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## The Net Neutrality Debate: What's It About and What's at Stake?

by David S. Turetsky

### I. The Debate

Given the importance of the Internet to the way people increasingly live their lives and conduct business, it is not surprising that one of the highest profile and possibly highest-stakes debates in Congress, at the FCC, and in various commerce, policy and legal circles concerned with the Internet, is over the concept of "net neutrality."

This debate comes about in part because historic rules of common carriage, which include a duty to serve upon reasonable request and certain restrictions on discrimination, have been held not to apply to broadband access services, including DSL,<sup>1</sup> and cable modem service.<sup>2</sup> Providers of broadband access via other technologies, such as broadband over power lines, have rushed to get clarification that their broadband access services too are "information services," a classification associated with very light regulation as compared to the more extensive obligations associated with classification as a common carrier.<sup>3</sup>

### II. The Positions

The issue for some is whether the Internet will retain its open character, where a consumer generally can, on an equal and nondiscriminatory basis, view or provide any lawful content or services through, or attach any equipment to, their Internet connection.

Proponents of additional legal safeguards to secure net neutrality fear that the companies that provide broadband on- and off-ramps to the Internet, some of whom also are major Internet backbone providers, will turn the Internet into a

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100 YEARS

DEWEY & LeBOEUF

1909 – 2009

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discriminatory toll road. They fear that broadband carriers will allow data and services from Web sites to reach the end user in timely, high quality and convenient ways only if the Web sites pay the carrier an extra fee (or the content belongs to the carrier), in addition to payments made by consumers and other end users to use high speed connections. They say this would hurt consumers' Internet experiences and jeopardize choice, innovation and competition, by placing new barriers in the path of startup Internet companies — startups typically would lack the capital to pay broadband companies handsomely for the top-tier speed and quality of service that established competitors could afford. They argue that this would allow broadband carriers, rather than consumers, to choose winners and losers, and that such a system is inconsistent with the structure and design of the Internet.

Vinton Cerf, a key developer of the Internet, and now with Google in the role of “Chief Internet Evangelist,” says that the Internet was designed without “gatekeepers over new content or services” and that broadband carriers could “fundamentally undermine” the Internet.<sup>4</sup> Noted Stanford Law professor and author Larry Lessig says that network operators seeking payments from Web sites for preferential carriage may turn the Internet into a “celestial jukebox.”<sup>5</sup> One Voice Over Internet Protocol (“VoIP”) provider says that a broadband carrier operating without neutrality could be like an electric company controlling which toasters consumers choose by telling them that unapproved toasters may not work as well with the electric power.<sup>6</sup>

Opponents of major additional legal safeguards to secure net neutrality, including many broadband carriers and proponents of deregulation, see the stakes as equally important. Some point to the fact that the speeds available to broadband users in the United States lag behind several other nations. Those opponents argue that for carriers to undertake the enormous investment to build next generation high-speed networks, which will also enable content and service providers to create exciting new products and services, there must be deregulation, flexibility, and an opportunity to compete in new ways. While some consumer groups and content providers take a starkly different view of the state of competition,<sup>7</sup> the carriers say that consumers increasingly can choose between multiple competing broadband providers and technologies and, therefore, the market, rather than regulators, can and should address any departures that consumers may not want from a common carriage-like model.

The broadband carriers' rhetoric can be colorful, too. AT&T chief executive Ed Whitacre has called it “nuts” or “bull” for sites that send large quantities of bits to consumers to expect to “put more and more through our pipes for free.”<sup>8</sup> Verizon deputy general counsel John Thorne says Google freeloards on its wires that cost billions of dollars to build, “enjoying a free lunch that should, by any rational account, be the lunch of the facilities providers.”<sup>9</sup> Some Web sites or service providers counter that they already pay carriers for Internet connections commensurate with their needs.

