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Panel Session
"Just and Unjust Discrimination on the Internet: What are the Boundaries?"

Speaking Notes of Philippa Lawson,
Director, Canadian Internet Policy and Public Interest Clinic (CIPPIC)
in response to a paper by Craig McTaggart,
Director, Broadband Policy, TELUS Communications Inc.

The issue of Network Neutrality has manifested itself in Canada in different ways. I see four quite distinct net neutrality issues, each of which deserves regulatory attention:

1. A Telecom Service Provider ("TSP") blocking or degrading of access to content and applications that the TSP doesn't like or considers to be a competitive threat;
2. A TSP charging higher rates to customers of competitors than it does to its own customers for the same internet-related service;
3. Traffic-shaping, or "throttling" of certain types of traffic (namely, P2P) ostensibly in order to ensure that service to the vast majority of customers is not compromised by such traffic; and
4. Charging content/application providers a premium for faster downloads (the "two-tiered internet", or "fast lane/slow lane" analogy).

A common theme of all of these issues is control of network access, and abuse - or potential abuse - by TSPs of their gatekeeper powers.

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The debate about Net Neutrality should be seen in context. There are three significant features of the context in which the debate has arisen:

1. The importance and value of the internet to society at large.
2. Conflicts of interest on the part of major corporations with gatekeeper powers.
3. Scarce capacity (if claims of such are believed).

First, the internet: We are not talking about just another way of communicating. Rather, we are talking about a new medium of communication that has already had a transformative effect on society and that promises to further enhance democracy, social welfare and economic development - <u>in its current incarnation</u>, a key feature of which is the (by and large) neutral treatment of traffic flowing over it. The internet has become a social utility of sorts, deserving of special respect and protection given its tremendous value for generating social and economic benefits.

Second, conflicts of interest: We are seeing the collapsing of the content/carriage distinction, and an abandonment of the effect to keep these two types of activities separate. This is resulting in a situation of major conflicts of interest by Telecom Service Providers (TSPs) who serve as both gatekeepers and messengers in a competitive environment, and who have powerful incentives and ample opportunity to abuse their gatekeeper powers in ways that frustrate consumer and competitor access to content and applications on the internet. It's worth noting that this is often done under the euphemistic guise of offering more consumer "choice".

Finally, scarce capacity: Some TSPs are claiming that they have to engage in new forms of traffic management in order to ensure quality of service to the majority of customers, given the increasing demands placed on their systems by a few heavy users and the inability of their networks to handle exponentially increasing bandwidth demands.

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Let's talk about traffic-shaping first, since it is the focus of attention in Canada right now, with the CAIP Application for relief from Bell's P2P throttling practices.

If traffic-shaping is a solution to the problem of insufficient capacity to meet demand, then why aren't suppliers building more capacity to meet demand? Economic theory suggests that if demand increases, supply should follow, and that such supply can be funded through higher prices if necessary. It's a strange kind of market forces that lead TSPs instead to throttle their own customers, generating unprecedented consumer backlash. I would suggest that these are not the kind of market forces we want to rely upon, and that competition is clearly inadequate to protect users in this market from such practices.

If not invest in additional capacity, then why aren't TSPs at least figuring out a way to manage traffic that doesn't enrage their customers and that doesn't favour one type of traffic over another. After being called on the carpet before the FCC, Comcast says that it can and will from now on use network management practices that do not single out particular applications, and acknowledges that such an approach is "more appropriate for today's emerging internet trends". So Bell and Rogers don't need to be targeting P2P; they can be handling the alleged capacity problem in other less intrusive and less discriminatory ways.

Third, there is a strong case to be made that traffic-shaping that targets P2P traffic constitutes unjust discrimination under s.27(2) of the *Telecommunications Act*, and it is good to see that CAIP is now making that argument before the CRTC, with respect to ISP resellers, who are competing with Bell for retail customers. As CAIP has pointed out, it can hardly be coincidental that Bell began throttling its wholesale customers who offer flat-rate internet service just at the time that it imposed usage-based pricing on its own retail customers.

But the argument also applies to Bell's and Rogers' throttling of P2P usage by their own retail customers – here again, it is hard to ignore the fact that such usage competes with Bell's and Rogers' affiliated content providers.

Finally, as Craig has pointed out, the traffic-shaping issue is in part an issue about transparency and fair advertising practices. TSPs need to be up front and open about what they are doing, not

secretive as they have been. As well, the advertising of internet service speeds has, in my view, been misleading. This has led to much of the consumer backlash, as consumers feel they are not getting the service that they were promised. TSP advertising practices and openness regarding network management practices that affect consumers are exactly the kind of systemic issues that the new Commissioner for Complaints for Telecommunications Services should be looking into and attempting to resolve through industry codes of practice, as done in Australia.

I would also note that there are serious privacy issues with Deep Packet Inspection, used by Bell and Rogers to identify and discriminate against certain kinds of traffic. These issues are deserving of more attention.

Other Net Neutrality issues, as I've mentioned, include:

First, blocking or degrading access to content and applications that the TSP doesn't like or considers to be a competitive threat. It think we all agree that this is simply not on, and is indeed prohibited by ss.27(2) and/or 36 of the Telecom Act.

Second, charging higher rates for the same service to customers of competitors than to one's own customers. Again, this would surely constitute unjust discrimination and is therefore covered by s.27(2). (I'll leave discussion of the *Cybersurf* case to another day.)

