving alleged violations of the Communications Act or FCC rules to the agency under the primary jurisdiction doctrine.[22] A primary jurisdiction referral allows the FCC to use its expertise to consider an alleged violation of the act or an FCC rule in the first instance.[23] The FCC has invited courts to refer cases to the agency involving alleged violations of the net neutrality rules, explaining that courts reviewing ISPs' practices "in the first instance should recognize the Commission's primary jurisdiction in a context such as this." [24]

10. Arbitration clauses may be used to defeat class actions. The Federal Arbitration Act requires courts to enforce the validity of arbitration clauses in consumer contracts.[25] Courts have routinely disposed of class action complaints where the plaintiffs bypassed arbitration clauses governing the disputes.[26] ISPs may be able to use arbitration clauses in their customer agreements to defeat class actions alleging violations of the net neutrality rules,[27] although the FCC has proposed to curb the use of these clauses in ISP contracts.[28]

Consumer class actions are on the rise, including class actions against common carriers for violations of the Communications Act and FCC rules. The FCC's net neutrality rules increase the likelihood of exposure to litigation by allowing consumers to challenge ISPs' network management practices and disclosures in court. Compliance with the net neutrality rules is essential to protect against the threat of class action litigation.

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[1] Ajit Pai & Lee Goodman, Internet Freedom Works, Politico (Feb. 23, 2015), <http://www.politico.com/magazine/story/2015/02/fcc-internet-regulations-ajit-pai-115399#ixzz4H2Dz11oV>.

[2] United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), petitions for rehearing pending.

[3] 47 C.F.R. §§ 8.5, 8.7; see also 47 C.F.R. § 8.11.

[4] 47 C.F.R. § 8.2(f).

[5] Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶¶ 214-24 (2015) ("Open Internet Order").

[6] 47 C.F.R. § 8.3; see also Open Internet Order ¶¶ 162-72.

[7] Consumer and Governmental Affairs, Wireline Competition, and Wireless Telecommunications Bureaus Approve Open Internet Broadband Consumer Labels, Public Notice, DA 16-357 (Apr. 4, 2016) https://apps.fcc.gov/edocs_public/attachmatch/DA-16-357A1.pdf.

[8] Open Internet Order ¶ 181.

[9] *Id.* ¶¶ 308, 330-35.

[10] *Id.* ¶¶ 441-52.

[11] 47 U.S.C. § 201(b).

[12] 47 U.S.C. § 202(a).

[13] Open Internet Order ¶¶ 283-84, 289-92.

[14] *Id.* ¶ 137.

[15] 47 U.S.C. § 207.

[16] *In re AT&T Mobility LLC*, Notice of Apparent Liability for Forfeiture and Order, 30 FCC Rcd 6613 (2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-63A1_Rcd.pdf; Press Release, FCC, FCC Settles Verizon “Supercookie” Probe, Requires Consumer Opt-In for Third Parties (Mar. 7, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-338091A1.pdf.

[17] See, e.g., *Lilienthal v. AT&T Corp.*, No. 5:15-cv-01045 (N.D. Ala. 2015); *Michael v. Verizon Communications Inc. et al.*, No. 3:15-cv-00072 (S.D. Miss. 2015); *Henson et al. v. Turn Inc.*, No. 4:15-cv-01497 (N.D. Cal. 2016).

[18] See *Cogent Commc’ns Inc. v. Deutsche Telekom AG*, No. 1:15-cv-01632 (LMB/IDD) (E.D. Va. 2015).

[19] See Open Internet Order ¶¶ 28-31, 195, 205.

[20] E.g., *CE Design Ltd. v. Prism Bus. Media Inc.*, 606 F.3d 443 (7th Cir. 2010).

[21] 47 U.S.C. § 402.

[22] Order Granting Request to Stay, *Hart v. Comcast of Alameda*, No. C 07-6350 PJH (N.D. Ca. June 25, 2008).

[23] Richard Welch, Demystifying Primary Jurisdiction Referrals, FCC Blog (July 29, 2010), <https://www.fcc.gov/news-events/blog/2010/07/29/demystifying-primary-jurisdiction-referrals>.

[24] Open Internet Order ¶ 455.

[25] 9 U.S.C. § 2.

[26] AT&T v. Concepcion, 562 U.S. 333 (2011).

[27] Notice of Dismissal at 1, Lilienthal v. AT&T Corp. No. 5:15-cv-01045; Order Granting Defendant's Motion to Stay This Action and Compel Arbitration at 1, Henson et al. v. Turn Inc. No. 4:15-cv-01497.

[28] Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 31 FCC Rcd. 2500, ¶ 274 (2016) (asking "whether to prohibit BIAS providers from compelling arbitration in their contracts with customers"), https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-39A1.pdf; Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Report and Order, WC Docket No. 16-106, FCC 16-148, ¶ 305 (released Nov. 2, 2016) (expressing "serious concerns about the impact on consumers from the inclusion of mandatory arbitration requirements as a standard part of many contracts for communications services"), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1103/FCC-16-148A1.pdf.