

The issue of net neutrality takes a sharp turn

Net neutrality has, over the past few years, become a familiar issue on the policy agenda. Opponents of net neutrality in the telecom industry and proponents of the principle in the Internet content industry and among public interest NGOs have been sparring with each other and pushing hard to influence slow-moving political processes in the EU and the US – processes which seem forever aimed at a regulatory and legislative resolution that hasn't fully taken shape yet.

This month, however, the status quo was roiled by a striking new development in the US, where discussions between industry actors and the Federal Communications Commission (FCC), the media and telecom regulator, broke down after it became clear that two of the main business players were preparing a plan of their own.

Internet giant Google and telecom titan Verizon have traditionally been on opposing sides of the debate. In early August, however, news first emerged that the two were preparing a kind of deal that would bypass the FCC and the talks which it had been hosting since June, and which suggested that Google was ready to buy preferred access for its own services on Verizon's networks. The news immediately triggered widespread concern about what the future of the Internet would look like. Such a deal, many feared, would have triggered a rush toward a two-tiered Internet, in which wealthy corporations like Google would start buying up the right to have their online content delivered to Internet users more quickly, while the rest of the Internet would become slower as a consequence.

What the two companies eventually presented, however, was not the business deal that had initially been reported. Instead, they proposed a “legislative framework proposal” or “joint policy proposal” for lawmakers and regulators to act on; and they presented the plan as a defense of net neutrality. The reality, however, is a lot more complicated – and the size and influence of the two companies’ means that their plan will significantly influence whatever steps are taken next.

Google and Verizon claim their plan would enshrine net neutrality as legislative principle

After much speculation throughout the previous week, Google and Verizon unveiled their proposal on Monday 9 August. It presented, they said, “the principled compromise our companies have developed over the last year concerning the thorny issue of “network neutrality.” They announced it in a blog post by Alan Davidson, Google director of public policy, and Tom Tauke, Verizon executive vice president of public affairs, policy, and communications.

The two men presented the plan as a defense of an open Internet. They framed the proposal as “a suggested legislative framework for consideration by lawmakers,” which US legislators could use to create laws that would prevent Internet service providers from discriminating against or prioritizing Internet content or services.

Davidson and Tauke outlined seven key elements, the first of which would “ensure that consumers have access to all legal content on the Internet, and can use what applications, services, and devices they choose”. The second would establish “a new, enforceable prohibition” against wireline broadband providers blocking or degrading Internet content and applications. In addition, it would include “a presumption against prioritization of Internet traffic - including paid prioritization,” meaning that “wireline broadband providers also could not favor particular Internet traffic over other traffic.” The presumption that all prioritization of Internet traffic would be inconsistent with the prescribed non-discrimination standard, however, “could be rebutted,” the plan adds.

The two companies also took to the op-ed page of *The Washington Post*, the next day, to defend their proposal. Google chief executive Eric Schmidt and Verizon CEO Ivan Seidenberg wrote that “our companies have long supported the FCC's openness principles toward wireline broadband, and we also believe that blocking and degrading Internet traffic is antithetical to the principle of openness and to consumers'

expectations". Their proposed policy for an "Internet free from discrimination," they argued, "presumes that prioritization of Internet traffic -- such as slowing down delivery of one video file so another's arrives more quickly -- is harmful".

However, the New York Times pointed out, the plan proposes to bar only "undue" discrimination that causes "meaningful harm to competition or to users" of broadband, without specifying what would make for undue discrimination or meaningful harm. Providers would still be allowed to "engage in reasonable network management", for example to address congestion, ensure "network security or integrity," ensure "service quality to a subscriber," provide "services or capabilities consistent with a consumer's choice," or "prioritize general classes or types of Internet traffic, based on latency". The language on what makes some network management "reasonable," the Electronic Frontier Foundation (EFF) pointed out, is "extremely unclear."

Even the repeated use in the proposal of the word "lawful" raised questions for some observers. The plan specifies that "a provider would be prohibited from engaging in undue discrimination against any lawful Internet content, application, or service" and from "preventing users of its broadband Internet access service from sending and receiving lawful content of their choice [or] running lawful applications and using lawful services of their choice". This made Ian Paul in PC World "wonder if by "lawful Internet content" what these two companies really mean is "any content but torrents," also known as peer-to-peer (p2p) file sharing":

"So how would the Google-Verizon proposal effect p2p file sharing? Would access to sites like The Pirate Bay or other torrent databases be restricted based on accusations that most of the content it points to isn't "lawful"? Also, how deeply would broadband carriers be monitoring p2p traffic to watch out for unlawful content on their networks?"

A brazen exception: no net neutrality on the wireless networks of the future

In an exemption that immediately attracted criticism and mockery, Google and Verizon said the rules of the legal framework should not apply to wireless broadband Internet connections.

The companies argue that the wireless arena "is different from the traditional wireline world, in part because the mobile marketplace is more competitive and changing rapidly," and that too heavy a regulatory hand could stifle innovation. The wireless industry has "unique technical and operational challenges, demanding different consideration than wireline networks", the CEO's wrote. "In recognition of the still-nascent nature of the wireless broadband marketplace, under this proposal we would not now apply most of the wireline principles to wireless," Davidson and Tauke concluded.