And finally, the big issue: tiered pricing for access by content providers to customers. This would be, of course, in addition to the accepted practice of tiered pricing for end user access to content. In other words, TSPs would be charging for different levels of access at both ends. This raises the spectre of two-tiered internet, with a fast lane for rich content providers and a slow lane for everyone else. It would constitute a fundamental shift from the approach to date of neutral treatment by TSPs of content and applications – i.e., no different classes of website customers based on willingness to pay; the same quality of service is provided to all content and application providers.

Do we really want to let fundamental decisions about how the internet develops be made entirely by commercial interests with huge profits at stake and with the ability to exercise gatekeeper powers?

A key feature of the internet as we know it is neutral treatment of traffic. End-users can select among different levels of access or quality of service, but content is equally accessible by all. There are exceptions, of course, for illegal content, fair rationing of scarce bandwidth, etc. But these are *exceptions*, not the rule. Those developing and providing content and applications on the internet don't have to pay more to TSPs for faster downloads. As a result, small but worthy initiatives like Wikipedia, Bryte and RabbleTV compete on a level playing field with behemoths like Google and Yahoo.

Some third parties like Akamai offer services to help content providers enhance their online presence, but those third parties don't have competing interests and don't have the same ability as TSPs to determine quality of service o the internet.
There is nothing restrictive about this model – TSPs are free to charge end-users as much as they want to.

Craig asks why allowing TSPs to offer value-added website download services is a bad idea? It's a bad idea for two reasons:

1. The potential for abuse by TSPs, given the fact that they are competing with some of their customers; and
2. The likely effect on innovation, creativity and choice in online media. Tiered pricing for content providers will result in less opportunity for small entrepreneurs to compete with the behemoths, leading to less likelihood of great ideas being realized, leading to less choice and diversity of content online.

Value should come from the quality of the information and application, not from control of access to it.

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Craig has proposed a principle of non-interference by TSPs with user access to content or applications, which I think has merit. However, two of the four exceptions he proposes need to be further refined in order to prevent abuse.

"Customer choice" must be informed and explicit in order to be meaningful. We have learned this lesson in the context of data protection: even where customer consent is required, it is often only notionally obtained. If "customer choice" can be achieved simply by inserting a clause into the fine print of a set of terms that customers never read, let alone agree to in any meaningful way, it is a sham.

Similarly, the proposed exception for "enforcement of contracts" could prove to be the rule, if companies are permitted to include in their so-called "contracts" (which are really no more than imposed terms) provisions that purport to permit the very interference we are seeking to prevent. This is a live issue in the current CCTS proceeding, where TSPs are attempting to have their purported liability limitations enforced by the CCTS even though such limitations are not necessarily enforceable in law and even though they would, if enforced, deprive the new agency of the ability to order compensation to deserving victims.

With respect to the proposed exception for "reasonable network management", we need to establish some guidelines about what constitutes "reasonable". Why not implement a process whereby TSPs could apply to the CRTC for prior approval before engaging in questionable network management practices?

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Do we need new legislation to deal with Net Neutrality issues?

Sections 27(2) and 36 cover cases of unjust discrimination and interference with content, and have stood the test of time well. I agree with the implicit message in Craig's paper that we should not do away with these important safeguards against gatekeeper abuse and conflicts of interest with which the telecom sector is now rife. Contrary to the Telecom Policy Review Panel's (TPRP) recommendations, we should keep both s.27(2) and 36.

But additional legislation is needed if:

a) we want to provide more clarity and guidance to the industry and the CRTC regarding the big grey area of what constitutes "unjust discrimination", "undue preference" and "controlling content";

b) we want to protect the public from interference with their ability to access internet content and applications, even where such interference is not discriminatory in nature (e.g., where it is applied across the board); or

c) we want to reduce the opportunities for TSP gatekeeper powers to be exploited in ways that undermine the public interest in an open internet – and in particular if we want to protect the flow of internet traffic from being channelled into different lanes according to the price commanded by parties that not only own the lanes, but also use those lanes themselves.

The TPRP proposed a new provision, s.36.1, designed to protect against TSP interference with internet access even where such interference is not discriminatory or otherwise contrary to ss.27 or 36. This is a helpful addition to the general rules against unjust discrimination, undue preference, and controlling content. It would cover situations such as the Telus and Madison Rives cases, where ISPs block or degrade access to content they don't like or consider to be a competitive threat. It would also cover situations in which TSPs engage in network management practices that are unreasonably restrictive or targeted – the issue being debated in the CAIP v. Bell case right now.

But I don't think the TPRP proposal covers the situation of content and application providrs being subject to tiered access arrangements or tolls charge by TSPs for differing levels of access to internet subscribers – ie, the threat to Net Neutrality from the other end.

We need a new rule to prevent that threat from being realized. Such a rule could be worded along the lines of the following formulation from our colleagues in the U.S.:

"TSPs shall not discriminate among internet content or applications based on source, ownership, destination, or type of content/application."

The general principle should be one of neutral carriage, with exceptions only for legal compliance and explicit end user requests for filtering or other interference. We need additional legislation to accomplish this.

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In conclusion,

Given the stated intentions of TSPs to pursue tiered pricing for access by content providers to end-users, and given the numerous incidents already of TSPs abusing their gatekeeper powers, and given the obvious inability of market forces to prevent such abuses,

we need to protect the internet from being hijacked by commercial interests, and to ensure that value comes from the quality of content and applications online, not from control of access to them. This requires more than general rules against unjust discrimination and interference with content.

The internet has had a transformative effect on society as a result primarily of its nature as an open medium, free of commercial control –as accessible to the individual user as to the multinational corporation. Its promise as a beneficially transformative social and economic tool depends on this key feature.

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