

## Tech Legislation And Regulation To Watch In 2015

By **Bill Donahue**

*Law360, New York (January 02, 2015, 4:18 PM ET)* -- Net neutrality is going to grab the headlines again, but 2015 is also going to see important regulation on Internet television, another shot at patent reform legislation, and multiple measures to deal with hacking and data breaches.

### Net Neutrality

More than 3 million public comments; plenty of overheated rhetoric from both sides; a bit from comedian John Oliver calling Federal Communications Commission Chairman Tom Wheeler a dingo — in 2014, after bursting onto the scene with a D.C. Circuit ruling in January, net neutrality very quickly became the biggest technology story of the year.

And with Wheeler getting set to finally introduce the new neutrality rules that got everyone so hot and bothered last year, 2015 isn't looking like it'll be much different.

The yearlong debate has boiled down to whether or not Wheeler should reclassify Internet service providers more like phone companies, which would allow the FCC to more strictly regulate them as “common carriers” under Title II of the Communications Act.

The ISPs and conservative lawmakers loathe the idea, saying it would impose century-old regulation and chill infrastructure investment. Wheeler didn't want to reclassify at first, either, but his initial plan without it — which arguably would have still allowed ISPs to strike deals charging content companies like Netflix for faster access — infuriated neutrality advocates and liberal lawmakers. They quickly and loudly said it would lead to “fast lanes” for those that could pay and throttled access for everyone else.

Wheeler appeared to be zeroing in on a middle-ground plan that had been termed a hybrid approach, but then came President Barack Obama's forceful call for the FCC to use Title II in November. The president said he wanted the “strongest-possible rules,” and he said broadband providers “must carry the same obligations as so many of the other vital services do.”

Now, with an actual proposal right around the corner, what once seemed like an unlikely route is increasingly looking like it might happen. The ISPs have begun to tell their investors that “common carrier” rules might be coming; speaking to reporters earlier in December, Wheeler himself made a point to say that Title II regulation, handled properly, hasn't caused problems for investment in wireless networks.

“Obviously nobody knows for sure, but I think the conventional wisdom is that the FCC is working on an order that imposes Title II regulations in some manner,” Yaron Dori, the co-chair of the communications and media practice at Covington & Burling LLP. “If they do that, the big question will be what provisions the agency is going to forgo, and what implications will that have for the market.”

That last part — forbearance — will be the key thing to watch as the debate moves forward. Nobody has ever suggested foisting the full strength of Title II on ISPs; any eventual “common carrier” neutrality rules would waive significant restrictions, a step advocates say will help avoid the rules’ being overly burdensome.

But just how exactly the FCC will attempt to do that, and exactly how it applies to real-world situations, are big, open questions. And as with everything involving net neutrality, the two sides are miles apart on them: Neutrality advocates say forbearance will be a cinch, and the ISPs say it’ll be a disaster.

In the more immediate future, the FCC is also nearly certain to be sued over the new rules, no matter what they look like. Certain ISPs have hinted as much, and Wheeler has publicly acknowledged the same. That means the ever-spirited debate over net neutrality is likely to stretch far beyond this year.

“My expectation is that this story is not going to get resolved quickly in 2015,” Dori said. “It’s more like this year will be the end of the beginning.”

## **Internet TV**

The FCC is currently weighing a proposal floated by Wheeler in October to treat “over the top,” or Internet-based, video providers more like other traditional video providers, expanding the definition of “multichannel video programming distributor” from just cable, satellite and telephone companies to include OTTs.

MVPDs are covered by so-called program access rules, which require that many cable channels be made available to them, and Wheeler believes the move will create more television competition by giving Internet streamers better access to programming.

It should be noted that the move is limited. It would apply only to so-called “linear” providers that offer prescheduled lineups — meaning not the popular Netflix, Hulu or HBO Go platforms that have dominated streaming viewing over the past few years. It also wouldn’t address parallel problems, like access to the same kind of compulsory licenses that make it easier for old-school pay-TV providers to get copyright authorization.

But in one big way, it’s still quite significant: It’s the first regulatory acknowledgment of a much larger trend in the way people consume video content.

Remember, pay-TV providers lost 150,000 subscribers in the third quarter of 2014. Fourteen percent of broadband Internet users now don’t have a parallel subscription to a pay-TV service, up from 9 percent in 2011. Verizon, CBS, HBO, and other companies have sure noticed, announcing or launching a variety of new and increasingly content-rich streaming services in 2014.

