

A Brief History of Net Neutrality



Professor Daniel Lyons, Boston College Law School
71st NECPUC Annual Symposium
May 21, 2018

Origins: 1996 Telecommunications Act



“Today, with the stroke of a pen, our laws will catch up with our future.”



--President Bill Clinton,
signing the 1996
Telecommunications Act

Origins: 1996 Telecommunications Act



Title I

Information
Services

Lightly
Regulated

Example:
Voicemail

Title II

Telecom
Services

Common
Carriage

Example:
Telephone

Title III

Wireless
Services

Licensing

Example:
Broadcast

Title VI

Cable
Services

Local
Franchising

Example:
Cable TV

What About the Internet?



- 1996: only 50% of Americans have Internet Access



- Act mentions Internet almost entirely in context of regulating online pornography
- Mentions Broadband only once

What About the Internet?



“I want to create an oasis from regulation in the broadband world, so that any company, using any technology, will have incentives to deploy broadband in an unregulated or significantly deregulated environment.”

--FCC Chairman William Kennard
1999

What About the Internet?



Title I

Information
Services

Lightly
Regulated

Example:
Voicemail

Title II

Telecom
Services

Common
Carriage

Example:
Telephone

Title III

Wireless
Services

Licensing

Example:
Broadcast

Title VI

Cable
Services

Local
Franchising

Example:
Cable TV

City of Portland, Oregon (1999)



Title I

Information
Services

Lightly
Regulated

Example:
Voicemail

Title II

Telecom
Services

Common
Carriage

Example:
Telephone

Title III

Wireless
Services

Licensing

Example:
Broadcast

Title VI

Cable
Services

Local
Franchising

Example:
Cable TV

AT&T v. City of Portland (9th Cir. 2000)



Title I

Information
Services

Lightly
Regulated

Example:
Voicemail

Title II

Telecom
Services

Common
Carriage

Example:
Telephone

Title III

Wireless
Services

Licensing

Example:
Broadcast

Title VI

Cable
Services

Local
Franchising

Example:
Cable TV

FCC Cable Modem Order (2002)



Title I

Information
Services

Lightly
Regulated

Example:
Voicemail

Title II

Telecom
Services

Common
Carriage

Example:
Telephone

Title III

Wireless
Services

Licensing

Example:
Broadcast

Title VI

Cable
Services

Local
Franchising

Example:
Cable TV

NCTA v. Brand X (Supreme Court 2005)



- 1996 Act is ambiguous re classification of cable modem service
- FCC reasonably classified as Title I information service
- FCC then classifies all other forms of broadband service as Title I information services

2005 Internet Policy Statement



Consumers are entitled to:

- Access lawful Internet content of their choice
- Run applications and use services of their choice
- Connect their choice of legal devices
- Competition among network providers, application and service providers, and content providers

2010 Open Internet Rules



- Substantial Rules Governing Wireline
 - Transparency
 - No Blocking
 - No Unreasonable Discrimination
- Lighter Touch for Wireless
 - Transparency
 - No Blocking Voice/Video Telephony Apps
 - No Blocking Lawful Websites
- Invalidated by Verizon v. FCC (D.C. Cir. 2014)

2015 Open Internet Rules



Title I

Information
Services

Lightly
Regulated

Example:
Voicemail

Title II

Telecom
Services

Common
Carriage

Example:
Telephone

Title III

Wireless
Services

Licensing

Example:
Broadcast

Title VI

Cable
Services

Local
Franchising

Example:
Cable TV

2015 Open Internet Rules



- Unified Regulatory Scheme for Wireline/Wireless
- Bright Line Rules
 - Transparency
 - No Blocking/Throttling
 - No Paid Prioritization
- No “unreasonable interference/disadvantage” standard
- Forbearance from some Title II requirements

2018 Restoring Internet Freedom



Title I

Information
Services

Lightly
Regulated

Example:
Voicemail

Title II

Telecom
Services

Common
Carriage

Example:
Telephone

Title III

Wireless
Services

Licensing

Example:
Broadcast

Title VI

Cable
Services

Local
Franchising

Example:
Cable TV

2018 Restoring Internet Freedom Order



- Restores traditional classification of broadband as Title I information service
- Repeals blocking/throttling/paid prioritization rules and general conduct standard
- Enhances transparency requirements
- Like 2015 Order, preempts state regulation of broadband network management practices

Arguments for Net Neutrality



- Flow of speech/information online
- Anticompetitive abuse: giving self/allies unfair advantage in upstream markets for content
- Tilting playing field in favor of well-funded content/application providers



