

Network Neutrality in Canada

**Michael Geist
Canada Research Chair in Internet and E-commerce Law
University of Ottawa, Faculty of Law**

August 2007

The Search, John Battelle's insightful book about Google and the search engine industry, provides a revealing look at how in its early years Google's founders were unsure of how to channel their enviable position as intermediaries between Internet users and the search for Internet content into a viable business model. The answer ultimately emerged as advertisers' willingness to pay for visibility in search results became the basis for the multi-billion dollar paid search market.

Analysis of the Internet service provider business suggests that it has engaged in a similar decade-long search. Although providing Internet connectivity is certainly a profitable enterprise, ISPs have understandably sought to identify how they can leverage their role as intermediaries to generate additional revenues.

In the 1990s, many ISPs focused on providing both connectivity and content. Large ISPs such as America Online developed a wide range of exclusive content, though they ultimately failed to match the breadth of what developed freely online.

Meanwhile, companies such as BCE pursued convergence strategies, buying up television networks (CTV) and publishers (the Globe and Mail) with the view of combining connectivity and content. More recently, the industry has relied on bundling, de-emphasizing the content and connectivity combination for the opportunity to cross-sell Internet services with cable or satellite television as well as with conventional phone and wireless services.

While some consumers resent the bundling approach, there is the far more troubling strategy unfolding that involves the creation of a two-tiered Internet. This strategy, which threatens to upend the longstanding principle of network neutrality under which ISPs treat all content and applications equally, would enable ISPs to prioritize their own network traffic over that of their competitors.

The network neutrality principle has served ISPs, Internet companies, and Internet users well. It has enabled ISPs to plausibly argue that they function much like common carriers and that they should therefore be exempt from liability for the content that passes through their systems.

Websites, e-commerce companies, and other innovators have also relied on network neutrality, secure in the knowledge that the network treats all companies, whether big or small, equally. That approach enables those with the best products and services, not the deepest pockets, to emerge as the market winners.

Internet users have similarly benefited from the network neutrality principle. They enjoy access to greater choice in goods, services, and content regardless of which ISP they use. While ISPs may compete based on price, service, or speed, they have not significantly differentiated their services based on availability of Internet content or applications, which remains the same for all.

In short, network neutrality has enabled ISPs to invest heavily in new infrastructure, fostered greater competition and innovation, and provided all Canadians with equal access to a dizzying array of content.

Notwithstanding its benefits, ISPs have begun to chip away at the principle.

Although the U.S. has yet to adopt universal net neutrality legislation, it has not stood pat. In 2006, the U.S. Congress and state legislatures debated several net neutrality bills. Moreover, both the Federal Communications Commission and the Federal Trade Commission, the two U.S. regulatory agencies responsible for telecommunications and consumer issues, have focused on net neutrality.

The FCC imposed net neutrality conditions on telecom giant AT&T in December 2006 as part of its merger with BellSouth. In return for regulatory approval, AT&T agreed to maintain a neutral network for two years and committed that it would not “provide or sell to Internet content, application, or service providers...any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination.”

Europe and Asia have similarly not been immune to net neutrality concerns. In 2006, Norway’s public broadcaster, the Norwegian Broadcasting Corporation, learned that NexGenTel, one of the country’s largest broadband providers, was limiting bandwidth to its content. The ISP dropped the practice only after public disclosure and customer complaints.

Meanwhile in South Korea, three million broadband Internet subscribers were denied access to HanaTV, an Internet-based video-on-demand service. The ISPs engaged in the blocking were evidently concerned that the service would harm their own video offerings.

Net Neutrality and Canadian Providers

The network neutrality issue has also surfaced in Canada. In fact, Canada is arguably the leading source for illustrations of how ISPs may prioritize or block content and applications when they perceive that it is in their interests to do so.

1. Telus

In 2005, Telus, Canada’s second largest telecommunications company, shocked many by actively blocking access to Voices for Change, a website supporting the Telecommunications Workers Union. Telus was been embroiled in a contentious labour dispute with the union, yet its decision to unilaterally block subscriber access to the site was unprecedented.

The company argued that the site contained confidential proprietary information and that photographs on the site raised privacy and security issues for certain of its employees.

Nevertheless, the blockage of the site was completely ineffective since it remained available to anyone outside the Telus network. Moreover, those within the Telus network could access the site with a bit of creative Internet surfing.

The appropriate approach for Telus would have been the same formula it advises law enforcement and copyright holders to follow -- to obtain a court order to get the site removed. In fact, that was precisely what Telus ultimately did as it obtained a court order barring the site from posting content with the intent of threatening company employees.

