

# Net Neutrality: the Plot Thickens Internationally



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In this presentation to the ITU World Conference 2009 in Geneva we deal with net neutrality developments in the US and the EU. They will point the way for regulators and legislators in other countries. It is important for stakeholders to have a proactive strategy, as regulators and legislators look for guidance from the US and EU experience. This is a complex area in which the debate can be distorted by simplistic pleas for open access. This can lead to poor consumer outcomes. The devil is in the detail and that detail includes the varying circumstances in each country.

## Introduction

Following up on President Obama's election promises, the Chairman of the US telecoms regulator (FCC) has announced details of the proposed US approach to network neutrality.

The Chairman took an open access approach in his 21 September speech to the Brookings Institute<sup>1</sup>. He also recognised, and sought to deal with, some of the technical and economic problems associated with unfettered network neutrality. He recognised that it would not be right to treat all IP packets equally, whether on fixed line or mobile networks.

This address by the FCC Chairman starts a much more granular consultation and review by FCC.

We outlined the background to network neutrality issues in our September 2009 article, *Net Neutrality and Online Content*<sup>2</sup>. Readers may find it helpful to review that article.

<sup>1</sup> "Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity" See <http://openinternet.gov/read-speech.html> for the full text.  
<sup>2</sup> [http://www.wigleylaw.com/assets/\\_Attachments/net-neutrality-and-online-content.pdf](http://www.wigleylaw.com/assets/_Attachments/net-neutrality-and-online-content.pdf)

On 7 October 2009, in an address to the CTIA<sup>3</sup> (the Association representing wireless operators), the Chairman covered the implications of net neutrality for mobile in more detail. We deal with this in our separate article, *Mobile Services and Net Neutrality*.<sup>4</sup>

The EU has taken a step further in two statements<sup>5</sup> in October 2009 by Commissioner Reding.

## What's happening in the US?

In his Brookings Institute speech, the FCC Chairman proposes to add, to the existing FCC

<sup>3</sup> "America's Mobile Broadband Future" (San Diego, 2009)

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293891A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293891A1.doc)

<sup>4</sup> <http://wigleylaw.com/Articles/LatestArticles/mobile-services-and-net-neutrality/>

<sup>5</sup> Viviane Reding, *The Digital Single Market: a key to unlock the potential of the knowledge based economy*. (1 October 2009) <http://www.egovmonitor.com/node/29069/print> ; Viviane Reding backs net neutrality (V3.co.uk) (7 October 2009) <http://www.v3.co.uk/v3/news/2250763/viviane-reding-talks-future>.

principles, two network neutrality principles based on non-discrimination and transparency.<sup>6</sup>

In particular, network neutrality is to be achieved by a requirement that incumbents don't discriminate between their services to retail customers, and those of other ISPs, content providers, etc. As our earlier article notes, there is a multitude of multi-layered relationships, potentially impacted by net neutrality concerns.

In economics and regulation theory, "non-discrimination" is an easy concept to state, but more complex to implement (and it is also difficult to monitor, even with a "transparency" principle in place).

The Chairman notes two facets which, he says, can potentially go some way to ameliorate the negative consumer welfare outcomes of unfettered net neutrality: network management and product/price differentiation.

### Network management

First, he says that Telcos need to manage their networks, and prioritise traffic in appropriate situations. The Chairman notes the example of the need to manage high volume traffic which adversely affects other users. An obvious example is the de-prioritisation of P2P traffic. Another is the management of spam, as well as dealing with copyright piracy issues.

Misuse of such network management in the interests of the Telco wouldn't be acceptable to the FCC. The line between misuse and appropriate use will be challenging to draw if this approach is adopted.

### Product/price differentiation

The Chairman also notes – applying net neutrality – that there does not have to be only one way in which consumers get a service. As we noted in our September article *Net Neutrality and Online Content*<sup>7</sup>, it is not economically efficient, nor in the interests of consumers, for choice of services and price points to be unduly limited by net neutrality. That is so, unless this raises abuse of market power issues.

