Center for Democracy & Technology Transition Memo
Theme: Keeping the Internet Open
Issue: Internet Neutrality

✶**Issue/Problem.** The Internet offers an extraordinary platform for independent innovation and speech. Major innovations like instant messaging, VOIP, Web-based email, and the World Wide Web itself were all pioneered by individuals or small startups. This is not an accident – it is a direct consequence of the Internet's open architecture. Specifically, open and standardized technical protocols enable innovators to develop and deploy new content and services on an Internet-wide basis without needing to seek permission from any gatekeeper. Crucially, broadband providers do not exercise centralized control over what applications, services, or content will be allowed or how they must be designed.

Unfortunately, the future of this "neutral" platform for innovation is uncertain. Some broadband providers have suggested that they may seek to charge fees to deliver or prioritize selected traffic; some have sought to limit traffic associated with certain high bandwidth applications. This creates a serious risk that broadband providers could determine which online services will work smoothly and which will not.

Regulatory safeguards are needed to protect against the risk that broadband providers, by favoring some Internet traffic over others, could exert creeping gatekeeper control and undermine the medium's openness to independent innovation. At the same time, extensive or burdensome regulation in this area clearly is not desirable. Overbroad rules could slow network deployment and interfere with legitimate network management.

✶**Policy History.** The debate over Internet neutrality began in earnest in 2005, after the Supreme Court's decision in the *Brand X* case and the FCC's decision on the regulatory classification of DSL established that broadband services would be exempt from all common carrier regulation. The FCC, recognizing the fear that this could lead to more closed broadband networks, issued a "Policy Statement" (FCC 05-151) featuring four openness principles. The FCC expressly stated, however, that the principles do not have the status of formal rules.

Congress began to look at the issue in 2006. Bills aimed at prohibiting broadband providers from discriminating against selected traffic included S. 2360 (Wyden), S. 2917 (Snowe/Dorgan) and H.R. 5273 (Markey) in the 109th Congress and S. 215 (Dorgan/Snowe) and H.R. 5353 (Markey) in the 110th. But no bills were enacted, and controversy over neutrality provisions helped sink a major telecommunications legislative package in late 2006.

In 2007, the FTC and FCC began to get involved. The FTC held a two-day workshop in early 2007 and issued a report later in the year, essentially concluding that policy makers should be hesitant to enact new regulations to address the Internet neutrality issue. The FCC launched a Notice of Inquiry requesting information on whether and how broadband carriers currently favor or disfavor selected traffic and whether such practices are harmful.

In the second half of 2007, the debate was transformed by revelations that Comcast was interfering with some of its subscribers' peer-to-peer (P2P) upload traffic. Comcast argued that it was merely trying to control congestion, but the news caused a firestorm in the blogosphere and prompted petitions to the FCC alleging that Comcast was violating the agency's 2005 Policy Statement. The FCC launched a new proceeding and ruled (FCC 08-183) by a 3-2 vote in August 2008 that Comcast's practices were inconsistent with the Policy Statement and hence impermissible. The decision was sharply critical of Comcast, both for its discriminatory traffic management tactics and for its failure to disclose them to the public.

The FCC's decision marks the first time the government has taken official action against a broadband carrier for discriminating against selected traffic. In one sense, this is a positive development; Comcast's practices represented a significant departure from the Internet's open architecture. But the decision also creates substantial uncertainty. Comcast has appealed, and the decision may be vulnerable on the ground that it treated mere "principles" as if they were actual rules. Perhaps even more worrisome, the decision asserts a dangerously elastic concept of FCC regulatory authority over matters related to the Internet.

✶**What the Obama Administration Should Do.** President Obama should spearhead legislation to cabin the FCC's assertion of unfettered authority and replace it with an explicit but narrowly focused statutory mandate to police discriminatory behavior that could undermine the openness of the Internet. Such legislation could help ensure that the Internet retains its openness to innovation, with less risk of unpredictability and regulatory overreaching than the current status quo. Uncertainty regarding the scope and future effect of the FCC's decision may create a unique opportunity in which many parties have an incentive to consider compromises. For more details on what such legislation should include, see the attached Appendix.

✶**Campaign Platform.** This recommendation is consistent with Obama's campaign platform, which states, "Barack Obama strongly supports the principle of network neutrality to preserve the benefits of open competition on the Internet."

✶**Other Voices.** Technology companies like Google and eBay and a broad coalition of groups listed at SavetheInternet.com have advocated for net neutrality and likely would support legislation. Cable and telephone companies have strongly opposed net neutrality, but perhaps could be interested in reining in the FCC's broad assertion of authority.

✶**For More Information.**

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Resources:

- CDT policy post on network management: http://cdt.org/publications/policyposts/2008/7
- CDT comments to FTC: http://www.cdt.org/speech/net-neutrality/200702028ftcneutrality.pdf
- CDT blog on FCC/Comcast: http://blog.cdt.org/2008/07/16/fcc-enforcement-against-comcast/

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Appendix: Crafting Legislation To Protect Internet Neutrality

Terminology:

We have used the term "Internet neutrality" to reflect common usage in the ongoing policy debate, but the next Administration may want to consider using different a different term with less accumulated baggage. Possible candidates might include variations on preserving the "open Internet" or "independent Internet innovation."

The Need for Legislation – Problems with Status Quo After FCC Comcast Order:

The FCC's August 2008 ruling in the Comcast case includes welcome language recognizing the innovation benefits of the Internet's open architecture. On a practical level, the ruling will likely have the beneficial result of pushing broadband providers to shy away from congestion management techniques that single out specific protocols or services for degraded treatment.

