

The Virtual Lawyer

Briefings on Technology and Business Law

October 2008



Net Neutrality: the Government's Here to "Help" You

Legal Disclaimer

- Law is ever-changing. This briefing is a synopsis only and cannot substitute for personal legal advice. Everyone's facts and circumstances are different and you should not rely on the contents of this publication to make substantive legal decisions. Please contact me for a further consultation.

To paraphrase a failed Civil War general, I don't care for the federal government one pinch of owl dung. It's bloated, ponderous, inefficient and overpriced. As a general rule, whatever it does it does badly. We've only survived as a nation because our enemies' governments were even more fouled up than ours. In fact, the only activity at which our government truly excels is depriving us of our freedom. As Mark Twain famously observed, "No Man's life, liberty or property is safe while the legislature is in session". So, if certain Congressional worthies said that they wanted to "help" the Internet become more "competitive" and "efficient", we'd all be grateful, right?

Wrong. The latest stupid idea to come from the Asylum-on-the-Potomac is the notion of "net neutrality." Although it sounds simon-pure, the reality is somewhat different. Internet giants are asking legislators to choose sides in a purely private negotiation between the telecoms that provide bandwidth and large internet companies like Google and Amazon that carry on business free of charge over an infrastructure paid for by consumers.

As bandwidth has increased exponentially over the last few years, content providers have kept pace. Think of high-volume traffic generated by music download sites, Google, Amazon and streaming radio sites. And now movie downloads at a gig or so a pop. Although broadband is rapidly becoming the standard, even these bigger pipes are stretched by the massive files now mov-

ing through the system. The question is who pays for the infrastructure improvements necessary to accommodate the desires of internet companies, not to mention those of their customers.

Until now, there's been a principal of "net neutrality", which considers everyone's data to be the same, whether a few bytes or a few gigs. As the evolving infrastructure gets disproportionately stuffed by a relatively few businesses and their customers, telecoms are proposing a virtual "car pool lane" for larger enterprises that need rapid data movement even at times of congestion. This guaranteed service would attract an additional fee. And hence the outcry.

Naturally, there are absolutists in this duel of titans. These are the folks who say, you build the pipeline and I'll stuff it full and then cry discrimination when I'm charged a bit extra for my piggery. For instance, Professor Tim Wu at Columbia opined that "Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally." This is a nice way of saying, "you bake the cake and I'll eat the whole thing." So much for professors.

Google naturally wants all the capacity it can get. In its "Guide to Net Neutrality" Google states that, "Network neutrality is the principle that Internet users should be in control of what con-

Attorney at Law
David P. Crocker
Solicitor of England and Wales



Business Address
Russell House
158 Pleasant Avenue
Portland, Maine 04103-3204 USA

Phone: 207.879.0708
Fax: 207.221.6417
Email: dpc@davidcrocker.com
www.davidcrocker.com

Net Neutrality

tent they view and what applications they use on the Internet. The Internet has operated according to this neutrality principle since its earliest days Fundamentally, net neutrality is about equal access to the Internet. In our view, the broadband carriers should not be permitted to use their market power to discriminate against competing applications or content. Just as telephone companies are not permitted to tell consumers who they can call or what they can say, broadband carriers should not be allowed to use their market power to control activity online.” This is a noble-sounding way of saying that a “neutral” Internet must forward packets on a first-come, first served basis – even if Google is sending enough packets through the network to choke a virtual horse.

But when we stop to think about it, there’s nothing particularly odd about different pricing models within a specific service. Think of first class travel versus cattle class in the airlines, cruise lines and railroads, for instance. As a starting point, therefore, the idea of different levels of service is not unreasonable. But who would pay for the higher service?

Well, according to Amazon and Google, it should be the consumers themselves. An Amazon representative was recently quoted in Communications Daily baldly stating the position without apology. According to Amazonians, it “makes perfect sense” for carrier customers to pay for bits they use and it’s up to them how many bits they do use: “Bits don’t flow unless the consumers want them” and it’s one thing for network operators to charge more to end users for specialized services, “just don’t charge providers.”

First admitted to practice in 1989, David P. Crocker manages an international law practice in licensing, intellectual property, information technology and business law. He has experience in domestic and international licensing, technology development and general intellectual property law, including copyright, trademark and trade secret protection.

Crocker provides direct and timely assistance not only to technologists, but also to writers, artists, photographers and all creative people who wish to protect and license their work.



Crocker is currently qualified to practice in the United States and England and Wales. He advises United States, United Kingdom and other international clients in intellectual property, technology and business matters.

*All Content © 2008 David P. Crocker.
All Rights Reserved*

And so there you have it: everyone connected with Internet commerce apparently agrees that there is nothing intrinsically unreasonable in creating different levels of service. Even the larger content providers are in on this game: AOL has proposed a premium services that pushes advertisers’ emails through spam filters. Movielink and CinemaNow want a premium to download new movies as an alternative to a DVD purchase. So, since it seems that everyone is trying to charge a premium, the only remaining question is who picks up the tab

Enter the Congress, which is currently considering comprehensive telecommunications reform. Over the past several sessions, Congress has considered several bills that include a variety of provisions governing availability of service and some very interesting proposals to reallocate unused TV frequencies for wireless broadband services. Unfortunately, the bill has become a battleground for those who want Congress to choose sides in a purely private fight between the people who build the pipes and those who fill them.

Here’s the reality: broadband providers and Internet companies need each other. That essential fact will force the players to sort out their differences. After all, there’s too much money at stake. Leave them alone. Consumers will express their preferences and the spirit will move in good time. We don’t need a governmental “Miss Jo” to decide who’s a “do-bee” and a “don’t-bee”.

Which leads me back to owl dung. When Congress picks sides in the technology sector, they necessarily pick one solution over another. If the Internet has taught us anything, it’s this: consumers, innovators and entrepreneurs are the ones who most efficiently determine both the technologies to use and the business models that work. Choices made by politicians are invariably wrong and not worth a pinch of you-know-what.