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Batty, Luke

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“Fly Home Ye Ravens!”: How the FCC’s Abandonment of Broadband Regulation Will Harm Music Diversity

By Luke Batty¹

Citing supposed harms to competition among Internet service providers, the 2017 Restoring Internet Freedom Order reverses a decade long push to implement a regime of broadband regulation protecting net neutrality. However, the 2017 Order failed to recognize non-pecuniary interests in its sweeping change. Critical infrastructure, national security, and democracy all rely on a free and open Internet. Music creates an outlet for diverse cultural and individual representation, allowing artists and audiences to participate in democratic dialogues by creating and listening to music. The music industry shifted to online streaming as the primary market for artists to reach audiences. The possibility of instant global access for creators and audiences alike relies on an Internet free from blocking, throttling, and prioritization arrangements by Internet service providers. If Internet services providers exercise their gatekeeping capabilities, as courts have anticipated and the 2017 Order permits, artists will be forced to rely more substantially on outdated markets where their individual creativity may be stifled. The argument that audience demand will preserve worthy artists fails because it ignores creators' contributions as inherently relevant to democracy. In addition, the audience will be less accessible as Internet service providers will exert greater control over the availability of streaming services and social media platforms provided to their users through prioritization and zero-rating arrangements. Music embodies the broad, democratic character of the Internet that the 2017 Order ignores and trivializes; arguably, fatally so.

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¹ JD Candidate, Santa Clara University School of Law, Class of 2019

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INTRODUCTION

Before riding her horse into a bonfire, Brünnhilde releases Wotan’s ravens to spread the flames, thus completing Richard Wagner’s “Ring Cycle” in *Götterdämmerung*.² Brünnhilde’s aria ends with her self-immolation, as the funeral pyre engulfs all of Valhalla and its gods, bringing the end of the world.³

Enter our twenty-first century Brünnhilde, FCC Chairman Ajit Pai. The FCC’s repeal of net neutrality protections⁴ is nothing less than an apocalyptic divestment of the agency’s duties and regulatory authority. The FCC’s Restoring Internet Freedom Order (the “2017 Order”) changes and attacks the character of the Internet as the foundation for modern speech and democratic debate. In the spirit of Wagner, the casualties of the FCC’s proposal include niche music genres that challenge perceptions of artistry and cultural norms.⁵ Rather than leading to a rebirth and renewal, the FCC’s repeal of Title II protections turns control of the Internet over to Internet Service Providers (ISPs) who the FCC’s rules will allow to block, throttle, or require payment for Internet priority or protection against Internet degradation due to ISP management.⁶

² RICHARD WAGNER, *GÖTTERDÄMMERUNG*, 61-62 (Oliver Ditson Co. 1926) (1876).

³ *Id.* at 62. See also WILLIAM O. CORD, AN INTRODUCTION TO RICHARD WAGNER’S *DER RING DES NIBELUNGEN*, 10 (1983) (“The poem relates the actions that lead to and conclude with the destruction of the ancient gods, the doom of the corrupt world they had shaped, and the rebirth of the universe.”).

⁴ Restoring Internet Freedom, Notice of Proposed Rulemaking, 82 Fed. Reg. 25568, (rel. May 23, 2017) (hereinafter *Restoring Internet Freedom NPRM*); Proposal to Restore Internet Freedom, Public Draft (proposed Nov. 22, 2017), <https://www.fcc.gov/document/proposal-restore-internet-freedom> (hereinafter *Restoring Internet Freedom Draft Order*); Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb. 22, 2018) (hereinafter *Restoring Internet Freedom Order*).

⁵ See Cord, *supra* note 3, at 6 (“[Wagner’s] ideas did not represent mere modifications or alterations. Rather, they advocated a completely new and radically different operatic tradition.... The practiced and the professional, the famous and the near-famous, the scholar and the artist lifted their pens in denunciation of his ideas.”).

⁶ *Restoring Internet Freedom Draft Order*, *supra* note 4, ¶ 235.

While the Internet created some hurdles for musicians and copyright holders,⁷ the overall advantages of global networking offered profound and positive impacts on artists. Selling merchandise, announcing events, and increased outlet diversity helped artists thrive.⁸ Artists no longer had to rely on major labels or broadcasters to pick up their songs in order to distribute them. In addition to streaming and MP3 file sharing, subcultures and forums arose to advance niche music genres. For example, the online forum Reddit has a growing catalogue of “recommended niche” genres available for perusal: the classical genre network has thirteen subgenres listed; electronic music has an more than eighty linked subgenre forums; the combined rock/metal category has nearly as many subgenre communities.⁹ This rich cultural network of music styles could not exist without regulations protecting a truly free and open Internet.

The repeal of net neutrality deserves review as it impacts music diversity, a valuable democratic and cultural asset. First, the legal history of net neutrality leading up to the repeal of the 2015 Open Internet Order (the “2015 Order”) will contextualize the new regulatory regime. Second, music diversity will be defined and recognized as a valued part of democracy, framing the effects of the 2015 Order. Third, the paper will demonstrate how the prospective consequences of the FCC’s repeal will harm music diversity by giving broadband providers more power over content creators, regressively forcing artists into markets subject to the FCC’s “public interest” standard. Finally, the public interest standard will be analyzed as adverse to music diversity.

I. LEGAL HISTORY OF NET NEUTRALITY

The FCC’s 2017 Restoring Internet Freedom Notice of Proposed Rulemaking (the “NPRM”) indicated the FCC’s intent to adopt regressive policies that would prevent equal Internet access and distribution of information.¹⁰ The proposal sought to repeal the agency’s 2015 Open Internet Order.¹¹ Namely, the FCC announced

⁷ See, e.g., *A&M Records v. Napster Inc.*, 284 F.3d 1091 (9th Cir. 2002); *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁸ See Casey Rae-Hunter, *Licensing, Access, and Innovation in the New Music Marketplace*, 7 J. BUS. & TECH. L. 35, 39 (2012). See also Alliance for Media Arts & Culture et al., Comment Letter on Restoring Internet Freedom, WC Docket No. 17-108 (Aug. 30, 2017) (“Under the existing open Internet rules, anyone with a robust broadband or mobile connection can reach users, promote their work and sell creative products and services without having to ask permission or pay a toll to an ISP.”).

⁹ *Subreddits by Genre*, REDDIT (last visited Oct. 27, 2018), <https://www.reddit.com/r/Music/wiki/musicsubreddits>.

¹⁰ See generally *Restoring Internet Freedom NPRM*, *supra* note 4.

¹¹ *Restoring Internet Freedom NPRM*, *supra* note 4, ¶ 24. See also, In the Matter of Protecting

their plan to revert broadband providers' classification as telecommunication services back to information services, thus removing the limited common carriage restrictions the 2015 Order imposed.¹² The FCC spent several years trying to impose regulations on broadband providers because the agency believed broadband providers were exercising unfair competitive advantages by funneling user traffic to its own content and applications.¹³ The FCC also sought to protect the Internet's open character which it characterized as an engine of innovation.¹⁴ Ironically, the general implications and risks of repealing net neutrality are best presented by studying the FCC's prior attempts at regulation. Therefore, the legal history and evaluation of the current state of issues are best presented hand-in-hand.

The Communications Act of 1934 created the FCC to regulate the use of the electromagnetic spectrum.¹⁵ In addition to this general grant of authority, certain spectrum-based industries and practices were also recognized for more specific regulation under the 1934 Act. Specifically, the FCC was tasked with licensing spectrum for broadcasting¹⁶ and enforcing common carriage requirements under Title II.¹⁷ Under Title II, common carriers are for-hire services that provide an indiscriminate outlet for users to both receive and send information.¹⁸

The development of broadband required the FCC to determine how to regulate the internet and broadband providers as Internet service progressed from private-to-public telephone lines to a network of cable, fiber, and wireless connections as last-mile delivery mechanisms.¹⁹ The majority of net neutrality regulations have focused

and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015) (hereinafter *2015 Open Internet Order*).

¹² *Restoring Internet Freedom NPRM*, *supra* note 4, ¶ 25.

¹³ *See Comcast Corp. v. F.C.C.*, 600 F.3d 642, 644 (2010). Comcast allegedly throttled peer-to-peer services. *See also*, *Verizon v. Fed Comm. Comm'n*, 740 F.3d 615, 623 (2014). Verizon allegedly throttled Apple's FaceTime app to incentivize the use of its own Voice over Internet Protocol (VoIP) application.

¹⁴ *Open Internet Order*, *supra* note 11, ¶ 2; *Verizon*, 740 F.3d at 634.

¹⁵ Communications Act of 1934, Pub. L. No. 73-416, Title I, sec. 1, 48 Stat. 1064, 1064 (codified at 47 U.S.C. § 151).

¹⁶ Communications Act of 1934, Pub. L. No. 73-416, Title III, sec. 301, 48 Stat. 1064, 1081 (codified at 47 U.S.C. § 301).