Thus, a Christian Science Monitor editorial explained, the mobile wireless networks – companies such as AT&T, T-Mobile, and Verizon Wireless – "would be left free to discriminate – say by offering faster speeds to websites that pay for the privilege, or slowing delivery from sites that compete with the companies' own offerings." A New York Times editorial added that Verizon, which markets phones running Google's Android operating system, "might, for instance, find it lucrative to one day block Bing." Skype, warned Siva Vaidhyanathan for MSNBC, might "not have a chance to compete with any video telephony service Verizon might develop" if Verizon provides its own service with prioritized service on wireless networks.

The only requirement for wireless providers in the Google / Verizon plan would be that they be transparent about how they manage and prioritize web traffic, and "give consumers clear, understandable information about the services they offer and their capabilities." Presumably, this kind of transparency would allow users to switch carriers if they noticed any policy that violated net neutrality and troubled them – for example, because it limited or slowed down access to a website, service or application they liked.

This, however, would require them to have the choice of switching to a broadband service provider that doesn't prioritize traffic in similar ways - which would not necessarily be likely, considering the potential profits involved, and the trend towards extreme concentration in the broadband market. In the US, Verizon and AT&T control about 60 percent of wireless subscribers. If the development of the wireless market follows the model of what happened to the wireline market, many Americans might soon face a monopoly or duopoly of providers in their region. Some 80% of Americans live in areas with only two wireline broadband providers.

As CNNMoney's Fred Wilson explained: "In the past 10 years, [h]undreds, maybe thousands, of dial-up providers have been replaced in the U.S. by a handful of broadband providers with local duopolies. We now have a wireless Internet in the U.S. with an on ramp controlled largely by four carriers (two of which have the dominant market share). And these access providers have invested heavily in packet detection systems that will allow them to use their dominant positions to "manage their networks."

The other reassurance the Verizon/Google plan offers regarding the wireless market is that it would be broadly subject to regular review by Congress. The companies recommend that the Government Accountability Office report yearly on how the mobile Internet arena is developing.

Wireline vs. wireless regulation: a fair compromise or paving the way for a future Internet without net neutrality?

The Guardian's Richard Adams described the plan as an exchange by the two companies: "Google gets a commitment to net neutrality over the standard, wired internet that people access via computers at home or at work, while Verizon gets far weaker regulation on wireless networks accessed via smartphones."

The ground yielded by Google is underlined by how just last January, in a joint filing to the FCC, Google had still openly disagreed with Verizon on whether mobile networks should be part of net neutrality rules, arguing that they should. Google CEO Eric Schmidt, however, presented the plan as a worthwhile compromise. "Verizon's willingness to agree to clear net-neutrality rules for its wired business was "pleasantly surprising," he said. "They're serious."

Google's change of heart on wireless networks might, however, also be driven by commercial self-interest. Google is behind the growing Android mobile operating system, an OS that is featured on many phones running on the Verizon network. Having this industry unregulated would therefore arguably likely benefit both companies now.

Whether Google's decision to give in to Verizon on exempting wireless networks from net neutrality rules constituted a genuine compromise or not, Alexis Madrigal of The Atlantic asked the obvious question. "If open networks are good, why should wireless be different?" To wit, if the CEOs truly believe that prioritization of Internet traffic is "harmful" and even "antithetical to the principle of openness and to consumers' expectations," then what makes it OK on wireless networks?

"They don't make the case in these documents for why the 'unique technical and operational characteristics' should change the fundamental underlying principle of the network," wrote Madrigal. "That's not to say there isn't a good argument, but it's certainly not in either the blog post or the policy document."

Instead, defenders of the Google / Verizon plan like Larry Downes, a fellow at the Stanford Law School Center for Internet & Society, have sketched the argument for why it is too early to enforce net neutrality on wireless networks. Wireless-network operators, Downes pointed out, have been complaining for some time "that already-overburdened 3G networks and the slower pace of deployment for additional infrastructure require them to limit or even ban some otherwise-lawful Internet content, including Internet videos and large-scale file sharing."

Wireless, however, is the place everyone, including Google, believes to be the future of the internet – and it is doubtful that net neutrality could still be imposed at a later stage, when wireless providers will have already established a host of commercial services to websites and consumers that involve prioritizing some web content.

As the Guardian's Jemima Kiss remarked, "the desktop is dying - wireless, mobile networks are the future." The internet of the future will operate on the network of the future, which will largely be a wireless one, she wrote - and the wireless services involved would, under the Google-Verizon proposal, be exempt from net neutrality requirements. In short, in the Internet of the future, ISPs "would be able to discriminate against competitors and would be able to block access to a service even if it was legal."

"Mobile is the future, and mobile is wireless," AFP quoted California high school student Mitchell Kernot summarizing the issue. "So, what they are saying is the future isn't net neutral."