Carriers sometimes emphasize that they are not threatening to block or degrade access to any Web site; rather, they are considering something extra, such as a high-quality of service “fast lane.” Some carriers suggest that this is necessary to ensure that they can offer high-quality of service and competitive video programming to consumers over their own new networks, rather than rely on the “best efforts” delivery that typifies the Internet and that they say may be inadequate for some services. Opponents dismiss these arguments, suggesting either that networks that include fiber connections to the home and provide competitive video programming are not bandwidth constrained, or that allowing network owners to prioritize and reserve scarce capacity for their own video programming in this way will enable them to starve for bandwidth and degrade offerings from other content or service

providers. Carriers and their allies also argue that there is no reason that consumers alone, and not content providers, must pay all of the costs, and that content providers who would pay the carrier a fee to enhance consumers' experience of their site or services by prioritizing the site's bits or by storing content on limited capacity servers closer to the consumer should be allowed to do so. One content provider that downloads movies to customers, Movielink, has said that it is willing to explore paying a fee to secure a higher quality of service and speed for its customers.<sup>10</sup>

The cable industry, which for a long time has not been subject to a comprehensive nondiscriminatory common carriage regime, simply claims that there is no reason for Congress or the FCC to do anything on this issue: Comcast chief executive Brian Roberts said "proponents of the so-called net neutrality are pursuing a solution in search of a problem."<sup>11</sup> Cable companies also have asserted First Amendment rights in connection with issues relating to the carriage of content.

### **III. Government Action?**

What departing from common carriage rules ultimately means for broadband providers is unclear. The FCC has ancillary jurisdiction to regulate information services such as broadband access services and can impose obligations.<sup>12</sup> Certainly Congress has broad freedom to legislate as it continues to consider how to change telecommunications laws and may address this issue.

In spite of broadband deregulation, the FCC has made clear that it is willing to step in if broadband providers actually block Web sites or bit streams. In *In re Madison River Communications, LLC*,<sup>13</sup> the FCC fined a rural telephone company \$15,000 for blocking use of its network to access competing VoIP service. The FCC also adopted as enforceable conditions certain time limited voluntary net neutrality commitments made by AT&T and Verizon in connection with their respective mergers.<sup>14</sup>

Current FCC Chairman Kevin Martin has deplored blocking by broadband providers and wants consumer access to lawful Web sites to remain secure. At the same time, he has not taken a position to date on every aspect of the Internet neutrality debate.<sup>15</sup> His predecessor as chairman, Michael Powell, endorsed four Internet freedoms but did not want them enshrined in new regulations: the freedom to access legal content; the freedom to run applications of the consumer's choice; the freedom to attach any devices to the consumer's home Internet connection; and the freedom to receive meaningful information about the consumer's service plan.<sup>16</sup> The FCC adopted those four principles in a Policy Statement in August 2005, with the full support of now Chairman Martin.<sup>17</sup>

Public interest groups, on the other hand, claim that there have been several instances of blocking in the US, that equipment providers are selling equipment to carriers that is designed to "filter" or block VoIP traffic, that cable operators sometimes have barred consumers from home networking using cable modems, and that other disruptions of consumer access have occurred and increasingly will occur if net neutrality is not addressed by Congress or the FCC.<sup>18</sup>

All of this leads policymakers to try to consider and balance a number of concerns — how to: identify and preserve the openness and other valuable qualities of the Internet that make it unique and have turned it in a short time into a major tool for human expression, commerce and innovation; promote construction of very high-speed networks and efficient use of capacity, which will create valuable and important opportunities; assess the extent of competition and relevant trends, and whether any

potential threats to the open nature of the Internet warrant action; and ensure that if statutory or regulatory reform to promote Internet neutrality is desirable, it incorporate a sufficiently light touch to achieve what is necessary, without being so inflexible or heavy-handed as to impede investment, innovation and competition.