¹⁷ Communications Act of 1934, Pub. L. No. 73-416, Title II, sec. 201, 48 Stat. 1064, 1070 (codified at 47 U.S.C. § 201).

¹⁸ 47 U.S.C. § 153(11) (2012). *See also*, *United States Telecom Ass'n v. F.C.C.*, 825 F.3d 674, 707 (D.C. Cir 2016) (“[C]ommon carrier obligations [require] broadband providers to offer indiscriminate service to edge providers.”).

¹⁹ *See* Catherine J.K. Sandoval, *Disclosure, Deception, and Deep-Packet Inspection: The Role of the Federal Trade Commission Act's Deceptive Conduct Prohibitions in the Net Neutrality Debate*, 78 *FORDHAM L. REV.* 641, 652-59 (2009).

on whether broadband providers should be regulated under the FCC’s general authorization to manage wired and wireless communications per Title I of the Communications Act of 1934 or alternatively whether broadband providers are subject to some form of common carriage standards under Title II. During the 1960s-1980s, the FCC developed several frameworks for considering prospective regulations on the Internet and computer networks.²⁰ First, the FCC recognized the four parties involved in Internet use: (1) broadband lines (the infrastructure of the network), (2) broadband providers (the subscription services permitting access to the Internet as Internet service providers), (3) edge providers (online content creators and services), and (4) end users (edge providers’ audience and broadband providers’ customers).²¹ Computers were categorized into “basic” and “enhanced services” regarding their participation in telecommunication services.²² Under Computer Inquiry II (Computer II) adopted in 1980, the FCC defined “basic services” as the systems of communications where the digital and analog voice, video, and data were transmitted without being altered in form or stored.²³ Under Computer II, any service that stored or modified the information, namely through user input, qualified as an “enhanced service.”²⁴ While basic services had an enforceable duty to serve the public as common carriers, enhanced services operated on a client-by-client basis, creating content and services as well providing the materials to an audience.²⁵

Congress codified this framework in the Telecommunications Act of 1996 (the “1996 Act”). Under the 1996 Act, basic services were recognized as “telecommunications services,” subject to common carriage restrictions.²⁶ Enhanced services, including broadband providers, were reclassified as “information services.”²⁷ During this

²⁰ See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 28 F.C.C.2d 267 (Mar. 18, 1971) (“*Computer Inquiry I*”); Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, ¶¶ 6-7 (May 2, 1980) (“*Computer Inquiry II*”); Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (June 16, 1986).

²¹ See Preserving the Open Internet, 25 FCC Rcd. 17905, ¶ 20 (2010).

²² *Computer Inquiry II*, *supra* note 20, ¶ 97.

²³ *Computer Inquiry II*, *supra* note 20, ¶ 95. See also, Robert Cannon, *The Legacy of Federal Communications Commissions’ Computer Inquiries*, 55 FED. COMM. L.J. 167, 183-84 (2003).

²⁴ *Computer Inquiry II*, *supra* note 20, ¶ 5.

²⁵ See Cannon, *supra* note 23, at 183-84.

²⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 3(a)(48-51), 110 Stat. 56, 60 (codified as amended at 47 U.S.C. § 153).

²⁷ Sec. 3(a)(41), 110 Stat. at 59. *But see* Cannon, *supra* 23, at 191-92. Cannon points out some differences between the enhanced services and information services designations based on the different uses of telecommunications versus telecommunications services.

time, Internet service providers were only subject to common carriage requirements in their role as a dial-up service accessing telephone lines.²⁸

Following the 1996 Act, the Supreme Court analyzed the statutes to interpret whether cable broadband providers fell into the information or telecommunications services. The split between Clarence Thomas and Antonin Scalia in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* prompted the FCC's campaign to enact net neutrality protections over the following decade.²⁹ Thomas, writing for the majority, held that the agency reasonably interpreted that broadband providers did not offer telecommunications because even though broadband services used telecommunications to deliver Internet connection, providers did not independently offer telecommunications, independent of the communications service, and therefore could not be treated as telecommunications services.³⁰ Scalia's dissent attacked this interpretation, claiming that broadband service could not be separated from telecommunications service based on the shared infrastructure.³¹ The dissent provided a prophetic view of society's growing reliance on Internet, and provided the allegory of the pizza parlor: if a pizza parlor refuses to "offer" delivery but will bring the pizza to the customer's house as part of a "pizzeria-pizza-at-home service," the parlor does in fact offer delivery.³² A separate delivery service, according to Thomas's view, would independently offer delivery of other restaurant's pizza. To Scalia, the inseparable nature of broadband access and its method of delivery provide not only a more reasonable and pragmatic view, but arguably the only reasonable interpretation when compared to Thomas's semantics.

Following *Brand X*, the FCC proscribed its Internet policy objectives and created a set of voluntary principles for broadband providers to further these objectives.³³ Soon after, Comcast tested the FCC's ability to enforce these "voluntary" principles by throttling peer-to-peer communications in 2007.³⁴ The FCC claimed they were authorized to regulate broadband providers under an ancillary

²⁸ See Sandoval, *supra* note 19, at 653.

²⁹ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

³⁰ *Id.* at 988-89.

³¹ *Id.* at 1006 (Scalia, J., dissenting).

³² *Id.* at 1007 (Scalia, J., dissenting).

³³ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14986, at ¶ 4 (Sept. 23, 2005).

³⁴ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 28 FCC Rcd. 13028 (Aug. 20, 2008).

jurisdiction theory.³⁵ Specifically, the agency pointed to a policy statement in the 1996 Act promoting the FCC’s purpose under Title I to increase the public’s Internet and telecommunications access via broadband providers.³⁶ The Commission also defended the legitimacy of the voluntary principles based on Justice Thomas’s approval of exercising such enforcement under ancillary jurisdiction in *Brand X*.³⁷ The FCC argued that Comcast’s degradation of data transmissions directly conflicted with the agency’s goals to increase “rapid” and “efficient” Internet access across the country.³⁸ Essentially, a broadband provider was operating spectrum in the form of wired communications contrary to the public interest, requiring an FCC intervention.

The court held that the FCC lacked congressional authorization to implement anti-discriminatory regulations.³⁹ Specifically, the FCC had misplaced its reliance on Section 706 of the 1996 Act because a prior FCC order only considered the section a policy statement proposing the FCC regulations advance public broadband access at reasonable rates rather than a statutory authorization.⁴⁰ Therefore, the FCC lacked regulatory authority absent a change in their own record reconsidering whether Section 706 constituted an independent grant of authority. The FCC could not ground its rulemaking authority in independent policy statements.⁴¹ *Comcast Corp. v. F.C.C.* proved that the FCC’s voluntary principles were toothless.

Following *Comcast*, the FCC changed its interpretation of Section 706. The 2010 Open Internet Order specifically reclassified Section 706 as an independent statutory grant of authority.⁴² With this newly minted authority, the FCC imposed transparency requirements, anti-discrimination and anti-blocking limits on broadband providers.⁴³ These rules intended to protect the “virtuous circle” of innovation as independent edge providers created content and services for end users.⁴⁴ Absent such protections, the FCC believed broadband

³⁵ *Id.* ¶ 18.

³⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 1302(a)). *See also* *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 658 (D.C. Cir 2010).

³⁷ *Brand X*, 545 U.S. at 996 (2005) (“[T]he Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.”)

³⁸ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 28 FCC Rcd. at 13036-37, ¶ 16.

³⁹ *Comcast Corp.*, 600 F.3d at 661.

⁴⁰ *Id.* at 658.

⁴¹ *Id.* at 644.

⁴² Preserving the Open Internet Report and Order, 25 FCC Rcd. 17905, ¶ 117 (Dec. 23, 2010).

⁴³ *Id.* ¶ 43.

⁴⁴ *Id.* ¶¶ 13-17.

providers would exercise gatekeeping control over independent edge providers, creating a competitive advantage for broadband providers' own resources.⁴⁵ For example, Comcast could throttle user traffic to Google and Yahoo, incentivizing users to Comcast's own website as a source of news, web searching, and advertising.

However, these measures also failed in court due to the FCC's failure to classify ISPs as common carriers while imposing common carriage style rules. In *Verizon v. F.C.C.*, the court held that while the FCC's new interpretation of Section 706 was reasonable, confirming that the statute promulgated regulation the FCC could cite to enact restrictions such as transparency rules that require ISPs to disclose their network management practice.⁴⁶ The D.C. Circuit held that the blocking and non-discrimination rules the FCC adopted as part of the 2010 Order imposed *per se* common carriage obligations on ISP without appropriately classifying broadband providers as common carriers subject to regulation under Title II.⁴⁷ The court noted that broadband providers could, and likely would, exercise gatekeeping control.⁴⁸

The D.C. Circuit held that 1996 Act specifically exempted information services from common carriage responsibilities, namely the duty to serve the public indiscriminately.⁴⁹ This distinction, according to the court, permitted broadband providers to discriminate against edge providers and end users by blocking, restricting, and preferring competing edge providers unless the FCC classified ISPs as common carriers.⁵⁰

After licking their wounds for a second time, the FCC returned with the 2015 Open Internet Order (the "2015 Order") which aimed to satisfy the issues preventing common carriage regulations presented in *Verizon*.⁵¹ First, the FCC restated their updated interpretation of Section 706 as a statutory grant of authority allowing the FCC to take action to promote broadband deployment, including action to prevent Internet discrimination.⁵² *Verizon* specifically approved this

⁴⁵ *Verizon v. F.C.C.*, 740 F.3d 623, 646 (2014).