The role of the FCC according to the Google / Verizon plan

The Google / Verizon plan “spells out clear FCC authority,” the CEOs of the two companies argued in their op-ed. “In addition to creating enforceable consumer protection and nondiscrimination standards that go beyond the FCC’s preexisting consumer safeguards,” Davidson and Tauke claimed in their announcement, “the proposal also provides for a new enforcement mechanism for the FCC to use.” The plan foresees an authority for the FCC to “impose a penalty of up to \$2 million on bad actors.”

The role of the FCC is, however, strictly delineated in the plan. “The FCC would enforce the consumer protection and nondiscrimination requirements through case-by-case adjudication, but would have no rulemaking authority with respect to those provisions. Parties would be encouraged to use nongovernmental dispute resolution processes established by independent, widely-recognized Internet community governance initiatives, and the FCC would be directed to give appropriate deference to decisions or advisory opinions of such groups. [...] The FCC would have exclusive authority to oversee broadband Internet access service, but would not have any authority over Internet software applications, content or services. Regulatory authorities would not be permitted to regulate broadband Internet access service.”

The EFF responded positively to the clear delineation of FCC jurisdiction. “[W]hile we strongly support neutrality in practice,” its legal director Cindy Cohn wrote, “we are opposed to open-ended grants of regulatory authority to the FCC. On that score, the Google / Verizon proposal takes a promising new approach. It would limit the FCC to case-by-case enforcement of consumer protection and nondiscrimination requirements and prohibit broad rulemaking. In essence, it tries to limit the FCC to the type of authority that the FTC has — the authority to investigate claims as they are made. This limitation, if enforced, could help avoid many of the problems we’ve been concerned about, such as the possibility that a future FCC might decide to take on the role of “Internet indecency” police”.

Commenting on the plan in the Huffington Post, however, Prof. James Boyle of Duke Law School, founder of the Center for the Study of the Public Domain, lambasted this part of the plan. If the FCC is envisioned to be enforcing rules on a case-by-case basis, using a complaint-driven process, and only as the arbiter of last resort if industry groups and other technical advisory bodies fail to enforce Net neutrality rules, say “goodbye to the FCC’s role as a regulator of network neutrality,” he wrote. He pointed out that the FCC, according to the plan, would be able to evaluate individual cases against any federal net neutrality legislation passed by Congress, but would not be allowed to develop or enhance “detailed rules” itself to safeguard net neutrality. “The Google-Verizon proposal settles the FCC’s disputed power to regulate the net by removing all but a vestige of it,” Boyle concluded, “leaving an entity that can adjudicate on a case-by-case basis, but cannot make rules.”

The New York Times editorial highlighted this element as well. Some of the ideas put forth by Google and Verizon, it concluded, “are reasonable in principle. But the overall effect would dangerously limit the commission’s reach. That’s not where Congress should be headed. The F.C.C. should have an expanded role in regulating what is rapidly becoming the most important channel of communication in the world.”

Further exemptions in the Google / Verizon plan: “additional, differentiated services”

While wireless services would be granted almost full freedom from net neutrality regulation, the Verizon/Google proposal also includes a more subtle exemption regarding the application of net neutrality rules on the wireline network.

“Internet service providers should ... have a fair amount of flexibility to manage their networks and the opportunity to provide additional services - such as telework applications, medical monitoring services or optimized gaming - so long as these services do not affect consumers’ ability to simply access their favorite sites over the open Internet offerings that this framework would protect,” the CEO’s wrote. “It is too soon to predict how these new services will develop, but examples might include health care monitoring, the smart grid, advanced educational services, or new entertainment and gaming options.”

This exemption was heavily criticized as a significant step towards a two-tiered Internet as well. Before addressing the substantive, significant risks which the critics of this exemption have called attention to, however, it is worth delving into the dilemma the CEOs are referring to here.

In a post explaining what kind of services this exemption in the Google / Verizon plan might pertain to, Prof. David Post, affiliated with both the liberal-leaning Center for Democracy and Technology and the libertarian Cato Institute, explained that he is himself a strong supporter of the current end-to-end (E2E) design of the internet, which treats all data packages the same and forms the basis of net neutrality. The problem, however, is that “there are many things that the open, nondiscriminatory E2E inter-network [...] can’t do that people want their inter-network to do and would pay to have it do, and businesses serving those people want to provide those things.”

These include “things like guaranteed delivery of [data] packets”, which can not be done on a net neutral basis because it would require the network to keep track of your transmission, and treat it differently, as it moves along. Unless providers can guarantee reliable delivery, liberal blogger Kevin Drum chimed in, “things like on-demand video streaming,” for example, “simply can’t work commercially.” The Google and Verizon CEOs offered a more specific example: an opera performance streamed in 3-D over the Web, which would require extensive bandwidth. Verizon would be paid a premium to send the program to opera buffs more quickly and at higher quality.

Net neutrality also limits possibilities for a virus-free network, for example, Post suggested. “The E2E network can’t give you that because it doesn’t “scan” packets for viruses as it moves them along; you’ll have to worry about that for yourself”, for example by running an anti-virus application.

