



Understanding Net Neutrality

May 2014



It is in the news again: the issue of Net Neutrality. The topic comes up in conversations about Netflix, Amazon or other bandwidth-heavy applications that people seem to crave. The discussions surrounding Net Neutrality and Open Access date back to when the Internet was in its infancy; and due to recent court decisions (at least in the United States), it appears the discussions will continue far into the future.

What is Net Neutrality?

Net Neutrality and Open Access are two closely related concepts designed to preserve the openness and transparency of the Internet. Some people differentiate between the topics and say open access addresses the openness of the “pipes” (e.g. television cable and DSL facilities being available to intermediaries), while network neutrality addresses “content.” In most discussions, and therefore in this paper, you’ll find these terms used interchangeably.



Net Neutrality is the principle that Internet users should be able to access any web content or use any applications they choose without restrictions or limitations imposed by their Internet service provider (ISP). It means access to information flowing across the Internet should be handled similarly within and across the network, regardless of its source: one type of traffic should not be favored over another (e.g., processed more quickly). Industry leaders, users and policy groups at the state and federal levels have been talking about this issue for well over a dozen years. As the opportunities that the Internet provides continue to expand and our reliance on high-bandwidth content for commerce, education, entertainment, health care and other services continues to increase, the issue of Net Neutrality will continue to be a topic of discussion.

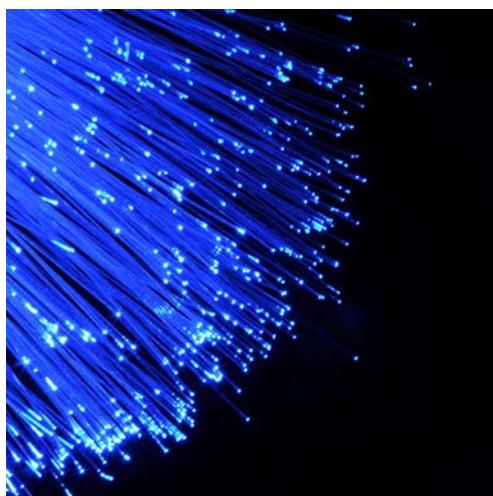


Proponents versus Opponents

Those that support Net Neutrality believe that an open network is the Internet’s guiding principle: it enables and protects free speech by preserving the right to communicate freely online. They believe that regulations would ensure that companies that provide Internet service provide us with open networks — and should not block or discriminate against any applications or content that ride over those networks. Just as your phone company cannot decide who you can call and what you say on that call, supporters believe your internet service provider (ISP) should not be concerned with what content you view or post online. They fear that in time, ISPs will begin to throttle, limit or degrade certain internet traffic in ways that commercially benefit them or in ways that favor one application or vendor over another. Proponents argue that a service provider cannot serve as a gatekeeper, favoring their own traffic over traffic originating from competing content providers or to create an artificial scarcity. Proponents often state in

their arguments that net neutrality regulation is needed to ensure continued innovation on the internet.¹

Opponents of Net Neutrality regulation argue that there needs to be no regulation of the Internet—that it is working fine without it. Opponents believe that there are no immediate or foreseeable concerns that warrant this type of intervention. Generally, opponents advocate that the marketplace will over time self-regulate in the best interest of innovation, rather than regulating/stifling innovation. They state that regulation can result in inefficient network operation and stifle incentives to make the necessary investments demanded by consumers. An ISP needs an incentive to invest in more Internet infrastructure. If it can't charge more for heavy bandwidth use, the bandwidth won't get built. Opponents also warn about potential unintended consequences of such 'fuzzy' regulation and how the costs of such regulation will get passed on to consumers.² Some opponents also argue this as a property rights issue, ISP's have the right to allocate their bandwidth capacity as they see fit.



It is interesting to note that both the proponents and opponents believe that their position will enhance innovation of the Internet. Those who support regulations to treat all Internet traffic equally believe that innovators can start small and dream big without facing insurmountable hurdles. Without Net Neutrality, startups and entrepreneurs will be muscled out of the marketplace by big corporations that pay more for their traffic to be favored.³

Those who oppose the regulation of the Internet believe that innovation will be stifled by any regulation of bandwidth. Imposing regulations will hinder much-needed private investment and diminish incentives to invest in broadband deployment nationwide. They worry that broadband connections will experience more congestion and increased service interruptions if providers are restricted in managing traffic on their networks, therefore not allowing the next start-up adequate access. And they argue that some level of restriction, or at least prioritization, is necessary to promote the best interest of consumers as a whole.⁴

Who is In Charge?

Seeking to resolve the issue, the FCC attempted to strike a balance between the two perspectives. In December 2010, it released the Open Internet Order. In passing this Order, the FCC stated that the goal was to create a level playing field where the commercial market, rather than the government or some other central authority, picks winners or losers. Within the order, they addressed three important issues:

¹ Proponents include the Internet Association (lobbying arm of Facebook, Google, Amazon, etc.), the Open Internet Coalition and Public Knowledge, among others.

² Opponents include CATO Institute, American Enterprise Institute, the large carriers (Verizon, AT&T) and cable providers (Time Warner, etc.)