⁴⁶ *Id.* at 659.

⁴⁷ *Id.* at 655-56.

⁴⁸ *Id.* at 646 ("[B]roadband providers have the technical and economic ability to impose such restrictions. Verizon does not seriously contend otherwise. In fact, there appears little dispute that broadband providers have the technological ability to distinguish between and discriminate against certain types of Internet traffic.").

⁴⁹ *Id.* at 646.

⁵⁰ *Id.* at 658.

⁵¹ 2015 *Open Internet Order*, *supra* note 11.

⁵² 2015 *Open Internet Order*, *supra* note 11, ¶ 275.

interpretation, thus overcoming the FCC’s error in *Comcast Corp.*⁵³ Second, the FCC classified ISPs as common carriers, imposing limited common carrier obligations on ISPs to promote the “virtuous circle” theory of Internet innovation.⁵⁴ The 1996 Act borrowed its framework of telecommunication services from *Computer Inquiry II*, which contained three categories: basic services, enhanced services, and enhanced services that facilitate basic services.⁵⁵ When the 1996 Act codified this theory, it silently recognized the third facilitating category. According to the FCC, information services that facilitate the distribution of telecommunication services were additionally subject to common carriage rules.⁵⁶

The FCC claimed that in their role as telecommunication facilitators, broadband providers could exercise gatekeeping harmful to the public, a theory the court in *Verizon* considered legitimate.⁵⁷ To counter the threat of ISP gatekeeping, the 2015 Order provided three “bright line rules” for broadband providers to follow as common carriers; no blocking, throttling, or paid prioritization.⁵⁸ These rules only amounted to limited common carriage obligations because the 2015 Order allowed application-specific exceptions for reasonable network management; ISPs could block or throttle as long as it would be done indiscriminately and “tailored to achieving a limited network management purpose.”⁵⁹ However, the 2015 Order created no such exception for paid prioritization because “paid prioritization is inherently a business practice rather than a network management practice.”⁶⁰

The 2015 Order succeeded where prior attempts to regulate failed. During litigation, the court upheld the facilitation theory because, according to the court, broadband providers facilitated the communication and connection between end users and edge providers and consequently took on common carriage responsibilities.⁶¹ The 2015 Order successfully enacted net neutrality protections.

⁵³ *Verizon*, 740 F. 3d at 741 (“We think it quite reasonable to believe that Congress contemplated that the Commission would regulate this industry, as the agency had in the past, and the scope of any authority granted to it by section 706(b).”).

⁵⁴ 2015 *Open Internet Order*, *supra* note 11, ¶ 283.

⁵⁵ *Computer Inquiry II*, *supra* note 20, ¶ 2-4.

⁵⁶ 2015 *Open Internet Order*, *supra* note 11, ¶ 331.

⁵⁷ *Verizon*, 740 F.3d at 646.

⁵⁸ 2015 *Open Internet Order*, *supra* note 11, ¶¶ 14-19.

⁵⁹ *Id.* ¶ 32.

⁶⁰ *Id.* ¶ 18 n.18.

⁶¹ *United States Telecom Ass’n v. F.C.C.*, 825 F.3d 674, 698 (D.C. Cir. 2016), *aff’d*, 855 F. 3d 381 (D.C. Cir 2017).

However, the net neutrality regime was short lived. An executive shakeup placed Ajit Pai as head commissioner of the FCC following the 2016 Presidential Election. Pai vigorously opposed the 2015 Order and quickly issued the 2017 NPRM.⁶² The proposal rejected the 2015 order as a success for the public, seeking a full repeal of the policy.⁶³ The NPRM sought to tear down the common carriage regulations on broadband providers and utilize *ex post* enforcement of anticompetitive violations.⁶⁴ This would permit broadband providers to discriminate against edge providers by throttling and blocking content or demanding fees for preference and access to end users. Considering the outcomes in *Comcast* and *Verizon*, indicating that ancillary jurisdiction is no more than a fiction and voluntary principles have no legal ramifications, the FCC would wash their hands clean from broadband regulation.

In December of 2017, three of the five FCC commissioners passed the Restoring Internet Freedom Order (the “2017 Order”), repealing Title II protections.⁶⁵ The repeal specifically abandons the classification of ISPs as information services facilitating telecommunications services, consequently invalidating the foundations of the limited common carrier obligations, and instead reinstating ISP’s status as information service providers.⁶⁶ As a result, the FCC cannot enforce the limited common carrier provisions set forth by the 2015 Order’s bright line rules that prevented blocking, throttling, and paid prioritization because the 2017 Order removes the regulatory rug out from under enforceable rules to oversee such behavior. Further confirming the agency’s intent to abdicate its responsibility to preserve the Internet as a democratic forum, the 2017 Order names the Federal Trade Commission as the enforcing body.⁶⁷ As the FTC is limited to preventing anticompetitive practices between ISPs, and has some jurisdiction to address misrepresentations such as a mismatch between ISP promises and practices,⁶⁸ there is apparently no executive body expressly seeking to preserve the Internet’s democratic and participatory character. The FCC’s repeal solely focuses on harms to competition, leaving non-pecuniary harms and

⁶² *Restoring Internet Freedom NPRM*, *supra* note 4.

⁶³ *Restoring Internet Freedom NPRM*, *supra* note 4, ¶ 70.

⁶⁴ *Restoring Internet Freedom NPRM*, *supra* note 4, ¶¶ 76-91.

⁶⁵ See Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y.T. (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html>.

⁶⁶ *Restoring Internet Freedom Order*, *supra* note 4, ¶ 20.

⁶⁷ *Restoring Internet Freedom Order*, *supra* note 4, ¶ 2.

⁶⁸ See Sandoval, *supra* note 19, at 694-95 (arguing that the FTC review ISP disclosures for deceptive conduct).

interests without a remedy as the Supreme Court has held that antitrust laws only provide redress for competition harms.⁶⁹ While the FTC can foreseeably address mismatches between ISP promises and performance – such as whether offering “unlimited” plans amounts to deceptive conduct⁷⁰ – FTC jurisdiction will not capture the breadth of harms that can result from ISP blocking, throttling, and paid priority. The *post hoc* enforcement method also leaves greater uncertainty as to the legitimacy of individual practices compared to bright line rules, assuming the FTC would even pursue such enforcement.

Part of the Internet’s democratic function stems from its magnificent breadth of content. Music may only be a small part of what the Internet offers but as an industry, music has adapted and benefitted from an informational world like few others. Therefore, the relation between music and the Internet can serve as a case-study to understand the value of net neutrality. The prospective impacts of repealing net neutrality policies present substantial dangers to the music as an industry and an art, and therefore threaten democracy.

II. OVERVIEW OF THE 2015 OPEN INTERNET POLICIES

While many online music innovations predate the 2015 Open Internet Order, anti-discriminatory policies benefit and protect the music industry’s online presence. This section will detail three primary ways artists and copyright holders benefit from a regulatory framework that preserves net neutrality.

A. *Expansion of Music Delivery*

For many of these genres, alternative markets and methods of distribution are limited beyond the internet. Music forums, like certain divisions on Reddit, allow artists and audiences to share, recommend, and discuss the subculture where other outlets may not be widely accessible. For example, “doom metal” is a metal subgenre that draws influences from progressive and experimental rock from the 1970s and 1980s as well as the original metal band, Black Sabbath.⁷¹ The lyrical content is gloomy and apocalyptic while the music itself is slow and

⁶⁹ See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (“[I]njury, although causally related to an antitrust violation, nevertheless will not qualify as ‘antitrust injury’ unless it is attributable to an anti-competitive aspect of the practice under scrutiny.”). See also Catherine J.K. Sandoval, *Net Neutrality Powers Energy and Forestalls Climate Change*, 9 SAN DIEGO J. CLIMATE & ENERGY L. 1, 63 (2018) (arguing that the 2017 Order did not address harms to national security, particularly critical infrastructure).

⁷⁰ See Sandoval, *supra* note 19, at 694-95.