However, Post continued, there are already thousands of non-E2E networks that “provide lots and lots of services the E2E Internet does not provide”. Most corporate wide area networks, for example. “Obviously, if Verizon wants to build a separate network and offer all sorts of glorious services on it, it can do so. The real net neutrality problem is this: if Verizon *uses the Internet’s infrastructure* to provide those services, will that [...] degrade the performance of the E2E Internet”?

Basically, Kevin Drum explained, Google and Verizon are suggesting “that the current internet [...] should remain governed by strict net neutrality that treats everybody equally,” while “carriers would be allowed to construct complementary networks that discriminate freely,” where “well-heeled corporations could indeed buy better service”. Moreover, they are suggesting that “the public internet — i.e., the one we all know and love today — would be unaffected” by those additional networks.

If that is true, Post argues, there is no problem: “A world in which the open, nondiscriminatory, E2E Internet is alive and well, and in which some users can obtain additional services that they want, is a better world than the one where such additional services are forbidden.”

But critics worry that this will be far from the truth in practice, and that such a second layer of vaguely defined digital services in the future might become a non-public, parallel wireless Internet, a sort of gated Internet. They call it a first step toward a two-tiered Internet, which would create a pay-to-enter private tier of premium services alongside a public Internet for those who can’t afford access to it. Moreover, considering the opportunities for profit would be much greater in the private tier, the open, public Internet might soon wither under a lack of investment.

Might, a Christian Science Monitor editorial asked, “carriers like Verizon concentrate on delivering service to their premium customers and leave the Internet as we know it as a dusty relic that receives little attention or maintenance”? Drum wrote that it seems “pretty likely” that “if carriers put all their capital development into high-speed dedicated networks, [...] they’ll simply let the current public internet deteriorate naturally as traffic increases but bandwidth doesn’t keep up”. Alternatively, he points out, if net neutrality is strictly upheld, the backbone infrastructure of the public Internet “will stay robust, because everyone — including the big boys — has an incentive to keep it that way.”

The Eastern division of the Writers Guild of America decried the exemption for additional services on these grounds, saying it would split the Internet into a zone for the masses and another for elites that could pay for preferred data handling. “We urge Congress and the FCC to scrutinize this backdoor method of prioritizing Internet content carefully and to see it for the violation of liberty and creativity that it is,” guild director Lowell Peterson and president Michael Winship said in a statement.

The same argument about wireless constituting the future of the Internet, and an exemption to net neutrality rules for wireless networks therefore meaning that the future Internet itself will not have those rules anymore, applies here too. After all, Cindy Cohn pointed out, referring to the language used in the plan to define the additional services that should be exempt from net neutrality regulation, much of the innovation that can be expected in the future will involve services “distinguishable in scope and purpose from broadband Internet access service, but could make use of or access Internet content, applications or services.” If discrimination is allowed for all such things, she wrote, “then there could easily be little left on the “neutral” part of the Internet in a few years.” Again, she argued, the problem of the plan is that the language is just too vague: “There may be some services that need traffic prioritization, such as urgent medical services, but the approach in the proposal creates no real limits on what could be allowed as an “additional online service.””

Aiming to quell such concerns, Google claims it plans to compete only on the open “public Internet,” including keeping its YouTube video service there. “If Schmidt was telling the truth when he said Google's overwhelming focus will remain on the public internet, such as his promise that YouTube will remain there, that's great,” commented Dan Gillmor at Salon.com. “But plans change, managements change, and corporate goals change.”

Some critics claim that the kind of new services being floated here threaten privacy as well. Whether it is guaranteed speed or prioritized delivery, providing the “additional services” that would be exempt from net neutrality in the Google / Verizon proposal involves monitoring the data that is being transmitted “so that packets of information can be routed at the agreed-upon speed and that premiums can be charged,” explained Noam Cohen for the New York Times. People like Cindy Cohn warned against the additional level of monitoring that an Internet with built-in nonneutrality would require. “Interfering with packets,” Cohn said, “creates the space for [...] surveillance.”

A chilly reception for the Google / Verizon plan

The Google-Verizon plan hit like “a tidal wave” especially because Google had always been “a very strong supporter of net neutrality,” Darrell West, vice-president of governance studies at the Brookings Institution, told Bloomberg Television.

“Needless to say,” the Guardian's Richard Adams wrote, “the lack of regulation applying to wireless access and the possibility of future 'designated services' doesn't please anyone outside the telecoms industry, or indeed at the FCC.”

Both the exemptions for wireless and for ill-defined future additional services trouble many Silicon Valley start-ups, the New York Times reported. The risk, they said, is that Internet access companies could charge companies for faster access to consumers, hurting smaller players and innovation.

The New York Times editorial concluded that the “Google / Verizon proposal gives broadband providers lots of leeway to offer preferential treatment to some and to choke off others”. It called the proposed exemption for wireless communication “a serious error” and agreed with the plan's critics that it “would allow broadband service providers to split the Internet into a high-end pipe for new types of zippier paid services and a lower-speed pipe carrying regular broadband.”

