

## Will Net Neutrality Be Short-Lived?

Brian Heaton | March 11, 2015



Could history repeat itself in the ongoing debate over net neutrality? One legal expert thinks so.

Litigation over the FCC's vote to use Title II to regulate the Internet is inevitable, according to Michael Botein, professor of law, emeritus, at New York Law School. He believes the commission's latest ruling could be overturned, similar to what happened to the "crude form" of network neutrality it adopted in 2005. That decision was [vacated](#) by the U.S. Court of Appeals for the District of Columbia Circuit in January 2014.

Botein told *Government Technology* that the commission created a much bigger target for critics by invoking Title II as a big part of its regulatory authority.

"Assuming that someone pulls the trigger, it seems likely that any litigation will be long, expensive and hard to settle," Botein said. "It also seems a bit strange that there was not more of an attempt to limit the impact of any Title II regulation at all, and thus minimize the fighting and collateral damages."

The FCC's [decision last month](#) to ensure an open Internet was praised by many who didn't want telecommunications companies creating fast lanes to prioritize the content seen by users. But critics have slammed the commission's move, calling use of Title II

authority draconian. Title II is a part of the original Communications Act of 1934, which is used to regulate telephone service.

The Information Technology & Innovation Foundation (ITIF) called the FCC's decision "unhelpful," adding that it's also unwarranted and unnecessary. Doug Brake, telecommunications policy analyst for the ITIF, said the commission's vote to classify broadband as a Title II communication service will put "a dark cloud of uncertainty" over the Internet and the economy it generates.

Brake said he believes the move will make it harder to do pro-consumer network management, and applying it to mobile networks could be a "grave mistake."

"What we need here are not the 'strongest possible' rules, but flexible, balanced guidelines and ongoing oversight to allow good traffic differentiation and prevent practices that are anti-competitive or otherwise legitimately harm the open Internet," Brake said in a statement.

A number of lawmakers and other experts joined Brake in his criticism of the FCC's decision on net neutrality. William Pound, executive director of the National Conference of State Legislatures (NCSL), issued a press release calling the Title II adoption for Internet regulation "unfortunate and downright disappointing."

Republican members of the House Energy and Commerce Committee's Subcommittee on Communications and Technology were harsher in their criticism. The group expects the FCC's ruling to "trigger a stampede to the courts," and years of lawsuits.

"A 3-to-2 party-line vote is not the policy consensus this issue deserves," the members said in a statement. "Consumers, investment in state-of-the-art networks, and job creation all stand to lose from [this] heavy-handed decision. And transparency has all but evaporated during this broken process. Once these rules finally emerge from the shadows, it will become clear that the FCC's action ... does not end the debate."

Botein agreed that the debate could be far from over. He noted that people have continually referenced Title II regulation, but how it was applied in the past was "incredibly simplistic," to the point where if consumers paid the appropriate rate for services, they were entitled to receive that service as "good" as anyone else. There was no "fine print" as to how quickly the service had to be provided, the quality, or long list of details.

"Common carriage was explicitly seen as a means of promoting competition, and as long as vendors sold at roughly the same prices for the same quantities, they were in compliance with what we'd call Title II today," Botein said. "Surprisingly enough, this aspect didn't get much attention [from the FCC, and it] ... may be particularly important if the commission does not enter into detailed regulation – but rather just broad, sweeping generalizations – as may be likely."