⁷¹ See Bethany Tiamat, *Guide to Metal Subgenres*, BEAT (July 2017), <https://beat.media/guide-to-metal-subgenres>.

monotonous with tracks frequently exceeding the twenty-minute mark. A radio station would likely be unable to consistently draw a substantial local audience and keep their attention to sustain a doom metal focused broadcast outlet.

Other genres may not enjoy alternatives markets without sacrificing artistic integrity. Broadcast is subject to indecency censorship imposed by government regulation to serve the public interest, as well as voluntary censoring by the network.⁷² Artists can promote their work uninhibited via the Internet, but radio broadcast requires edited versions. For example, drill music is a hip-hop subgenre with a unique Chicagoan gangster rap perspective.⁷³ The content of the songs may not be radio appropriate, but to restrict the content would minimize the artist's viewpoint and voice. The Internet provided a forum for the Chicago style to reach global audiences. In some cases, the international response to drill music sought to restrict the art form; several have attributed violence in the UK to drill music and sought to quash the genre.⁷⁴ Without the Internet, subgenres like drill would need to rely only on live performances and physical records for distribution because even if the genre had a substantial local following, the restrictions on the content of the music would inherently detract from the viewpoint to which the audience relates. Absent a free and open Internet, genres like drill could also be susceptible to censorship if the broadband provider so decided based on a fear of liability for violent acts, no matter how tenuous the relation. Additionally, nothing in the 2017 Order prevents ISPs from accepting money from interest groups, for instance groups who may find drill music to be a source of violence. ISPs could then block and throttle certain content without specifically disclosing that the ISP had done so, as the 2017 Order only requires an admission that the ISP engages in prioritization arrangements without disclosing any of the terms, such as the parties or effected content.⁷⁵

⁷² *Pacifica Found. v. F.C.C.*, 438 U.S. 726 (1978).

⁷³ See David Drake, *Chicago Rap Blazes Up from the Streets*, SPIN (June 25, 2012), <https://www.spin.com/2012/06/chicago-rap-blazes-streets/>.

⁷⁴ See, e.g., Ben Beaumont-Thomas, *Is UK Drill Music Really behind London's Wave of Violent Crime?*, GUARDIAN (Apr. 9, 2018), <https://www.theguardian.com/music/2018/apr/09/uk-drill-music-london-wave-violent-crime>; Shingi Marakike, Tom harper & Andrew Gilligan, *'Drill,' the Demonic Music Linked to Rise in Youth Murders*, TIMES (April 8, 2018), <https://www.thetimes.co.uk/article/drill-the-demonic-music-linked-to-rise-in-youth-murders-0bkbh3csk> ("Judges in recent murder trials have explicitly made the link to drill music, which has received almost no political attention. Drill originated in Chicago, helping to make the city one of America's most violent with 650 murders last year.").

⁷⁵ See *Restoring Internet Freedom Order*, *supra* note 4, ¶ 220. See also Sandoval, *supra* note 69, at 41.

Some of niche musical genres may have been popular or had a substantial following for a time, but broadcasting outlets have focused on newer, more popular works. For example, the Reddit forum “Outrun” is dedicated to a 1980s retrofuturism aesthetic.⁷⁶ As an electronic music subgenre, the synthesizers and drum kits evoke a soundtrack for Detective Crockett’s Ferrari Testarossa in *Miami Vice*. While there may have been a broad audience in the 1980s, the genre modernly relies on the Internet for artists to spread awareness of their work.

Modern subgenres may also rely on the Internet to gain attention in alternative markets saturated by nostalgia and audiences who only want to hear the hits. Classical music has struggled to attract new audiences with fresh content. But at the same time, classical performances and curators are frequently constrained to satisfying conservative audience tastes.⁷⁷ Concert programmers choose music that appeals to the traditional taste (Beethoven, Mozart, Dvorak, etc.) and may throw in something novel, such as a premiere. However, the novelty expires following the premiere and the work is often forgotten.⁷⁸ Online forums allow composers to find performers and build a relationship that sustains both parties. Audience-based forums focus on new or lesser known works that deserve recognition. Twenty-first century technology allows musicians to find and distribute other collaborators and works to expand the repertoire.

B. In Defense of Music Diversity

Repealing net neutrality threatens the growing number of niche genres that have gained a following because they can access audiences without geographic limitations. Striking down Title II protections would decimate the artists who have been able to create and distribute music via the Internet. Ultimately, this new era of music diversity must be deemed worth protecting. Music diversity is more than a desirable end. Cultural representation, artistic expression, and democratic dialogue all factor into music diversity and a repeal would threaten these values as well.

⁷⁶ *r/Outrun*, REDDIT (last visited on Nov. 27, 2017), <https://www.reddit.com/r/outrun/>.

⁷⁷ Charlie Albright, “Classical Music Is Dying... and that’s the Best Thing for Classical Music,” CNN (May 29, 2016 8:44 AM), <http://www.cnn.com/2016/05/29/opinions/classical-music-dying-and-being-reborn-opinion-albright/index.html>. Albright believes the paradigm is shifting as new artists are driving change. However, this change is still limited to solo and small chamber works for the most part.

⁷⁸ See Ivan Hewett, *Why Is Classical Music Left to Wither and Die?*, TELEGRAPH (Jul. 21, 2016, 8:48 PM), <http://www.telegraph.co.uk/music/what-to-listen-to/why-is-new-classical-music-left-to-wither-and-die/>.

The arts are fundamental to culture. The modern philosophy of aesthetics studies the person's sensory approach and understanding of the world around them.⁷⁹ The role of fine arts, in the broadest possible definition of the term, within culture allows for the creation and elevation of expression for profound purposes.⁸⁰ Classical philosophy recognized the arts as part of the development of the whole person, shaping the person's skills and virtues.⁸¹ The United States' founders also recognized the value of the arts in society by creating patent and copyright protections as well as granting broad protection to artistic expression.⁸² American culture in the twentieth-century accelerated an interest in individual development as technology created an optimistic feeling that human creativity could solve the ills of the world.⁸³ The arts, including music, are intimately related to person's ability to understand themselves. They also present an elevated form of speech for broadcasting a viewpoint.

Composers, performers, and music enthusiasts on the Internet use modern technology to promote their own individual development and increase viewpoint diversity. Online personalities have access to more venues for discussion and as a result must learn to communicate and understand others as well as themselves.⁸⁴ Venues where multiple personalities can engage each other promote viewpoint diversity and intercultural communication. Music forums, where people share musical new works, techniques, and genres provide fertile grounds for viewpoint diversity.

Art's connection with an individual is only part of the equation; art also embodies cultures. Music promotes individual and cultural viewpoints. For example, drill music could be considered a specific

⁷⁹ See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 59 (Tr. Marcus Weigelt) (2008);

⁸⁰ See BRADLEY MURRAY, *THE POSSIBILITY OF CULTURE: PLEASURE AND MORAL DEVELOPMENT IN KANT'S AESTHETICS* 79 (2015) (“[O]ur adopting the stance of genius amounts to carrying out a useful function of abstraction that enables us to experience aesthetic pleasure in situations in which we might not otherwise have been able to do so.”)

⁸¹ See JACQUES MARITAIN, *ART & SCHOLASTICISM* (Tr. Joseph W. Evans) (1962) (available at <https://maritain.nd.edu/jmc/etext/art.htm>) (“The ancients termed *habitus* ... qualities of a class apart, qualities which are essentially stable dispositions perfecting in the line of its own nature the subject in which they exist When, for example, the intellect, at first indifferent to knowing this rather than that, demonstrates a truth to itself, it disposes its own activity in a certain manner, thus giving birth within itself to a quality which proportions it to, and makes it commensurate with, such or such an object of speculation, a quality which elevates it and fixes it as regards this object; it acquires the *habitus* of a science.”).

⁸² U.S. CON. Art. I, § 8; U.S. CON. Amend. I.

⁸³ Stephen M. Feldman, *Postmodern Free Expression: A Philosophical Rationale for the Digital Age*, 100 MARQ. L. REV. 1123, 1143 (2017).¹⁷

⁸⁴ *Id.* at 1150. (“One's online self is unequivocally social, cultural, and interactive.”).

sub-genre of trap music, a broader sub-genre of hip hop.⁸⁵ Drill’s specificity stems from its focus on Chicago culture. Cultural sub-genres are a timeless aspect of music. Christian rock, Argentinian tango, and “riot grrrl” punk carry cultural elements in their compositions. Musical subgenres greatly benefitted from a free and open Internet because it promoted greater representation of individual and cultural viewpoints.

The FCC has recognized the importance of viewpoint diversity, especially minority viewpoints, in other contexts. The FCC’s minority broadcast ownership rules intended to increase the number of minorities working in radio and broadcasting because it would spur more culturally reflective content.⁸⁶ The FCC later abandoned the policy for failing to meet strict scrutiny,⁸⁷ but it has never disavowed the value of viewpoint diversity and the Commission continues to promote diverse broadcast ownership.