Public-interest organizations rejected the plan, and laid out dire consequences if it were implemented. Joel Kelsey, political adviser for consumer advocacy group Free Press, said the pact “would give companies like Verizon, Comcast, and AT&T the right to decide which content will move fast and which should be slowed down.” S. Derek Turner, who manages the policy team of Free Press in Washington, D.C, wrote that:

“This fake Net neutrality will be a huge loss for consumers and online entrepreneurs, who will have to stand by and watch as these industry giants turn the vibrant marketplace that is the open Internet into something that looks more like cable TV, where consumers face high prices and few choices. [...] When companies choose to pay for not just access to the Internet, but for the right to give their content priority over their competitors, it tilts the playing field online against entrepreneurs and consumers, and towards the companies that can afford to buy market power.”

Gigi B. Sohn, president and co-founder of Public Knowledge, released a statement saying that "under the Google-Verizon definition of network neutrality, wireless companies would only have to be transparent about their network practices – meaning that they could block any application, content or service so long as they told consumers they were doing so". Moreover, the plan sets "almost no limits on so-called 'managed services,' other than that they would need to be 'distinguishable in purpose and scope,' from the Internet." Thus, she writes, "it is conceivable under the agreement that a network provider could devote 90 percent of its broadband capacity to these priority services" and only 10 percent to the regular, public Internet which the CEOs are claiming to protect.

"Net neutrality is the way Google is trying to spin it," said technology analyst Carmi Levy, but in reality, the plan "opens the door to a less neutral Internet in the future." The proposal contains some good principles but "falls short," said Center for Democracy and Technology president Leslie Harris: "The companies' plan puts wireless Internet service into a regulatory no-go zone and offers only toothless protection for the open Internet against the voracious expansion of so-called 'additional services'".

Emphasizing the importance of net neutrality for start-up companies, Prof. Boyle noted that Google had, so far, "defended open networks -- where new entrants will have the power to disrupt existing businesses just as Google did to Yahoo and Alta Vista's search services." But now, he wrote, Google is "rich enough that it can buy preferred treatment over wireless networks and premium services. And it needs the phone companies to have Android succeed and carry Google onto the mobile web. Net neutrality got Google where it is, but now it is time to pull up the ladder behind it."

The FCC needs to step in immediately, wrote the editors of the San Francisco Chronicle, who called on their readers to write to FCC Chairman Julius Genachowski, "by reclassifying broadband under a section of the telecommunications code that's subject to more scrutiny." Genachowski presented a plan to do just that last May, but in the face of fierce opposition from the oppositional Republican Party and telecom lobbyists, had since been focusing on conducting strategic talks with the main actors to create some consensus around his proposal – talks which have now been suspended.

The San Francisco Chronicle editorial criticized the way these talks were conducted as well, arguing that they had been too squarely focused on the big Internet content, service and access industries. In the end, it concluded, it shouldn't just be up to the FCC in the first place. "Congress needs to step in with net neutrality legislation. And the Google-Verizon pact isn't even close. They need to go back to the drawing board and get support from consumer groups and Internet users instead of just broadband carriers and web giants."

Karl Bode of Broadband DSLReports agreed with that last point. "It seems like common sense that telecom regulators, not the sector's wealthiest players, should be dictating the beat of this particular policy drum. [...] The framework used to create any internet policy rules shouldn't be [...] focused on protecting the revenues of the wealthiest constituents – it should be the brain trust of a broad collective, including consumers, smaller carriers, and truly independent experts."

Craig Aaron, Managing Director of the NGO Free Press, went as far as calling the plan a "pact to end the Internet as we know it" and "one massive loophole that sets the stage for the corporate takeover of the Internet".

Dissenting observers such as Downes and Post, however, pushed back against what they called, respectively, "near-hysteria" and "hysterical pronouncements". Downes hailed the plan as a sign of "compromise and collaboration" and "an offer of peace in the raging Net neutrality war, issued by two of the leading combatants," which "sends a strong and positive signal." The proposal, wrote Post, is "not an outrageous attack on the viability of the Internet, or the death of the Internet as we know it, or anything else it's being called". It is "simply an outline for a legislative / regulatory framework that attempts to jumpstart the contentious and largely moribund process that the FCC had already begun, months ago."

Both men also maintain that there is actually little news in this whole episode, with Downes opining that the differences between the Google-Verizon proposal and the FCC's are actually "not significant." However, if all the two companies wanted was to jumpstart existing talks, and their differences with the FCC's approach were small in any case, why did they decide to go it alone, triggering the collapse of the talks under the auspices of the FCC?

The FCC's initial (non-)response

FCC officials, including chairman Genachowski, initially declined to comment. In theory, the FCC could simply ignore the proposal. Google and Verizon's statement is only a white paper, and has no force of law, and the proposals the FCC had been discussing do not exempt wireless from net neutrality rules.

"The good news is nothing about this compromise has any teeth without the FCC deciding to make it part of its official rules on network neutrality," wrote Stacey Higginbotham of GigaOm. However, she feared, "given the FCC's precarious position as a broadband regulator and a lack of support from Congress on this issue," the temptation to accept the plan as a compromise solution will be powerful.