<sup>6</sup> These are to be added as Fifth and Sixth "Freedoms" to the existing so-called Four Freedoms

<sup>7</sup> [http://www.wigleylaw.com/assets/\\_Attachments/net-neutrality-and-online-content.pdf](http://www.wigleylaw.com/assets/_Attachments/net-neutrality-and-online-content.pdf)

### An example: IPTV v Web TV

Take IPTV as an example. IPTV (applying the definition we will use in this article) is a service, typically offered by a Telco, over dedicated virtual circuits. Content traffic is often prioritised ahead of public internet traffic. This typically happens as part of a triple or quad play bundle, for which a charge is made (in various ways such as a subscription as part of the bundle, pay-per-view, etc, perhaps supplemented by ad-funding).

Similar services, but with lower quality of service/experience, can be offered over the internet for "free" (these are typically ad-funded or Government-funded). These services have two-sided market characteristics, much like free to air TV (where the viewer pays nothing and advertisers fund the service). These services are often called Web TV or Internet TV services rather than IPTV.

The content might be just the same, but the viewer may be prepared to pay more to get a higher QoS service. A good example is the UK. There is the wildly successful BBC iPlayer Web TV service. iPlayer is also available as IPTV over the BT Vision service, and via Virgin Media's cable service. BT and Virgin carry both the IPTV and the Web TV services as they provide public internet access as well as the dedicated IPTV service which includes high QoS iPlayer.

If network neutrality removes that range of services, some argue that consumer choice and welfare reduces (subject to any misuse of market power issue).

It is argued that regulation should support both the Web and IPTV services.

The FCC Chairman notes his view of the importance of preserving these options. . Such additional and higher QoS services may be acceptable, he says, so long as they **supplement** rather than **supplant** the base internet service (such as Web TV). As he said in his Brookings speech:

I also recognize that there may be benefits to innovation and investment of broadband providers offering managed services in limited circumstances. These services are different than traditional broadband Internet access, and some have argued they should be analyzed under a

different framework. I believe such services can supplement - but must not supplant - free and open Internet access, and that we must ensure that ample bandwidth exists for all Internet users and innovators ...we will carefully consider how to approach the question of managed services in a way that maximizes the innovation and investment necessary for a robust and thriving Internet.

### Where to from here in the US?

The Chairman notes the complexity of the issues. It seems clear that incumbents and others have room to argue their positions, with a prospect of wins for incumbents despite the rhetoric of network neutrality. The devil is in the detail, not in some generalised mantra about "net neutrality". The FCC will hear submissions and work through the detail.

### Europe and net neutrality

Commissioner Viviane Reding, the Member of the European Commission responsible for Information Society and Media, has firmly supported a push for network neutrality<sup>8</sup>:

When the telecoms package enters into force, it will give the European Commission and national regulators new instruments to ensure that the net will be open and neutral in Europe. This is very important....I would like Europe to make good use of these new tools for enhancing net neutrality [and to have a debate about this in 2010 as part of Europe's Digital Agenda] And I plan to be Europe's first line of defence whenever it comes to real threats to net neutrality.

She notes however that the European telecoms framework has so far been effective in dealing with many net neutrality problems (and she would act if blocking of VoIP calls is continued by mobile network operators). Three points to note from Europe:

- The overall regulatory framework, including the role of Commissioner Reding and the role of national regulators, means that all

<sup>8</sup><http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/429>

her wishes do not necessarily translate into action;

- Her statements in October are at an earlier level of development compared to what is happening in the US;
- She has expressed concern about traffic management (e.g. prioritisation of packets) being misused to benefit Telcos:

One way in which this growth might be tackled is through traffic prioritization techniques, but Reding said that the use of this and other such tools could prove detrimental to net neutrality, and urged European operators to find other solutions.

"There are many reasons for being very vigilant with regard to new threats to net neutrality, as they can arise in the course of market and technology developments. The blocking or discrimination of Voice over IP services by mobile operators in several EU countries is just one example for this," she added.<sup>9</sup>

### Conclusion

Net neutrality is a complex issue which is gaining momentum. What happens in the US and Europe will inform regulators and legislators in other countries. Stakeholders such as regulators, incumbents, challengers, and media companies etc have an opportunity proactively to engage to reduce the risk of insufficiently-informed decision-making. The devil is in the detail, and that detail includes a country's particular circumstances.

<sup>9</sup> *Viviane Reding backs net neutrality* (V3.co.uk) (7 October 2009)  
<http://www.v3.co.uk/v3/news/2250763/viviane-reding-talks-future>

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