The Restoring Internet Freedom Order may be the closest the FCC has come to rejecting viewpoint diversity as an agency goal. Both the draft and final orders limit the public interest concerns that guide Internet regulation to anti-competitive enforcement and consumer deception protections, meaning the FCC denied redress for all non-economic concerns that shape the democratic and participatory nature of the Internet.⁸⁸ This specifically omits and contradicts agency concerns regarding ISPs restricting viewpoint diversity in the 2015 Open Internet Order.⁸⁹ Abandoning limited common carriage requirements for *post hoc* enforcement fails to serve individual speech interests and stifles intercultural communication.⁹⁰ Therefore, repealing Title II protections, which restricts music diversity and

⁸⁵ See Drake, *supra* note 73.

⁸⁶ Metro Broadcasting v. FCC, 497 U.S. 547, 570-71 (1990).

⁸⁷ Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (holding benign racial classifications are subject to strict scrutiny.).

⁸⁸ Restoring Internet Freedom Draft Order, *supra* note 4, ¶ 116; Restoring Internet Freedom Order, *supra* note 4, ¶ 140. See Sandoval, *supra* note 69, at 42 (“The Order does not discuss or analyze in any detail harms that may arise from its decision which are not compensable in antitrust law, by the FTC Act, or consumer protection laws such as harms to democracy, national security, critical infrastructure sectors, and the environment.”).

⁸⁹ 2015 Open Internet Order, *supra* note 11, at ¶ 77, n.118, quoting Open Media and Information Companies Initiative, Comment Letter on Protecting and Promoting the Open Internet, GN Docket No. 14-28, at 3 (July 14, 2014), <https://ecfsapi.fcc.gov/file/7521380808.pdf> (“Open Internet principles also promote free speech, civic participation, democratic engagement and marketplace competition, as well as robust broadband adoption and participation in the Internet community by minorities and other socially and economically disadvantaged groups.”).

⁹⁰ Barbara A. Cherry, *Misusing Net Neutrality to Eliminate Common Carriage threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483, 506-7 (2006).

access to the arts online, directly harms viewpoint diversity and contradicts the agency's mission.

C. *Internet Streaming*

The Internet dramatically increased access to music through on-demand streaming. Previously, if a listener wanted to hear a specific work, they would need to own a physical copy to play. LP's, vinyl recordings, audio cassettes, and CD's became obsolete once on-demand streaming became available for listeners. Additionally, this meant the copyright holders, whether it be the music labels or content creators themselves, also had to adjust their business models. Prior to online markets, labels and artists focused on broadcast licenses and unit sales.⁹¹ Audience access substituted streaming on-demand music for unit sales.⁹² Artists have taken various approaches to increase unit sales, for example delaying streaming access for a period following the release, forcing the consumer into a unit sale for on demand listening.⁹³ Another example of an increasingly popular approach, Radiohead's 2006 digital release of *In Rainbows* allowed users to choose their price to download the album.⁹⁴ This audience controlled model succeeded by simplifying artist-to-audience content sharing. Radiohead incentivized purchasers to directly benefit the band rather than a streaming platform, advertiser, or record label.⁹⁵

Copyright holders could not adapt a unilateral approach to streaming services because each platform treated revenue streams and royalties differently. For example, Apple Music and Tidal classify themselves as "premium services" because they require a subscription for revenue.⁹⁶ Spotify and Pandora introduced "Freemium" services that provide music streaming for free but rely on ad revenue.⁹⁷ Streaming services' diversity also depends on the royalty method they utilize. Per-stream royalties compensate the rights holder per each play on the service. Spotify uses a "play-share" method, where the artist

⁹¹ Matthew Flynn, *You Need Me Man, I Don't Need You: Exploring the Debates Surrounding the Economic Viability of On-Demand Music Streaming*, MUSIC II: TRANSACTIONS ON INNOVATION IN MUSIC (Edited by R. Hepworth Sawyer, J. Hodgson, J. L. Paterson & R. Toulson, 2016).

⁹² *Id.*

⁹³ *Id.* at 3.

⁹⁴ Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 914-15 (2011).

⁹⁵ *Id.* at 914.

⁹⁶ See Flynn, *supra* note 91, at 8.

⁹⁷ *Id.* at 2. Freemium services also provide a premium option, where users may subscribe for benefits such as ad-free content and more on-demand capabilities. For example, licenses may limit a user's number of plays for a certain song during a period of time. The premium service licenses the user more plays during that time.

receives a royalty commensurate to their “market share” of the total plays on the platform over a certain time.⁹⁸ A faction of artists have supported a “user-share” model where the rights holder receives royalties based on the share of plays for each individual user who streamed their work because in subscription models, it allows the audience to more directly benefit the artists they actually listen to rather than paying a portion of their subscription to popular artists, to whom they may never listen.⁹⁹ Under other models, more popular artists can window their releases by delaying streaming access or completely abstain from streaming services because they can rely on their following to participate in unit sales.¹⁰⁰ Smaller artists typically do not have the luxury of abandoning streams because niche genres may rely on those platforms to reach an audience and receive some form of compensation.

Amongst the different royalty models, a competing “no royalty” model in the form of digital piracy grew popular. Peer-to-peer services allowed users to share and access other’s music libraries without paying and became the primary method of digital piracy.¹⁰¹ Listeners have also avoided streaming services and unit sales through YouTube. While rights holders receive royalties for licensed videos on YouTube, ubiquitous unlicensed videos plague the video service. The combination of licensed and unlicensed content makes YouTube the largest music catalogue available online.¹⁰² For licensed music, streaming services pay on average eight-times in royalties more per play than YouTube.¹⁰³ While YouTube must remove unlicensed videos upon request, unlicensed music videos remain available in droves until those requests are processed and are easily re-uploaded once the video is taken down.¹⁰⁴ As long as YouTube responds to the requests, the site enjoys “safe harbor” protections under the Digital Millennium

⁹⁸ *Id.* at 5.

⁹⁹ *Id.* at 5; ARNT MAASØ, USER-CENTRIC SETTLEMENT FOR USER STREAMING 5 (Mar. 2014), <https://www.hf.uio.no/imv/forskning/prosjekter/skyogscene/publikasjoner/usercentric-cloudsandconcerts-report.pdf>.

¹⁰⁰ Taylor Swift famously left Spotify and other streaming services citing unfair royalties. As a result, her label shed any obligations to share revenue with other distributors. See Flynn, *supra* note 91, at 3.

¹⁰¹ See Yu, *supra* note 94, at 892.

¹⁰² See Paul Resnikoff, *9 Reasons You Won't Pay \$9.99 for Apple Music*, DIGITAL MUSIC NEWS (June 3, 2015), <https://www.digitalmusicnews.com/2015/06/03/9-reasons-why-you-wont-pay-9-99-for-apple-music/>.

¹⁰³ T. Randolph Beard, George S. Ford & Michael Stern, *Safe Harbors and the Evolution of Music Retailing*, PHOENIX CENTER POL'Y BULLETIN No. 41, at 4 (Mar. 2017).

¹⁰⁴ Peter Kafka, *Here's Why the Music Labels are Furious with YouTube. Again.*, RECODE (Apr. 11, 2016), <https://www.recode.net/2016/4/11/11586030/youtube-google-dmca-riaa-cary-sherman>.

Copyright Act, meaning it is not liable for royalties for unlicensed plays.¹⁰⁵

The Internet has become the premiere channel for music distribution but has also tormented rightsholders with broad infringement and meager royalties. A free and open Internet under the 2015 Order at least protects rightsholders from extortion or competition based on paid prioritization. The repeal of the bright-line rule against paid prioritization may force musicians to counter ISPs as well as the streaming services to ensure their work reaches an audience in return for fair compensation.

IV ANALYSIS OF MUSIC WITHOUT A FREE AND OPEN INTERNET: THREE SCENARIOS

Before understanding the impacts on music diversity, it is worth noting what kind of Internet access issues would have legal standing following the repeal of net neutrality. The FCC's draft order states that the Federal Trade Commission, rather than the FCC will be able to exercise dominion over ISPs.¹⁰⁶ This narrows the public interest to consumer protection and anticompetitive actions. This notably omits prior considerations, namely viewpoint diversity as protected under the 2015 Open Internet Order.¹⁰⁷ Part of the Internet's success, especially for music, undoubtedly relied on the democratic creation and sharing of content. Although it may not be protected, net-neutrality principles at least recognize the value of music diversity because it promotes a diverse array of artists and viewpoints.

Without an interest in preserving viewpoint diversity, content creators and musicians will likely be subject to three possible scenarios to continue accessing an audience. First, content creators will need to contract with zero-rated services to achieve the broadest distribution of their work. Second, artists will need to pursue alternative markets despite the fact that many genres rely on the Internet because alternative markets are not easily available. Finally, ISPs will claim editorial rights and will need to clarify their obligations as curators.

¹⁰⁵ 17 U.S.C. § 512 (2012).