The Google and Verizon CEOs themselves stressed that their plan is just one option. "No two companies should be so presumptuous as to think they can solve this challenge alone," they wrote. "We hope that our proposal provides some concrete ideas to move this process forward." Because the two companies are so huge, however - and because the FCC has been unable to finalize, let alone implement, its own policy on net neutrality, their proposal will shape the debate.

Nevertheless, if anyone thought that the Google / Verizon plan would be received warmly by the FCC, a response by one FCC commissioner should sober them up. "Some will claim this announcement moves the discussion forward," said Michael Copps in a statement that suggested he wasn't too pleased that Google and Verizon are trying to dictate policy. "That's one of its many problems."

Copps didn't detail what those "many problems" are, but the text of his statement made it clear that he strongly supports the plan Genachowski presented in May to restore some of the FCC's authority over net neutrality – an authority that had only been voided by a controversial US Appeals Court ruling in April (see below). "It is time to move a decision forward – a decision to reassert FCC authority over broadband telecommunications, to guarantee an open internet now and forever, and to put the interests of consumers in front of the interests of giant corporations," he wrote.

Copps, however, does not speak for the entire FCC. While Genachowski's plans on net neutrality are generally supported by the two Democrats on the commission, Copps and Mignon Clyburn, the two Republicans, Robert McDowell and Meredith Baker, have been vocal in their opposition, and would likely be more receptive to the alternative outlined in the Google / Verizon plan.

Google and Verizon on the defense

Critics say that Google's compromise with Verizon signals the latest collision between idealism and pragmatism at the company, which is known for its unofficial motto "Don't be evil" - and that idealism lost out. But the chiefs of Google and Verizon hosted a call with the press to argue that their goal was to defend net neutrality. "Preserving the open Internet is very important to Google," chief executive Eric Schmidt said on the call. "The open Internet makes it possible for the next Google to be created."

Schmidt and Seidenberg were adamant that they were not up to tricks or back room deals. "There is no prioritization of traffic that would come from Google under any circumstances on the Internet, period," Seidenberg said. "As far as we are concerned, there would be no paid prioritization of traffic on the Internet."

Schmidt has also argued that the exemption for additional, differentiated services merely recognizes what Verizon already offers through its paid FiOS broadband service providing TV, phone and Internet, rather than heralding some new, parallel, non-neutral Internet. Google also highlights safeguards in the plan to ensure that "such online services must be distinguishable from traditional broadband Internet access services and are not designed to circumvent the rules". According to the plan, the FCC "would publish an annual report on the effect of these additional services, and immediately report if it finds at any time that these services threaten the meaningful availability of broadband Internet access services or have been devised or promoted in a manner designed to evade these consumer protections."

Google, clearly the more sensitive of the two companies to criticism on this count, published a follow-up post on its Public Policy Blog called "Facts about our network neutrality policy proposal" in order to "separate fact

from fiction". It set out to dispel what Google called "myths" about the plan, such as that Google would have "sold out" on network neutrality or that the plan would represent a step backwards for the open Internet.

Defending the Google / Verizon plan, Larry Downes argues that such services are, in any case, also excluded under the FCC's proposed rules on net neutrality, and that FCC rules also allow network operators to implement "reasonable network management" techniques, "even if those would otherwise violate Net neutrality."

Several critical commentators, however, highlighted how especially Verizon CEO Seidenberg kept talking about "the public Internet" on the press call, when talking about the Internet as it exists now -- automatically raising the question of what other Internet it is being set off against.

A testament to the Google / Verizon plan's influence: the FCC "kicks the can down the road"

After three weeks of silence, the FCC published a public notice, along with a statement by Genachowski, on 1 September. The notice presents a "further inquiry" into "two under-developed issues," which dovetail closely with the two main points of controversy in the Google / Verizon plan. While Genachowski's statement never mentions Google or Verizon by name, he writes that "recent events have highlighted questions on how open Internet rules should apply to 'specialized' services and to mobile broadband".

In what could be read as a dig at the Google / Verizon plan, which claimed to enshrine "enforceable consumer protection and nondiscrimination standards", Genachowski writes: "As we've seen, the issues are complex, and the details matter. Even a proposal for enforceable rules can be flawed in its specifics and risk undermining the fundamental goal of preserving the open Internet."

The FCC notice articulates a number of urgent questions that were raised by the Google / Verizon plan. The timetable of the new inquiry, however, means that the commission is essentially kicking the discussion into the long grass.

Tackling the question of "specialized" services first, the FCC inquiry notes that "broadband providers may provide other services" to customers over the same lines used to provide regular broadband Internet, and that "[t]hese services may drive additional private investment in networks and provide consumers new and valued services". It then proceeds to tick off some of the concerns that were vocally raised after the release of the Google / Verizon plan, however.

Will open Internet protections be compromised if "broadband providers offer specialized services that are substantially similar to, but do not technically meet the definition of, broadband Internet access service, and if consumer protections do not apply to such services", the inquiry asks? What if "a broadband provider offers broadband Internet access service bundled with a "specialized service" that provides prioritized access to a particular website"?

