

How Did We Get Here? Title II, Net Neutrality, and the Struggle for Balance in Broadband Regulation

By Larry Downes

It's baaacckkk. The return this year, for the fourth or fifth time, of noisy public debates over "net neutrality," joins equally contentious and equally ungrounded fights over data collection and use, and uncertainty generally about the authority of different federal and state regulators over the Internet ecosystem. These distracting and seemingly unresolvable fights not only keep regulators from completing urgent reforms, but have also been shown to unsettle public markets, stalling investment just when it is needed most.

In the search for a long-term solution to all of these problems, it's worth taking a step back to ask: How did we get here?

The short answer is the lack of clear Congressional guidance on how and by whom the Internet is to be regulated. The 1996 Telecommunications Act, the last major piece of legislation to address the subject, only waded in the direction of the Internet, then just beginning its public life. What is true is that the wave was very much in the right direction. A bi-partisan Congress, with the agreement of the White House, thankfully recognized the Internet's potential for disruptive innovation. To maximize that promise, all stakeholders agreed that the policy of the U.S. would be to leave the Internet "unfettered by Federal or State regulation."

But since then, Congress has been largely silent, even as short-term crises have sorely tested the meaning of "unfettered." The Internet has already swallowed every other network, including regulated voice, video and data services, launching along the way dozens of billion dollar enterprises and a mobile revolution still in progress. Over the last twenty years, the information economy, carried on the back of the Internet, has become the central driver of growth for industries far afield of communications and media. And its appetite has only been whetted.

Convergence and expansion has left regulators and the federal courts scrambling every day to figure out who, how and whether to regulate, generating both gaps and conflicts that have complicated an already messy tangle of new and old rules.

No one is happy with the legal environment that has been cobbled together. But despite several recent efforts to pass either specific reforms or a broader update of the Communications Act, Congress has so far remained absent from the field.

Understanding both the history of Internet regulation and current efforts to reform it gives hope of cutting through the rhetorical excess and confusion that today makes rational conversation nearly impossible. Seeing where we've come from, we believe, will make clear what needs to be done to get us much closer to where we need to be