Congress is considering several different approaches, but may well not act this year, reflecting in part that “net neutrality” means different things to different people. Some approaches under consideration would bar the broadband network provider from interfering with or impairing the delivery to consumers of any content or services, and at least one would prohibit a network operator from creating “priority lanes” for fee-paying content providers to get preferential delivery to consumers. Some proposals also include significant exceptions, relating to quality of service considerations, for example, that might permit major departures from some notions of neutrality. Others would allow creation of a preferred or superior tier, but only if it is available to all sites and service providers on a nondiscriminatory basis. Some advocates have suggested putting the burden on a broadband access provider to justify to the FCC any deviation from a nondiscrimination regime. Still others would offer broadband access providers an incentive for a deal: allow broadband providers to secure benefits such as simplified and streamlined local franchises, a priority of the Bell companies, but only in return for net neutrality. Of course, some simply oppose congressional or regulatory intervention at this time, arguing that in rapidly changing technology markets, doing nothing is preferable to doing the wrong thing.

#### **IV. Antitrust**

Antitrust is relevant to the debate not merely because of the analytic tools and understanding of the market it offers, but also because if Congress or the FCC does not clarify this area, it is possible that broadband access providers (and perhaps those who receive preferential access from them, such as Web sites, content providers, or equipment companies) may ultimately find themselves defendants in antitrust cases. While those cases appear quite challenging now, the prospects for success will ultimately depend on the specific facts, timing and theories involved.

Antitrust cases involving net neutrality issues might be brought by government enforcers, consumers, or competitors claiming that preferential or exclusive arrangements have impermissibly harmed competition among equipment makers, various Websites, content or service providers, or even broadband access competitors. Depending on the circumstances, the line between whether a broadband access provider’s preferential treatment (including of its own content) confers an extra benefit, or rather degrades the service of others who do not share that treatment, may not always be clear. For example, an antitrust case may involve a Web site’s claim that the broadband access provider has agreed with a competing Web site to harm or exclude it, or that a carrier’s preferential treatment of its own content or equipment excludes competition and is creating or maintaining a monopoly. The United States Supreme Court decision in *Trinko*,<sup>19</sup> which blocked claims that a monopoly in the highly regulated local telecommunications services markets had engaged in an impermissible refusal to deal, may not be a decisive obstacle. Unlike the local telephone service involved in *Trinko*, broadband access is not currently heavily regulated. Moreover, it can be argued that a number of carriers voluntarily provide broadband access to Web content and services on a “neutral” basis, potentially putting a refusal to continue to do so in a different light than in *Trinko*, where the incumbent carriers did not engage in the transactions at issue until required to do so by the Telecommunications Act, a consideration that affected the Court’s view of the meaning of any refusal to do so later.

If this area is left to antitrust litigation to shape, there could be at least two ironies. The first is that Congress passed the Telecommunications Act in part to take telecommunications policy out of the hands of a federal judge, Harold Greene.<sup>20</sup> Should Congress and the FCC fail to act regarding net neutrality in favor of leaving this to the uncertainties of antitrust litigation, antitrust courts might again claim control over some of the most basic rules of telecommunications policy.

The second is that in the Telecommunications Act, rather than rely on the uncertainties of antitrust law and litigation, and the FCC, to address one of the issues most fundamental to how and whether competition might develop in the consumer market, Congress expressly chose to make a clear policy choice. Congress adopted a “cable-telco buy out prohibition,”<sup>21</sup> that generally bars cable companies and telephone companies from merging where they have overlapping local service areas “in order to maximize competition between local exchange carriers and cable operators within local markets.”<sup>22</sup> This decision to establish a clear but limited rule — and ensure that there would be at least two wires to most homes that could compete — avoided what otherwise might have been a decade of attempts by industry to collapse that barrier. Congress fostered an environment where telephone and cable companies would invest in their respective wires and compete over the long term, rather than look for clever ways and willing courts through which they might otherwise seek to slip their mergers and erode the competitive potential of these two wires. This foresight is paying big dividends to consumers as cable and telephone companies increasingly compete against one another. Recent news reports of cable companies substantially boosting modem speeds for subscribers without raising prices in response to phone company deployment of fiber connections offering high-speed Internet and TV at lower prices, suggest that there are continuing benefits to this policy.<sup>23</sup>

The debate over net neutrality is loud, at times complex, and the stakes are high. It is taking place in many venues with many participants and is not likely to be resolved soon.