³ <http://www.savetheinternet.com/net-neutrality-101>

⁴ <http://broadband.about.com/od/netneutrality/a/What-Is-Net-Neutrality.htm>

- The Order required that broadband providers, whether they're fixed-line providers or wireless operators, be open and transparent to their customers and to the services using their networks about how they manage congestion on the systems.
- The second rule prohibited broadband operators from the unlawful blocking of content, applications, services and the connection of devices to the network. In this section, there is a difference in strictness depending on whether the provider deals in fixed-broadband or wireless services. Fixed-broadband providers, such as cable operators and DSL providers, adhered to a more stringent set of rules, while wireless operators adhered to a less strict version of the rules.
- The third rule, which applied only to fixed-broadband providers, prohibited "unreasonable" discrimination against traffic on their networks.



The Order stated that tiered-pricing models are allowed to help broadband providers manage the expansion of and help with the investment in high-speed networks. Tiered-pricing models refer to what broadband providers can charge their customers for accessing content on the Internet. Under this sort of arrangement, customers pay a certain amount to access the Net at "normal" speeds or can pay extra for higher/faster bandwidth speeds. The FCC's order did not allow "pay-for-priority" arrangements, arrangements in which a content provider (e.g., Netflix) pays a broadband provider/ISP to prioritize its content over other types of content.

In 2011, after the FCC's rules were published, Verizon Communications challenged the rules in court, arguing that the FCC had no authority from Congress to impose such rules and that the rules stymied its First Amendment rights. In January 2014, the US Court of Appeals for the District of Columbia Circuit stayed the FCC's right to enforce these principles, not because of the principles themselves, as the judge made clear, but rather because Congress had failed to enact them as law, therefore giving the FCC nothing to legally regulate.

The Court ruled in a 2-1 decision that even though the FCC has the authority to regulate broadband access, it based these rules on a flawed legal argument. In other words, the FCC based its Net Neutrality regulation on a law that does not apply to broadband providers. Specifically, the court said that since the FCC has classified broadband providers differently than it has classified telecommunications providers, it cannot use statutes that pertain to telecommunications services as a basis for regulation on broadband services. U.S. Circuit Judge David Tatel, writing for a three-judge panel, said that while the FCC has the power to regulate Verizon and other broadband companies, it chose the wrong legal framework for its open-Internet regulations.

"Given that the commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the commission from nonetheless regulating them as such," Tatel wrote.⁵

In addition, Comcast is exempt from this decision since, as a condition of approving the purchase of NBCUniversal by Comcast in January 2011, the FCC required that Comcast abide

⁵ <http://www.bloomberg.com/news/2014-01-14/verizon-wins-net-neutrality-court-ruling-against-fcc.html>

by the Open Internet rules for seven years, even if the rules were modified by the courts. The case was much more complex than the information provided in this summary.⁶

To further complicate the issue, in February 2014, Netflix and Comcast announced that Netflix will pay Comcast for faster and more reliable access to Comcast's subscribers. The deal was a milestone in the history of the Internet, because content providers like Netflix generally have not had to pay for access to a broadband provider's customers. Netflix will now provide its content directly to Comcast, cutting out the intermediary and allowing for faster delivery of the service. FCC Chairman Tom Wheeler has said the FCC would not look at the deals that websites strike with Internet providers ("interconnection" or "peering" arrangements) in the agency's push to rewrite Net Neutrality rules. It is envisioned that the large content providers will continue to negotiate deals with the internet service providers in order to deliver their services.

It is also important to note that the National Broadband Plan speaks directly to the issue of Net Neutrality. Section 4.4 of the plan (Competition for Value Across the Ecosystem) states: "The Internet's openness, and the transparency of its protocols, has been critical to its success." As the FCC's Notice of Proposed Rulemaking (NPRM) on Preserving the Open Internet explains, broadband is a powerful engine for innovation and investment in America in part because the Internet is an open platform, where anyone can communicate and do business with anyone else on a level playing field. The open Internet "ensures that users are in control of the content that they send and receive," and that inventors and entrepreneurs "do not require the securing of permission" to innovate.

What is Next?

One thing is certain: the Net Neutrality debate is far from over, and the January 2014 court decision is not the last we will hear about the issue. The FCC has indicated it would not appeal the ruling, but rather work from within to re-write the rules. FCC Commissioners have indicated that they will consult with Congress during this process. A Bill was introduced in Congress in February 2014 that restores the Net Neutrality rules until the FCC makes a final decision on enforcing Net Neutrality, but no further action has been taken on the legislation. The White House has stated that the FCC is an "independent agency" and that the Chairman has "publicly pledged to use the full authority granted by Congress to maintain a robust, free and open Internet - a principle that this White House vigorously supports..."⁷



As you can see, there will be more to come on the issues surrounding Net Neutrality.

⁶ For more information on the complexities, please consult:
[http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/\\$file/11-1355-1474943.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf)

⁷ <http://www.whitehouse.gov/blog/2014/02/17/we-people-response-reaffirming-white-houses-commitment-net-neutrality>