But for years, the FCC allowed a petition by an OTT service — Sky Angel — for MVPD status to lay dormant. That changed with Wheeler’s proposal for rules, which are due out this year. It could be the

first of many changes.

“The OTT proceeding is going to be important because it's potentially going to set into motion a whole series of other activities that are going to be critical to launching a whole new way of selling video services,” Covington's Dori said.

## **Patent Reform**

The multiyear effort for further patent reform legislation aimed at curbing abusive litigation hit a rough patch in 2014. A reform bill — the Patent Transparency and Improvements Act — overwhelmingly passed the Republican-controlled House of Representatives in 2013, but died in the Senate when Sen. Patrick Leahy, D-Vt., pulled it from the Judiciary Committee's agenda in May.

Certain industries cheered PTIA's demise, but nobody wanted the bill to pass more than the tech industry.

The Internet Association — Facebook Inc., Google Inc., Amazon.com Inc. and the like — had urged Leahy to change rules that “shield [trolls] from responsibility for misuse of our patent system.” The Computer & Communications Industry Association — Motorola Mobility Solutions LLC, Samsung Electronics Co. Ltd., T-Mobile US Inc. and others — called Leahy's decision to pull the bill “a massive setback to the nationwide chorus of calls for reform.”

The Information Technology Industry Council — pretty much every major tech company you can think of — didn't hold back after Leahy's move, either, saying that “further delay in stemming the tide of vicious patent litigation serves only to embolden those who abuse the system, thereby killing jobs and increasing costs for American consumers.”

You get the idea.

The good news for that disappointed tech set? With both houses now in the hands of Republicans and President Barack Obama in support of legislation, the stars might be aligning for a patent bill to actually be enacted in 2015.

"I do feel strongly that patent reform will be passed [this] year," Mark Scarsi of Milbank Tweed Hadley & McCloy LLP told Law360. "It's one of the things the new Congress can do to show they can work together and really accomplish something."

What exactly gets passed is something else entirely, though. Remember, since the legislative efforts at reform were proposed, there was quite the big year for judicial reform in 2014, with major rulings from the U.S. Supreme Court that expanded fee-shifting and made it easier to invalidate computer-related patents involving abstract ideas.

Add to that the fact that the new patent review proceedings established by the America Invents Act have proven to be a very effective way to invalidate patents, which will likely be used more often to target patents wielded by nonpracticing entities, regardless of what Congress does.

But even if those changes mean that any future reform can be toned down a bit from past efforts, 2015 is still looking like as good a year as ever for the tech industry to finally get legislative changes to patent law to the president's desk.

"I definitely see patent reform for 2015, without a doubt," Marylee Jenkins of Arent Fox LLP told Law360.

## **Data Breach and Cybersecurity**

It was tough to avoid the issue of data security in 2014, with high-profile breaches for Home Depot Inc., JPMorgan Chase & Co., and most recently Sony Corp. Congress, though, somehow managed to do precisely that.

Bills to bolster data security — legislation that would impose security requirements and create a single standard for notifying consumers in the wake of a breach — were floated in 2014, but no significant measures were able to cross the finish line.

With a Republican-controlled Congress set to take over, privacy attorneys are optimistic that calls to enact clearer data security standards will finally come to fruition.

"There have been efforts throughout the last several years to enact legislation, but I think Republicans taking control of the Senate really increases the prospects for having legislation pass both houses and being sent to the president's desk," Mayer Brown LLP partner Howard Waltzman said. "Having Republicans in control means there's likely to be not only more agreement, but greater enthusiasm for it."

Ditto for legislation that would create a framework making it easier for companies and the government to exchange data on cybersecurity threats like the massive attack on Sony in December.

The House in April 2013 passed a cybersecurity bill designed to encourage the government-private information-sharing, but a similar bill that garnered bipartisan support in the Senate — S. 2588, the Cybersecurity Information Sharing Act — failed to emerge from the chamber.

The cybersecurity bill stalled over privacy issues, namely how much companies should be shielded from liability over personal information they share. But privacy attorneys are expecting those issues to be resolved in the year ahead.

"There were some concerns over the privacy implications of a voluntary information-sharing regime, but it seemed as though Congress was very close to a deal, so I think that a deal is extremely doable in the next Congress," Waltzman said.

--Editing by Edrienne Su.