## Endnotes

1. *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, 20 FCC Rcd. 14853 (2005).
2. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005); *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002).
3. *United Power Line Council*, WC Docket No. 06-10, DA 06-49, Public Notice, Pleading Cycle Established for Comments on United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service (Jan. 11, 2006).
4. *Ed Gubbins, Neutrality and Municipalities, Telephony*, Feb. 20, 2006; see also Letter to Congress, *Vint Cerf Speaks Out On Net Neutrality*, available at <http://googleblog.blogspot.com/2005/11/vint-cerf-speaks-out-on-net-neutrality.html>.
5. Tom Abate & Veme Kopytoff, *Are Internet Toll Roads Ahead? Web Heavy-Hitters and User Advocates to Argue in Senate*, San Francisco Chronicle, Feb. 7, 2006.
6. *Net Neutrality, Hearing Before the U.S. Senate Committee on Commerce, Science and Transportation*, 109th Cong. 2 (Feb. 7, 2006). (Statement of Jeffrey A. Citron, Chairman & CEO of Vonage Holdings Corp.).
7. Citing year-end 2004 FCC statistics, Google's Chief Internet Evangelist Vinton Cerf recently testified that 98.7% of consumers who buy broadband purchase it from either an incumbent cable or phone company, but only 53% have a choice between cable modem service and DSL service. *Net Neutrality Senate Hearing, supra*, n.6 (Prepared Statement of Vinton G. Cerf, Vice President and Chief Internet Evangelist of Google Inc, at 4-5).

This article is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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8. Abate & Kopytoff, *supra*, n.5; see also Bruce Meyerson, *Phone Companies Focus on High-Speed Net Connections*, USA Today, Dec. 25, 2005; Gubbins, *supra*, n.4.
9. Arshad Mohammed, *Verizon Executive Calls for End to Google's 'Free Lunch,'* Wash. Post, Feb. 7, 2006, at D1.
10. Dionne Searcey and Amy Schatz, *Phone Companies Set Off a Battle Over Internet Fees—Content Providers May Face Charges for Fast Access; Billing the Consumer Twice?*, Wall St. J., Jan. 6, 2006, at A1.
11. Abate & Kopytoff, *supra*, n.5.
12. *Brand X*, 125 S. Ct. at 2696, 2708, 2712; see also *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, FCC 05-151 (Adopted: Aug. 5, 2005; Released: Sept. 23, 2005), at 2-3.
13. *In re Madison River Commc'ns*, LLC, 20 FCC Rcd. 4295 (2005).
14. *In re Verizon Commc'ns Inc. & MCI, Inc.*, 20 FCC Rcd. 18433 (2005); *In re SBC Commc'ns Inc. & AT&T Corp.*, 20 FCC Rcd. 18290 (2005).
15. Drew Clark, *FCC Chief Opens Door To Tiered, High-Speed Internet*, Nat'l J., Jan. 10, 2006.
16. Michael K. Powell, Chairman, FCC, "Preserving Internet Freedom: Guiding Principles for the Industry," Speech at the Silicon Flatirons Symposium on The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age, University of Colorado School of Law, Boulder, Colorado (Feb. 8, 2004), available at <http://www.fcc.gov/commissioners/previous/powell/speeches.html>.
17. *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, *supra*, n.12.
18. See John Windhausen, Jr., *Good Fences Make Bad Broadband - Preserving an Open Internet through Net Neutrality*, Public Knowledge, Feb. 6, 2006, available at <http://static.publicknowledge.org/pdf/pk-net-neutrality-summary-20060206.pdf>.
19. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
20. See, e.g., Telecommunications Act of 1996, Conference Report No. 104-458, at 201 (1996) ("[O]ne of the underlying themes of the bill" is "to end government by consent decree.")
21. See Telecommunications Act of 1996, 47 U.S.C. § 572 (2006).
22. Conference Report at 174, *supra*, n.20.
23. Arshad Mohammed, *Comcast Boosts Modem Speed For Subscribers In Reston*, Wash. Post, Feb. 21, 2006, at D3; Karen Brown, *Cablevision Fires Back at FiOS*, Multichannel News, Feb. 23, 2006.