¹⁰⁶ *Restoring Internet Freedom Order*, *supra* note 4, ¶ 140 (“Today’s reclassification of broadband Internet access service restores the FTC’s authority to enforce any commitments made by ISPs regarding their network management practices that are included in their advertising or terms and conditions.”).

¹⁰⁷ *2015 Open Internet Order*, *supra* note 11, ¶ 126, n. 292.

A. Zero-Rating and Paid Preference

First, music distribution platforms are likely candidates to be zero-rated by ISPs. Under this practice, an edge provider or third party pays the broadband provider to receive various benefits in reaching the end user. This form of paid-prioritization exemplifies broadband providers exercising discrimination. Zero-rating creates a competitive edge amongst edge providers because it incentivizes end users to favor certain content sources. By zero-rating their content, edge providers can pay to avoid throttling and blocking or subsidize end user’s data usage, meaning user’s access does not count towards their data cap.¹⁰⁸ If a music service is zero rated, artists are forced to rely on that sole distributor who then has substantial bargaining power when it comes to negotiating royalties because the audience is incentivized to use that service.

Zero-rating in the forms of subsidized and sponsored data has already been adopted by wireless Internet providers trying to test the boundaries of the FCC’s 2015 Order, which permitted zero-rating on *ad hoc* basis until more conclusions on the value of the practice could be drawn.¹⁰⁹ AT&T introduced a “Sponsored Data” plan open to any edge provider to subsidize user traffic in 2014.¹¹⁰ T-Mobile implemented similar sponsored data programs for music and video.¹¹¹ “Music Freedom,” the network’s music service, zero-rated Apple Music, Pandora, Spotify, and Google play among more than a dozen other music streaming services that continues to expand as T-Mobile customers can vote to add additional music streaming services.¹¹²

T-Mobile’s music program stands out because the data is not subsidized by the benefitting edge providers, in this case the streaming

¹⁰⁸ See Arturo J. Carillo, *Having Your Cake and Eating It Too: Zero-Rating, Net Neutrality, and International Law*, 19 STAN. TECH. L. REV. 364, 367 (2016).

¹⁰⁹ See 2015 Open Internet Order, *supra* note 11, ¶¶ 151-52. See also, Nathaniel Mott, T-Mobile’s “Music Freedom” Plan Subsidizes Data Plans without (Really) Threatening Net Neutrality, PANDO (Aug. 28 2018, 4:49 PM), <https://pando.com/2014/08/28/t-mobiles-music-freedom-plan-subsidizes-data-plans-without-really-threatening-net-neutrality/>.

¹¹⁰ Tim Cushing, AT&T’s “Sponsored Data” Program an Admission that Data Caps Have Nothing to Do with Congestion, TECHDIRT (Jan. 6 2014, 4:20 PM), <https://www.techdirt.com/articles/20140106/13391125777/atts-sponsored-data-program-subverts-net-neutrality-admits-data-caps-have-nothing-to-do-with-congestion.shtml>.

¹¹¹ Mike Masnick, Music Freedom or Holding Consumers Hostage? Letting ISPs Pick Winners and Losers Is a Problem, TECHDIRT (Jun. 19, 2014), <https://www.techdirt.com/articles/20140619/06354227623/when-your-internet-access-provider-gets-to-pick-winners-losers-theres-problem.shtml>.

¹¹² Hayley Tsukayama, T-Mobile Adds Google Play, Xbox Music, and More to “Music Freedom,” WASHINGTON POST (Nov. 24, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/11/24/t-mobile-adds-google-play-xbox-music-and-more-to-music-freedom/>.

services.¹¹³ This drew divisive support from some net-neutrality proponents because featured edge providers are not extorted, and the anticompetitive blight is diluted by creating a competitive market between the zero-rated services.¹¹⁴ Arguably, some of these services can even serve music diversity if they focus on niche genres. However, a more categorical view of Music Freedom recognizes the plan's dangers.¹¹⁵ T-Mobile preferences certain data, regardless of who pays for it. Benign discrimination is no less discrimination. It still excludes edge providers who are not yet zero-rated under Music Freedom and therefore creates a competitive edge against those sites. Indeed, YouTube is the most popular music streaming service but is not covered under music freedom.¹¹⁶ While neither the streaming service nor user would pay for music streaming under Music Freedom, T-Mobile never disclosed who was subsidizing the data. Early in Pai's tenure as Chairman, the FCC dropped investigations into the matter.¹¹⁷ This abdication of responsibility was a primary step in repealing net neutrality rules including the "general conduct standard" that allowed the FCC to challenge unreasonable conduct that threatened the public interest.¹¹⁸ Once a site does qualify for Music Freedom subsidization, it remains to be seen whether there is innovative competition between the providers. The niche genre services provided may not be competitive with Pandora, Spotify, or Apple Music who have marketed to broader tastes rather than music-focused communities.

Ultimately, the debate regarding zero-rating completely ignores the role of the music creator, instead focusing on the audience and distributor. Music creators must still go through many of the same popular distributors who refuse to provide substantial pay in order to reach an audience. Further, zero-rating services like YouTube maintains demand in a market rife with unlicensed music that does not confer royalties to artists.

¹¹³ *Id.*

¹¹⁴ See Mott, *supra* note 109.

¹¹⁵ See Chris Ziegler, T-Mobile's "Music Freedom" Is a Great Feature – And a Huge Problem, VERGE (Jun. 18, 2014, 9:42 PM), <https://www.theverge.com/2014/6/18/5822996/t-mobile-music-freedom-net-neutrality>.

¹¹⁶ YouTube was later zero-rated in "Binge On," a separate T-Mobile program that certain video streaming services. See Binge On, T-MOBILE (accessed Jan. 28, 2017), <https://www.t-mobile.com/offer/binge-on-streaming-video.html>.

¹¹⁷ Daniel Fuller, Many Open Sponsored Data Investigations Closed by the FCC, ANDROID HEADLINES (Feb. 3, 2017), <http://www.androidheadlines.com/2017/02/many-open-sponsored-data-investigations-closed-by-the-fcc.html>.

¹¹⁸ Restoring Internet Freedom Order, *supra* note 4, ¶ 239.

B. *Alternative Markets*

If streaming services abuse their bargaining power to lower royalty rates, artists must seek alternative markets to reach their audience. A similar shift to alternative markets occurred with the dawn of peer-to-peer file sharing programs such as Napster and Limewire because copyright holders no longer received royalties in online markets.¹¹⁹ Artists would rely on live performances, broadcasters, and unit sales, such as CDs or the revitalized industry of vinyl records, for income. Essentially, artists would have to regress in the methods of revenue they could rely on. Radio lost a substantial portion of its audience to digital music access at the outset of online music markets and that exodus only continued to grow following the 2015 Order.¹²⁰ If artists cannot survive on online streaming royalties, they may discontinue licensing to the services and more actively grant licenses for broadcasters. As a result, the audience may follow the artists to the alternative medium.

A select number of artists have successfully bucked the streaming services and relied on alternative markets. In 2014, Taylor Swift argued that “music should not be free” and removed her catalogue, consisting of four albums at the time, from Spotify.¹²¹ Less than a year later, Swift posted an open letter to Apple Music on a social media profile, again removing her catalogue from the streaming service for refusing to pay royalties during the service’s three-month free trial offer for users.¹²² Swift’s music eventually returned to both platforms but not before creating a dialogue regarding whether streaming service royalties were fair when alternative methods of music distribution were available.

Although, streaming services may not be ideal, alternative methods may not suffice for every artist. As a household name with a massive following, Swift could count on her fans to seek and purchase her album released several weeks after leaving streaming services. Artists without a comparable reputation may not be able to rely on alternative markets or have the bargaining power to make streaming services change their policies.¹²³ Swift made a similar admission in her

¹¹⁹ See Yu, *supra* note 94, at 901-907.

¹²⁰ Christopher H. Sterling, *Transformation: The 1996 Act Reshapes Radio*, 58 FED. COMM. L.J. 593, 602 (2006).

¹²¹ Taylor Swift, *For Taylor Swift, the Future of Music Is a Love Story*, WALL ST. J. (July 7, 2014).

¹²² Peter Helman, *Read Taylor Swift’s Open Letter to Apple Music*, STEREOGUM (June 21, 2015) <https://www.stereogum.com/1810310/read-taylor-swifts-open-letter-to-apple-music/news/>.

¹²³ See Flynn, *supra* note 91, at 6 (“Spotify risks the periodic criticism from acts and record labels, because controlling a medium that delivers a network of 75 million potential fans means only the very few superstars, like Taylor Swift, can culturally and economically afford to circumvent their platform.”).

op-ed declaring her break with Spotify, “Some artists will be like finding ‘the one.’ We will cherish every album they put out until they retire.”¹²⁴ Ultimately, only the biggest names may be able to successfully shift to alternate markets, leaving niche genres and artists trapped among prioritized streaming services.