By first unilaterally blocking the site, however, Telus raised a host of challenging legal issues. The company argued that its subscriber contract granted it the right to block content. While that may have been true for its roughly one million retail subscribers, the blockage occurred at the Internet backbone level, thereby blocking access for other ISPs (and their customers) that use Telus as their provider.

For example, Prince Rupert, a small city on the northwest coast of British Columbia, has established a community ISP to provide its citizens with municipally supported Internet access. Since their connectivity is provided by Telus, the entire community found itself unable to access the Voices for Change website.

Canadian law also raises some interesting questions. While not directly applicable to a private sector company, the *Charter of Rights and Freedoms* guarantees Canadians “freedom of thought, belief, opinion and expression.” The Supreme Court of Canada has ruled that those rights extend to both the speaker as well as the listener. Telus may not be subject to the Charter, but surely all Canadian corporations should aspire to abide by its principles.

The Canadian *Telecommunications Act* may also be relevant to this situation, though the Canadian Radio-television and Telecommunications Commission’s 1999 New Media decision to take a hand-off approach to the Internet may diminish its applicability.

Section 27(2) forbids unjust discrimination in the provision of a telecommunication service. This section is primarily applicable to competing services, though the blocked website may well fit within the definition.

Moreover, Section 36 of the Act provides that a “Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.” The CRTC has sought to limit the applicability of this provision to retail end-user Internet services, yet it is clear that the Telus action extended well beyond its own retail customers.

2. Videotron

Quebec-based Videotron has been among the most vocal Canadian advocates of a two-tier Internet. In late 2006, President Robert Depatie called for the establishment of a new

Internet transmission tariff that would require content creators of all sizes to fork over millions of dollars for the right to transmit content to ISP subscribers.

The comments rekindled fears about the prospect of a two-tier Internet in Canada whereby the cable and telecommunications providers, shielded by limited competition, charge creators and e-commerce companies to transmit their content, reduce bandwidth for some applications, and potentially even engage in content blocking.

3. Shaw

In 2005, Canadian cable provider Shaw introduced a premium VoIP service that promised to prioritize Internet telephony traffic for a monthly fee. The potential implications of such a service are obvious – the use of competing services will require a supplemental fee, while Shaw will be free to waive the charge for its own service.

Moreover, Shaw did not offer its premium feature to resellers of its high-speed Internet service, such as Cybersurf. This placed resellers at a competitive disadvantage, yet the CRTC ruled that Shaw’s refusal to offer the service to resellers does not, however, constitute “unjust discrimination” under the Canadian telecommunications law.

4. Rogers

With well over a million subscribers, Rogers is universally recognized as one of Canada’s leading ISPs. The company offers several tiers of services, including the “Extreme” package that boasts of “blistering speed for sharing large files and much more.” The package offers fast downloads, somewhat slower uploads, and a monthly cap of 100 gigabytes of data transfers.

Despite the promises of fast speeds and large file sharing capabilities, there are growing concerns among many consumers that the service delivers far less than advertised. Rogers actively engages in “traffic shaping”, a process that limits the amount of bandwidth available for certain applications. Although this was initially limited to peer-to-peer file sharing applications, there is mounting speculation that the practice may be affecting basic functionality such as email and the use of virtual private networks.

While Rogers at first denied the practice, it effectively acknowledged it in late 2005, arguing that peer-to-peer file sharing was using a disproportionate percentage of network resources and that the traffic shaping was needed to maintain the functionality of core services such as email and web browsing.

In response to the implementation of traffic shaping, many file sharing applications now employ encryption to make it difficult to detect the contents of data packets. This has led to a technical "cat and mouse" game, with Rogers now believed to be one of the only ISPs in the world to simply degrade encrypted traffic.

The traffic shaping issue raises several important concerns. From a consumer perspective, it is difficult to reconcile how the company can promote a service offering specific speeds and a maximum cap on data transfers, yet secretly hamper the ability for consumers to make full use of the service for which they have paid. Moreover, the failure to disclose the practice – a comprehensive search of the Rogers website does not yield a single mention of traffic shaping or limits on peer-to-peer applications – may bring consumer protection statutes into play.

Rogers' traffic shaping practices have also raised concern among network neutrality advocates, who fear that the company could limit bandwidth to competing content or services. Some customers note that the bandwidth consumed by customers of Rogers Internet phone service does not count against the monthly cap, though the same is not true for competing Internet telephony services.