The ruling also, however, leaves considerable uncertainty and risk.

- The decision has been appealed to the D.C. Circuit, where the outcome is far from certain.

- The FCC's adoption of a "case-by-case" approach provides little clarity concerning which traffic control behaviors are permitted to network operators and which not. Moreover, since the Comcast decision appears to reserve a highly discretionary role for the FCC, rulings could vary widely over time as the composition of the FCC changes. The sharply divided 3-2 vote in the Comcast case illustrates this risk; a change of one Commissioner could lead to very different decisions with respect to future incidents the FCC might address.

- Of greatest long-term concern, the Comcast decision asserted a theory of FCC ancillary jurisdiction that has no discernable limits. The FCC said that its action was ancillary to section 230(b) of the Communications Act, which cites such broad policy goals as "promot[ing] the continued development of the Internet and other . . . interactive media." This rationale opens the door to virtually *any* regulatory action that some future FCC might view as "good for the Internet," potentially including actions directed at providers of online content rather than mere connectivity. Such a broad conception of ancillary jurisdiction is dangerous.

To the extent that new Internet neutrality legislation is viewed as reining in unfettered FCC discretion and jurisdiction, parties such as broadband providers could come to view it as an improvement over the status quo, despite their opposition to such legislation in the past.

An Outline for Legislation:

The next President should craft and propose legislation to protect the openness of the Internet in a manner that is narrowly focused and does not give unbounded regulatory authority to the FCC or any other agency. CDT is currently working to flesh out ideas for a legislative proposal. A possible approach to such legislation, reflecting CDT's preliminary consideration of the subject, is as follows.

1. Authorize the FCC to receive and adjudicate complaints alleging that a provider of broadband Internet service to residential-class subscribers has either:
    a. Unreasonably discriminated in the handling or transmission of Internet communications based on the content, source, destination, ownership, or application of selected communications; or
    b. Unreasonably failed to disclose to the public the nature and likely impact of any network management practices or policies that the provider employs and that may have a material effect on the online experience of some subscribers.

2. State that the FCC, in exercising this authority, shall be guided by a set of statutorily enumerated principles:
    a. The FCC shall seek to ensure that—
        i. subscribers to broadband Internet service retain the practical ability that consumers traditionally have enjoyed on the Internet to access and use the content, applications,, services, and devices of their choice, as stated in the FCC's 2005 broadband Policy Statement.
        ii. developers of innovative or independent content, applications, services, or devices intended for delivery over or connection to the broadband Internet retain the practical ability that developers of such offerings traditionally have enjoyed to make those offerings available to interested Internet users everywhere without having to negotiate for or obtain any kind of permission or agreement from those users' providers of Internet service.
    b. The FCC shall not act to prevent or discourage a provider of broadband Internet service from blocking, degrading, or otherwise interfering with the transmission of Internet communications that—
        i. are illegal or malicious;
        ii. threaten the stability or security of the network; or
        iii. constitute unwanted nuisances to a high proportion of the provider's subscribers to whom such communications are targeted.
    c. The FCC shall not act to prevent or discourage a provider of broadband Internet service from—
        i. offering service plans with prices that differ based on bandwidth-related factors such as the quantity or speed of transmission capacity made available to a subscriber or the quantity, timing, or patterns of a subscriber's bandwidth usage, without regard to the content or nature of the subscriber's Internet traffic;

ii. managing, responding to, or avoiding network congestion using techniques that focus on and are triggered by the bandwidth usage volume, bandwidth usage patterns, or service plans of individual subscribers, without regard to the content or nature of such subscribers' Internet traffic;
iii. providing tools to enable individual subscribers to block, filter, or otherwise control selected Internet communications at the subscribers' own discretion; or
iv. enabling individual subscribers to designate certain traffic transmitted to or from those subscribers for increased or decreased transmission priority, so long as the priority designation may be applied to any traffic, content, application, or service of the subscriber's choosing.

d. This Act shall not be interpreted to authorize the FCC to regulate or interfere with the provision, by an entity that is also a provider of broadband Internet service, of multichannel video programming distribution, pay per view video, subscription video, or similar services that are not marketed as Internet service and that transmit data to subscribers through facilities or bandwidth channels that are separate from the facilities or channels used to deliver the provider's broadband Internet service.

3. Direct the FCC to monitor and report to Congress on the extent to which:
   a. Providers of residential-class broadband Internet service are increasing the transmission capacity of such service; and
   b. The transmission capacity of residential-class broadband Internet service is sufficient to support the reasonable exercise of the abilities described in 2.a.i. and 2.a.ii.

4. State expressly that:
   a. FCC rulemaking authority under this Act shall be limited to the promulgation of rules prescribing such administrative procedures as the FCC may deem necessary or appropriate for receiving and adjudicating complaints.
   b. The FCC shall have no authority to exercise regulatory jurisdiction over Internet communications, except for the exercise of such specific regulatory functions as may be authorized expressly by statute.
   c. Neither this Act, sections 1, 201, 230, 256, 257, or 601 of the Communications Act, or section 706 of the Telecommunications Act of 1996 provide a basis for the FCC—
      i. to exercise regulatory jurisdiction over the content of communications transmitted over the Internet; or
      ii. to exercise regulatory jurisdiction, in connection with an Internet communication by wire or radio, over a person that does not provide, directly or indirectly, transmission capability used in connection with such communication.