Moreover, what will happen to the existing, "open," net-neutral Internet, once specialized services require ever more capacity, the inquiry wonders? Broadband providers may not continue expanding network capacity at a proportional rate, and if that happens, "the open Internet may wither as an open platform for competition, innovation, and free expression."

The inquiry raises the specter of anti-competitive behavior as well – in this case, presumably, the slowing down or blocking of rival sites and services. "Broadband providers may have the ability and incentive to engage in [such] conduct with respect to specialized services," it notes, if they themselves offer specialized content, applications, or services too, or strike deals with companies who do. The inquiry cross-references the point which net neutrality advocates have made about America's regional duopolies: "These concerns [...] may be exacerbated by worries that due to limited choice among broadband Internet access service providers, consumers may not be able to effectively exercise their preferences".

The FCC floats a number of ways in which these risks can be addressed in regulatory policy, foremost its desire for "definitional clarity". Broadband providers could be held to strict standards of truth in advertising and disclosure, the inquiry suggests, but moreover, providers could be obliged to offer any company the

same conditions for offering specialized services; broadband providers could be restricted to offering “only a limited set of new specialized services” which they could not offer over traditional broadband Internet service; and broadband providers could be required to offer a guaranteed network capacity for regular broadband Internet access, “regardless of any specialized services they choose to offer”.

The arguably bigger issue the inquiry raises is whether wireless access should be excluded from most net neutrality provisions for now. The FCC is seeking input on “how, to what extent, and when” net neutrality principles should apply to wireless platforms. Here, the inquiry does name-check the Google / Verizon plan, noting that it “exclude[d] wireless, except for proposed transparency requirements.” How fundamentally different are wireless and wireline networks, it asks? “Should a mobile provider have more discretion to restrict consumers’ downloading and/or use of native applications than they should with respect to web-based applications?” In a question seemingly aimed at the management of torrent and P2P applications, the inquiry asks: “To what extent should mobile wireless providers be permitted to prevent or restrict the distribution or use of types of applications that may intensively use network capacity, or that cause other network management challenges?”

The notice suggests, hopefully, that perhaps the introduction of “pricing plans that charge different prices based on the amount of data a customer uses [...] may reduce mobile broadband providers’ incentives to employ more restrictive network management practices that could run afoul of open Internet principles”. Such business models might, after all, already “mitigate concerns about congestion of scarce network capacity”.

While these questions are all to the point and fairly critical, at first blush, of the way the Google / Verizon plan articulated broad exemptions to net neutrality safeguards, the timing of the inquiry tells another story. Those who wish to submit comments have 30 days to do so, and a total of 55 days to issue reply comments, extending the period of analysis for another two months, almost a year after the FCC first solicited comments on the subject. The New York Times called this “an obvious effort to push any decision beyond the midterm elections.”

“Communications and Internet companies had been watching for a vote on Genachowski’s net neutrality proposal at the agency’s meeting on Sept. 23,” wrote Cecilia Kang on her Post Tech blog in the Washington Post. While the move of first publishing another inquiry “was not unexpected, it puts the politically sensitive issue of net neutrality on hold until around December.”

This is good news for telecommunications and cable companies and other opponents of strong net neutrality safeguards. Considering the likely outcome of the November elections, with the Republican opposition widely expected to make large gains and possibly win control of the House of Representatives, it could easily derail Genachowski’s open Internet goals, as “it would make the chairman’s proposal to re-regulate broadband as telecommunications service with stricter rules much harder to pursue.”

The delay, Wired.com observed, shows both “the intractability of the debate over wireless and wireline openness rules, and the ongoing shock waves of last month’s joint policy proposal from Google and Verizon to create a framework for Congress to enact new competitive rules for ISPs.”

Public advocacy groups expressed anger at the FCC’s move, accusing it of trying to duck a politically difficult decision. Gigi B. Sohn of Public Knowledge noted that “both of the issues on which the FCC seeks public comment, dealing with specialized services and the status of wireless services in an open Internet, were extensively explored in not one, but two proceedings pending at the Commission in which comments were submitted.” Matt Wood, Associate Director of the Media Access Project complained that “The Commission asks the same questions time and time again [...], instead of providing basic answers on the basis of the robust record it already has compiled. MAP, other public interest groups, companies, trade associations, and other commenters on all sides of the issue have provided great detail on these topics.”

Free Press Research Director S. Derek Turner chimed in: “The FCC continues to kick the can down the road and prolong this process, but the longer the FCC ponders the politics of Net Neutrality, the longer consumers are left unprotected. It is time for the FCC to stop writing notices and start making clear rules of the road.”

On the other side of the debate, Thomas J. Tauke said the company was encouraged by the commission’s decision to further study the ways in which net neutrality should be applied to wireless broadband and specialized services. President Steve Largent of the CTIA-The Wireless Association, a trade group of the

wireless communications industry, said, "We are pleased the FCC has put out the Public Notice for comment [..]. We will continue to work with them to explain why these rules are unnecessary and should not be applied to the wireless ecosystem."