Need for Regulatory Oversight

Arguments Against Net Neutrality



- “Solution in Search of a Problem”
- Good vs bad forms of prioritization (even for a fee)
- Harm to investment and innovation
- Antitrust as backstop

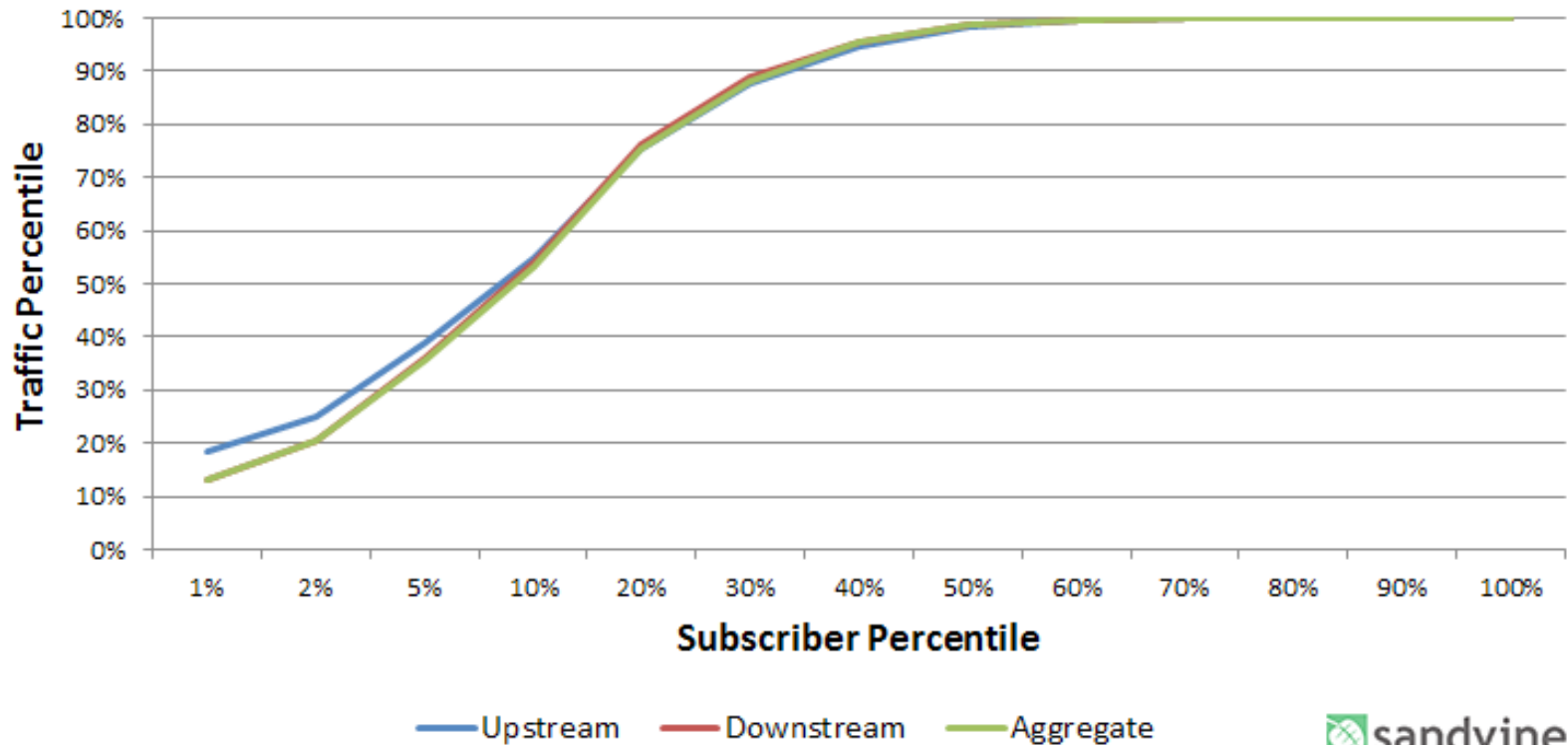


Need for Regulatory Flexibility

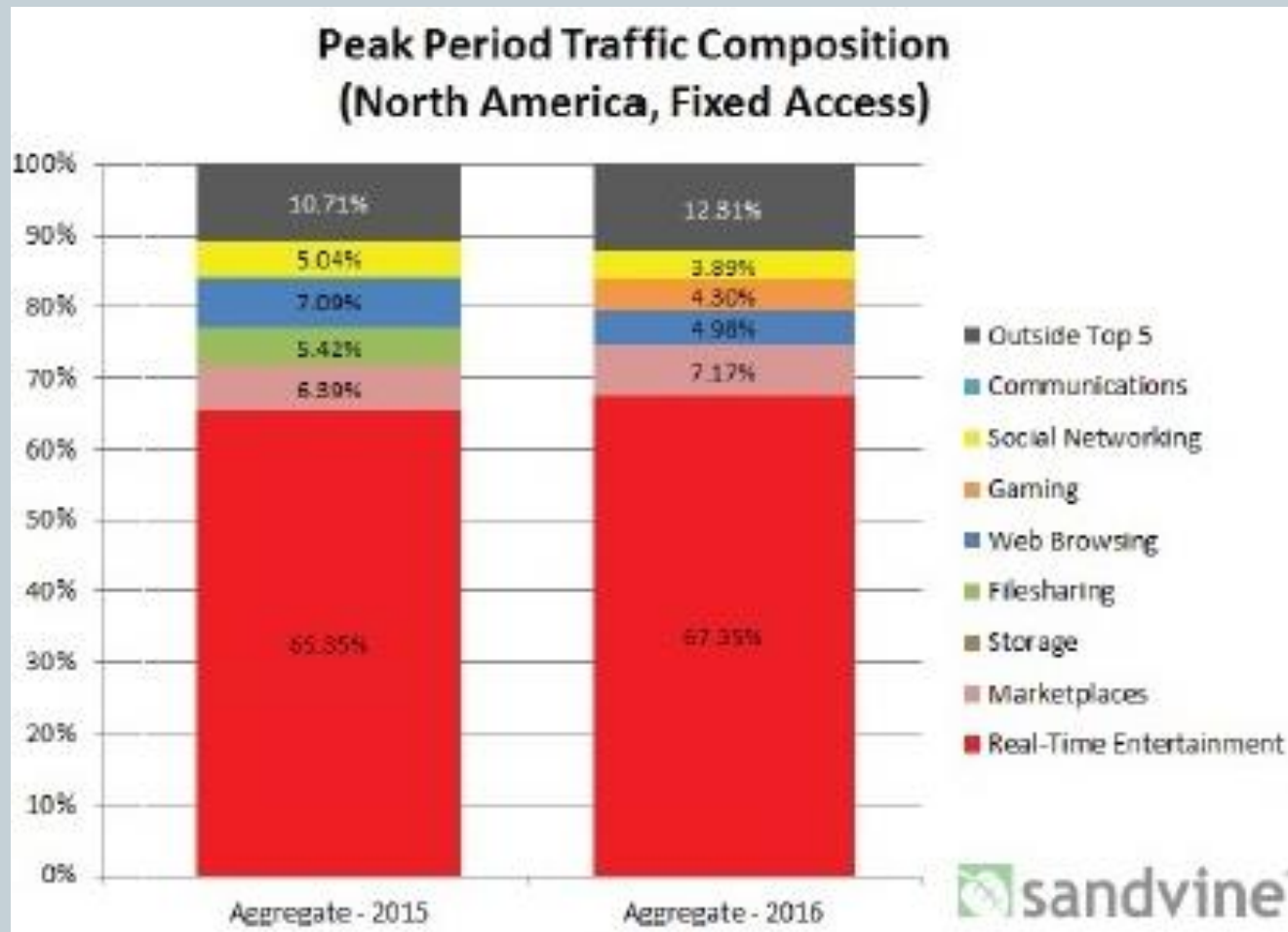
Heterogenous Customer Base



Monthly Subscriber Traffic Distribution (North America, Mobile Access)



Growth of Real-Time Entertainment



Netflix is King



Upstream		Downstream		Aggregate	
BitTorrent	18.37%	Netflix	35.15%	Netflix	32.72%
YouTube	13.13%	YouTube	17.53%	YouTube	17.31%
Netflix	10.33%	Amazon Video	4.26%	HTTP - OTHER	4.14%
SSL - OTHER	8.55%	HTTP - OTHER	4.19%	Amazon Video	3.96%
Google Cloud	6.98%	iTunes	2.91%	SSL - OTHER	3.12%
iCloud	5.98%	Hulu	2.68%	BitTorrent	2.85%
HTTP - OTHER	3.70%	SSL - OTHER	2.53%	iTunes	2.67%
Facebook	3.04%	Xbox One Games Download	2.18%	Hulu	2.47%
FaceTime	2.50%	Facebook	1.89%	Xbox One Games Download	2.15%
Skype	1.75%	BitTorrent	1.73%	Facebook	2.01%
	69.32%		74.33%		72.72%

One Part of Larger Internet Ecosystem



- Broadband networks: the “onramps to the Internet” (FCC Chairman Julius Genachowski)
- Middle-mile, backbone networks and interconnection disputes
- Content Delivery Networks
- Platform Monopolies