In addition, artists rely on the Internet for more than distributing their works. Advertising events, coordinating venues, and selling merchandise all primarily happen over social media.¹²⁵ This adaptability makes social media outlets ripe targets for paid prioritization. As a result, prioritized outlets would have substantial bargaining power because they would provide access to the desired audience and could pass the costs of prioritization onto the artists. The rate to “boost” one’s band on social media could potentially be exacerbated if the market concentrates into a few services.¹²⁶ While focusing on ISPs and end users in the Restoring Internet Freedom Order, the FCC falls short because it fails to recognize content creators’ dependence on the Internet. Sadly, the dialogue between demanding consumers and service providers regarding music revenue and online distribution methods has largely excluded musicians in their role as content creators.¹²⁷ Therefore, artists would need alternatives for streaming, publicizing, and merchandising at which point the audience may not follow unless the artist famous enough to work independent of online services.

Another suggested alternative market would require wholly new infrastructure. Entertainment is expected to become the dominant majority of Internet traffic and may require an alternate Internet “backbone” to separate entertainment from essential infrastructure, reducing network strain.¹²⁸ Reducing the network strain would arguably reduce the need to rely on paid-prioritization and throttling.¹²⁹ However, under the Restoring Internet Freedom Order, ISPs would be

¹²⁴ See Swift, *supra* note 121.

¹²⁵ Will Meyer, *No Internet, No Music: Why Musicians Need to Care about Net Neutrality*, WATT (May 3, 2017) <https://watt.cashmusic.org/writing/nointernetnomusic>.

¹²⁶ *Id.* (“Independent musicians get the short straw because if they want more than a few friends to see their band’s post, they must shell out five dollars to “boost” it.”).

¹²⁷ See Yu, *supra* note 94, at 937 (“whether the industry can buck this historical trend and avoid a radical transformation of the business and legal environment will depend on whether it responds adequately to consumer demand-and more importantly, their continued frustrations.”). Yu emphasizes that the consumers control the market. This ignores the need for consumers to actually be invested in artists’ success.

¹²⁸ William Lehr & Douglas Sicker, *Would You Like Your Internet with or without Video*, U. ILL. J. L. TECH. & POL’Y 73, 81, 83, Spring 2017.

¹²⁹ *Id.* at 86-87.

permitted to prioritize and throttle at will.¹³⁰ The alternate infrastructure would not bypass traffic restrictions because ISPs are no longer motivated to throttle based on an overburdened network but instead for their own gain.¹³¹ So long as the incentive and ability to profit from prioritization, blocking, or throttling persists, broadband providers will restrict data access.

Alternative markets only provide limited solutions and they can only benefit a limited number of artists who could persuade their audience to abandon the online market. Therefore, alternative markets may not be able to benefit smaller artists and genres.

C. *Music Subject to ISPs’ “Editorial Discretion”*

The FCC’s Restoring Internet Freedom Order does not expressly stipulate that ISP’s will be able to practice editorial discretion, but it is possible considering the Order’s rejection of past precedents. In *Verizon*, the broadband provider argued restrictions on different treatment of data violated the ISP’s editorial discretion.¹³² While *Verizon* was decided on administrative procedural grounds, the court in *U.S. Telecom. Ass’n v. F.C.C.* expressly denied that ISPs have editorial discretion because they neither select nor produce content, meaning any editorial discretion would interfere with the virtuous cycle of content creation, consuming, and sharing.¹³³ But once broadband providers can discriminate via throttling, blocking, and preferencing, they would have the ability to effectively curate content. In the case of paid-prioritization, some subsidized data has direct and related financial support, such as AT&T’s sponsored data plan. However, questions arise where the subsidizing party remains confidential, as in T-Mobile’s Music Freedom service. By benefitting certain services and providers without a clear financial reason, T-Mobile exercises editorial discretion in what content and providers are subsidized.

ISPs’ curating amounts to corporate expression, which the Supreme Court has recognized as protected under the First Amendment.¹³⁴ Previously, ISPs had limited speech rights because they simultaneously enjoyed immunity for illegal content made available by users accessing the ISPs’ services.¹³⁵ Speech rights are not

¹³⁰ *Restoring Internet Freedom Order*, *supra* note 4, ¶ 239.

¹³¹ *See* Cushing, *supra* note 110.

¹³² Alexander Owens, *Protecting Free Speech in the Digital Age: Does the FCC’s Net Neutrality Order Violate the First Amendment*, 23 TEMP. POL. & C. R. L. REV. 209 (2013).

¹³³ *United States Telecom Ass’n v. F.C.C.*, 825 F.3d 674, 740 (D.C. Cir. 2016).

¹³⁴ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¹³⁵ 47 U.S.C. § 230(c)(1) (2012) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content

new to mass communications organizations. Newspapers and new media who exercise editorial discretion are subject to a public interest standard that varies depending on the outlet. Restrictions on newspapers' editorial discretion that supposedly advance the public interest must survive strict scrutiny.¹³⁶ Regulations that curb broadcasters' editorial discretion need only survive an unclear but lesser form of heightened scrutiny because broadcast uses electromagnetic spectrum, a limited resource.¹³⁷

The issue for the courts would be drawing an analogous model of discretion between other forms of new media and the Internet. Thus far, the Supreme Court's underwhelming understanding of the Internet likened it to a "vast library" and shopping mall for all of the available services.¹³⁸ This view parallels other new media models where the technology acts to facilitate the user's receipt of information. ISPs can defend the practice of curating and restricting content based on this model because the Internet is not considered a traditional public forum where speech restrictions are at their weakest. The Supreme Court refused to recognize the Internet as a traditional public forum because they refused to hold other forms of new media to the same standard.¹³⁹ However, this view arguably ignores the most compelling aspect of the Internet, the ease for a user to actually produce and spread information.¹⁴⁰ A select few are able to distribute information via newspaper, radio, or cable. Internet access naturally carries the ability for any participant to contribute. Therefore, the Supreme Court's model for speech on the Internet needs desperate revamping before ISP discretion is reviewed. As a result, recognizing and protecting ISPs' corporate speech rights simultaneously stymies users' speech rights to participate on the Internet as a general forum.¹⁴¹

provider." See also, *Reno v. A.C.L.U.*, 521 U.S. 844, 869-70 (1997) (distinguishing the "captive audience" theory in broadcasting cases from the "affirmative steps" an internet user must take to seek and witness indecent communications).

¹³⁶ *Miami Herald Publishing Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974).

¹³⁷ *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367 (1969).

¹³⁸ *Reno*, 521 U.S. at 853.

¹³⁹ *Am. Library. Ass'n v. U.S.*, 539 U.S. 194, 204-5 (2003).

¹⁴⁰ See Owens, *supra* note 132, at 216 ("The Internet is not a one-way conduit for speech, like newspapers and television. Rather, the Internet is the aggregate of all other media combined (and then some) due to its immense interactivity, countless features, and ability to foster instant discourse.").

¹⁴¹ Feldman, *supra* note 83, at 1187. ("Consequently, corporate ISPs would be able to maximize profits, while their customers would be forced either to pay a premium or to suffer inferior or limited Internet access. In such a case, the Court would be complicit (with corporations) in limiting the free expression of many online users while ostensibly protecting corporate free expression."). See also, Barbara A. Cherry, *How Elevation of Corporate Free Speech Rights*

Regardless of a future court’s interpretation, niche music genres are threatened unless the music industry reframes its interest to better accommodate artists or the FCC recognizes the fundamental value of content providers in the virtuous circle and prioritizes their speech rights over ISPs. The sobering reality of the FCC’s repeal of its net neutrality regime is the lack of novel revelations. Pai’s FCC abandons content providers, for example musical artists. Although courts have endorsed the “virtuous circle” theory of artists distributing their content online, accessing users who further broadcast the work,¹⁴² Pai has chosen to ignore edge provider and information access. The FCC’s abrogation of its core methodology is self-destructive, instead favoring ISP profits.

III. MUSIC AND THE “PUBLIC INTEREST”

The FCC’s general duty is to ensure wired and wireless communications further the public interest because the electromagnetic spectrum is a limited resource in the communications context.¹⁴³ Following the repeal of net neutrality protections, music must rely on alternative markets for artists to reach audiences.¹⁴⁴ The primary alternative market for distribution of recordings will involve both unit-sales and broadcasting. Typically, a consumer does not purchase an album without first sampling it by listening to some of the songs on the album. Based on this process, broadcast and radio has traditionally acted as the introduction to the music, gaining initial interest until the consumer decides to purchase the album for their own use. Therefore, alternative markets will inevitably rely on the broadcasting and music will be subject to the relevant public interest standard if artists hope to compete in the alternative market.