Further, traffic shaping of file sharing applications – particularly those that use the BitTorrent protocol – targets a perfectly legal protocol that is relied upon by a growing number of small businesses. These include Canadian artists and film makers who use BitTorrent to circulate their work and open source software developers who depend on BitTorrent to distribute their programs in a cost-effective manner.

Net Neutrality and New Media

In a little noticed speech in June 2007 at a Canadian broadcasting conference, Konrad von Finckenstein, the newly appointed Chair of the Canadian Radio-television and Telecommunications Commission (CRTC), told the industry that new media is “the defining challenge of our time in broadcasting. There is no more important matter facing the Commission, nor does any other matter have such long-term consequences.”

To address the challenge, the CRTC has set in motion two initiatives that will go a long way in determining how it adapts Canadian broadcast and new media regulation to the Internet environment.

First, the New Media Project initiative will analyze whether new media should be regulated and assess its impact on the creation and distribution of Canadian content. The initiative will also consider critical access issues including network neutrality (described by von Finckenstein as “Internet traffic prioritization”) and whether access to high-speed broadband networks should be elevated to a core policy objective.

Second, the CRTC is currently engaged in a Diversity of Voices consultation that comes in response to the growing consolidation of Canadian media and seeks commentary on whether the changing corporate landscape has had a negative impact on the diversity of perspectives within the Canadian broadcasting system. The CRTC's interest in the issue arises directly from the Broadcasting Act, which includes a statutory objective that Canadian broadcasting “provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern.”

While the CRTC did not specifically identify network neutrality issues as part of the Diversity of Voices consultation, several important stakeholders used the opportunity to raise it as a concern.

For example, Corus, which is one of Canada's most successful media and entertainment companies, immediately became one of the highest profile Canadian companies to express concern about net neutrality, stating:

“Canadian creators and producers need to ensure that they can continue to have access to the networked bit stream on the basis of equitable rules. The CRTC should examine its potential role in governing net neutrality to ensure that access remains open to Canadian services on new digital distribution platforms. Corus recommends the establishment of an Industry Task Force on net neutrality.”

The Corus concerns were echoed by Pelmorex, which owns the Weather Network, which ranks among the most popular Canadian websites. After arguing for the promotion of a Canadian presence on mobile and Internet platforms, the company warned:

“However, the same cannot be said for cross ownership of new media undertakings by distributing undertakings, whether licensed, exempt, or unlicensed. In these situations, a more careful approach must be taken to ensure that undue preferential treatment is not given to distributor-owned content or that the gatekeeping activities by the distributor are not permitted to influence accessibility and ultimately the diversity of Canadian voices available to the public.”

The Canadian Media Guild offered the strongest endorsement of net neutrality among the submissions. One of its core recommendations was for a net neutrality guarantee, noting the potential for a company such as Rogers to unfairly advantage its own content. To address the issue, the CMG urges the CRTC to “guarantee "net neutrality" by establishing a rule prohibiting Internet service providers from controlling clients' access to websites for commercial gain.”

Looking Ahead

Notwithstanding the clear need for political engagement on the network neutrality issue, Canadian Industry Minister Maxime Bernier has shown little interest in it. According to internal government documents obtained under the Access to Information Act, Bernier is skeptical about the need for legislative safeguards to ensure that all Canadians enjoy equal and unfettered access to Internet content and applications by avoiding a two-tier Internet.

The government documents confirm that Bernier is aware of the situation. One prepared for the House of Commons Question Period notes that "Canadian telecommunications companies, like Bell and Telus, are increasingly determined to play a greater role in how

Internet content is delivered. As the carriers of the content, they believe they should be gatekeepers of the content, with the freedom to impose fees for their role.”

Despite publicly maintaining that he is undecided on the issue, another document leaves little doubt that net neutrality legislation is not in the cards for Canada. A Question and Answer memorandum dated November 16, 2006, asks about Bernier’s position on net neutrality. Echoing the position of the major telecommunications companies, the response concludes that “market forces have served Canadians well when it comes to the Internet. Public policy must consider a number of aspects of this broad issue, including consumer protection and choice [and] enabling market forces to continue to shape the evolution of the Internet infrastructure, investment and innovation to the greatest extent feasible.”

Given the competitive environment and the demonstrated willingness of Canadian telecommunications companies to leverage their privileged position to institute two-tier Internet, the need to prevent a two-tier Internet in Canada has never been greater. While prioritizing websites or applications may hold some economic promise, the lack of broadband competition and insufficient transparency surrounding these actions will rightly lead to growing calls for regulatory reform that grants legal protection for the principle of network neutrality in Canada.