Congress required that radio broadcasts furthered the public interest because they used electromagnetic spectrum.¹⁴⁵ When it came to defining the public interest, the FCC had to identify the values attached to furthering the public interest as well as what parties would be responsible for determining whether content furthered the public interest. While the public interest remained vague, the FCC initially determined that broadcasters would have editorial discretion and had a duty to act as public trustees, playing content they deemed relevant to

Affects Legality of Net Neutrality, 63 FED. COMM. L. J. 591, 633-34 (2011).

¹⁴² *Verizon v. F.C.C.*, 740 F.3d 623, 634 (2014).

¹⁴³ 47 U.S.C. § 151 (2012).

¹⁴⁴ *See supra* IV.b.

¹⁴⁵ § 151.

the public's interest.¹⁴⁶ While this gave DJs amorphous guidance as to content, it failed to address how to further the public interest when multiple broadcasters, all public trustees, were forced to compete.

Adopting an alternative model, the Federal Radio Commission was tasked in 1929 with licensing spectrum to three competing broadcasters in the Chicago area.¹⁴⁷ To settle the debate, the FRC assigned certain times and channels to the broadcasters based on the demographic the content aimed to serve.¹⁴⁸ This would become the groundwork for the "marketplace" theory of public interest that would come to replace the trustee model.¹⁴⁹ The marketplace theory not only settled disputes amongst trustees, it became the standard for broadcasters to meet in order to maintain a broadcasting license.¹⁵⁰ Broadcasters could select content that would be relevant to the market and would be held accountable by complaints to the FCC from members of the market who felt their interests, as the market and public, were not being represented.¹⁵¹

In addition, the market could impose content restrictions by filing complaints against broadcasters for carrying content that was patently offensive.¹⁵² The Supreme Court in *Pacifica* held that a radio station violated local norms by broadcasting George Carlin's profanity laden "Seven Dirty Words" routine during the mid-afternoon because a radio audience is a captive audience; the audience therefore had limited choices in content and had no control over the broadcasters' editorial discretion.¹⁵³ As a result, broadcasters took on a duty to censor themselves as part of their role serving the public interest.¹⁵⁴

While music and radio seem to be a harmonious pair, it must be reiterated that the Internet was the original alternate market that replaced radio. Internet prevailed as the primary channel for music because it was not subject to the same public interest requirements as broadcast. Therefore, it should not be assumed that radio is an adequate alternative for music when net neutrality can no longer preserve an equal playing field for artists. Music largely abandoned radio years ago

¹⁴⁶ Erwin G. Krasnow & Jack N. Goodman, *The Public Interest Standard: The Search for the Holy Grail*, 50 FED. COMM. L. J. 605, 610 (1998).

¹⁴⁷ *Great Lakes Broad. Co. v. Fed. Radio Comm'n*, 37 F.2d 993 (D.C. Cir. 1929).

¹⁴⁸ *Id.* at 995.

¹⁴⁹ See Krasnow & Goodman, *supra* note 146, at 612.

¹⁵⁰ See *National Broad. Co. v. United States*, 319 U.S. 190 (1943); Mark S. Fowler & Daniel L. Brenner, *Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 218 (1982).

¹⁵¹ See *e.g.*, *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966).

¹⁵² *Pacifica Found. v. F.C.C.*, 438 U.S. 726 (1978).

¹⁵³ *Id.* at 759-60.

¹⁵⁴ *Id.* at 743.

because the Internet let artists pursue audiences more directly with greater freedom of expression. The music industry today, full of diverse content relying on the Internet, could not be replicated with radio as an alternate market.

First, music diversity and minority genres relied on the Internet because there was not a substantial enough market share of interested audience members to appeal to broadcasters. Broadcasters seek popular genres with larger audiences to bring in more ad revenue. Profit interests motivate broadcasters, not artists or diverse representation.

The second notable difference between radio and the Internet’s music catalogues is on-demand music access. Giving the audience the power to control what specific content they hear removes the captive audience qualification. The Supreme Court in *Pacifica* specifically drew the distinction between a captive audience and one who would have the power to choose to listen to certain content in the privacy of their home.¹⁵⁵ The audience then takes on the role as curator but need only appease themselves rather than the public interest.

Finally, because the audience is willing rather than captive, censoring for indecency is no longer relevant. Internet music services allowed the audience to access some music that may not be appropriate for radio. As a result, artists were no longer restricted to reaching an audience by the content of their music. In addition, content deemed indecent for radio may not be lacking social value depending on the local cultural standards and norms. In this country, music and expression occur in the context of a pluralistic society. The variety of cultures and viewpoints inevitably carries some strife. An agonistic democracy requires views to compete, challenge hegemonic norms, and protect minority views from censoring by a controlling establishment.¹⁵⁶ Broadcasters, serving the public interest, are incentivized to focus on the majoritarian belief system and may self-censor when faced with an opportunity to advance challenging minority views. Because cultural representation is an essential part of music diversity,¹⁵⁷ broadcasters invariably stifle cultural viewpoints by serving the marketplace.

Music diversity thrived under a free and open Internet because cultural sub-genres were allowed to grow. Internet substituted radio as the primary music channel because broadcasting lacked such openness.

¹⁵⁵ *Id.* at 759-60. *Cf.* *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that the right to privacy permitted possession of obscene materials in one’s own home).

¹⁵⁶ Danielle Raejimaekers & Pieter Maesele, *Media, Pluralism, and Democracy: What’s in a Name?*, 37 MEDIA CULTURE & SOC’Y 1042, 1046-47 (2015).

¹⁵⁷ *See supra* II.b.

Forcing artists to regress back to broadcasting will only create more restrictions on cultural representation in music.

CONCLUSION

Repealing net neutrality protections would vastly inhibit artists from reaching audiences. While musicians have had a complicated relationship with the Internet, balancing audience access and illegal file sharing for instance, music diversity has been undeniably benefitted. Communities share and critique works in genre specific forums. Subgenres persist because they have a sustainable population of interested audience members. Previously, artists had to rely solely on local communities rather than global networks.

Forcing artists to rely on prioritized distribution outlets gives the ISP and a select few edge providers substantial bargaining power over artists, meaning the already minimal streaming royalties will continue to decline. In addition, forcing the music industry to regress into alternative markets will further demonstrate the necessity of a free and open Internet. Alternative markets, namely broadcasting, are extremely limited in their scope of interests under a marketplace model. The public interest doctrine as applied to radio is insufficient to allow niche genres to flourish in the face of net neutrality's repeal. By restricting the FCC's definition of the public interest to preventing anticompetitive practices, the agency ignores the true value of the Internet: abundant content creators, simplified distribution, and expansive audience access. Musicians are a small category of the content creators and edge providers that the FCC's policy ignores.

The impact of the 2017 Order on music serves as an allegory for the Order's effects on democracy. The FCC dismissed noneconomic harms left unaddressed as "small."¹⁵⁸ As the 2017 Order faces vacatur in court,¹⁵⁹ those democratic concerns should not go unheard. A court may vacate an agency action for being arbitrary and capricious.¹⁶⁰ The 2015 Order sought to protect democratic values and expression.¹⁶¹ The inversion of the FCC's position on democratic reliance on a free and open Internet cannot be dismissed and treated as insubstantial compared to the protections to competitions the 2017 Order purports to

¹⁵⁸ *Internet Freedom Order*, *supra* note 4, ¶ 116.

¹⁵⁹ See Joint Brief for Petitioners at 51, *Mozilla Corp. v. F.C.C.*, No. 18-01051 (D.C. Cir. Feb. 22, 2018) (arguing that the FCC's repeal of the 2015 Order after a decade of pursuing a common carriage framework amounts to an arbitrary and capricious change in law).

¹⁶⁰ 5 U.S.C. § 706 (2012).

¹⁶¹ *Open Internet Order*, *supra* note 11, ¶ 22.

offer.¹⁶² Artists’ voices contribute to the greater chorus of expression reliant on net neutrality that informs and shapes democracy and culture. The FCC’s refusal to recognize the democratic value of the Internet, and the need for common carriage style rules to protect it, amount to arbitrary and capricious decision-making. The FCC failed to address the relevant and substantial impacts on democracy of repealing the 2015 Order. Such an omission amounts to grounds for vacatur.¹⁶³

If left standing, Pai’s choice to repeal the Title II protections should be viewed as a lament. It is the final song of a tragedy where the FCC’s self-destruction has been driven by coercive forces seeking control over a digital world. The show may go on though. Vacation of the 2017 Order will return broadband regulation to a freer and more open Internet, a system that greatly benefits artists and the music industry. Rather than Wotan’s raven’s spreading the flames, democracy may re-emerge, more akin to a phoenix, so expression may be free from corporate gatekeeping control.

¹⁶² See *Internet Freedom Order*, *supra* note 4, ¶ 116.

¹⁶³ *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2706 (2015) (“Federal administrative agencies are required to engage in ‘reasoned decisionmaking.’”) (quoting *Allentown Mack Sales & Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998)).