TechNet, a national network of CEOs of businesses such as Apple, eBay and Facebook, declared: "We believe this extension of time shows both wisdom and humility. There is no quick and easy answer to these complex challenges and there should not be a rush to a conclusion before a strong consensus is reached. This extension also recognizes the important reality that in both the short- and long-term, technologies change and that some level of evolutionary flexible rulemaking is required. Again, this pause for a deep breath is needed to get this framework done right."

Explaining net neutrality in plain words

The New York Times topics page on net neutrality summarizes what it is in one sentence: "The concept of "net neutrality" holds that companies providing Internet service should treat all sources of data equally." The Guardian's Jemima Kiss proposed an almost as pithy definition: it "is the principle that all internet traffic – content, platforms, and websites – should be treated equally by the networks that deliver them."

What this means, the New York Times notes, is simply that "Internet users get access to any Web site on an equal basis. Foreign and domestic sites, big corporate home pages and low-traffic blogs all show up on a user's screen in the same way" - and at the same speed. Internet service providers (ISPs) do not block or slow down individual sites or applications and do not give others preferential treatment by delivering them faster. They can, therefore, also not charge customers for accessing certain sites or applications, or for having their sites or services made accessible at the same or greater quality or speed than others'.

The term goes back at least as far as 2002, when Columbia University's Tim Wu wrote a paper on "Network Neutrality, Broadband Discrimination". Wu argued that consumers having a choice between different ISPs was not, in itself, a sufficient guarantee of this kind of equal access and delivery, and an anti-discrimination rule was needed to safeguard it.

Bearing out Wu's skepticism, the telecom companies that provide broadband access have been eager to jettison the principle of net neutrality. What they want, Kiss explained, "is the right for companies to pay a premium to have their content delivered faster than rival content, or to establish new layer of faster internet on which to serve paying, premium services." Such tiered, prioritized services would open up new revenue opportunities for them.

What could this look like in practice? Bloomberg sketched the difference in how commercial services and products would be delivered: "Imagine an Internet where consumers paid a low price for basic service and more for add-ons such as 3-D video. Or imagine if Comcast Corp., now seeking approval to acquire General Electric Co.'s NBC Universal, let its customers download Universal movies at superfast speeds, while relegating the latest Harry Potter film from rival Time Warner Inc. to the slow lane."

Pro

In the eyes of observers like Kiss, there are clear reasons to protect net neutrality. Tiered Internet service provision would, she wrote, "leave non-commercial sites on a poorer, slower web where they would find it harder to attract readers – changing the democratic nature of the internet. It would also mean poorer users, or those in the developing world, would find it harder to access the "full" internet experience."

Blogger Kevin Drum sketched the consequences by illustration. Currently, "if you send an email to Aunt Martha, it has the same priority as my Google search for Lady Gaga videos or Rupert Murdoch's latest multibillion dollar internet television startup. Data is data, and it all goes over

the net equally quickly.” But in a future without net neutrality, a magazine like the one he writes for won't be “big enough or deep-pocketed enough to pay for top tier service, and that means that in two or three years delivery of this blog could end up pretty molasses-like” in comparison with the delivery of corporate-backed, better-funded magazines.

Drum also made a broader argument for net neutrality. “[T]here are real benefits to providing routine, high-speed internet infrastructure to everyone. It means that small, innovative net-based companies can compete more easily with existing giants. It means schoolchildren can get fast access to a wide variety of content, not just stuff from Microsoft and Google. It means we have a more level playing field between content providers of all kinds.” This is also why companies in the content business generally support net neutrality, he suggests: “they want their data delivered as fast as anyone else's without having to pay any special fees.”

Drum warns specifically against the consequences for competition and innovation. “I think the lesson of history is pretty clear: when common carriers are allowed to discriminate, the result is disastrous for everyone except the folks who currently dominate their market. If you have a startup search company that outperforms Google, but only if it's as fast as Google, well, what are the odds that Google won't pay to make sure that its service is always faster than yours?”

Contra

Other observers are more sanguine about the overriding import of net neutrality. Prof. David Farber has warned that net neutrality might hinder the progress of new, innovative networks. Enforcing net neutrality, he wrote in the Washington Post in 2007, “would prohibit practices that could increase the value of the Internet for customers,” when “an updated internet could offer a wide range of new and improved services, including better security against viruses, [...] services that require high levels of reliability, such as medical monitoring; and those that cannot tolerate network delays, such as voice and streaming video.” Nobody “would propose that the U.S. Postal Service be prohibited from offering Express Mail because a “fast lane” mail service is “undemocratic,”” he wrote, “yet some [...] proposals would do exactly this for Internet services.”

Some ISPs argue that it is in the interest of most web users if ISPs would have the right to demote or prioritize content. This was the argument of the ComCast corporation in a case that would change the trajectory of net neutrality policy. ComCast was found to be blocking or slowing down certain services, such as peer to peer (P2P) networks. Defending its practice, the company argued that file sharers took up a disproportionately big chunk of the bandwidth and slowed down the service for the majority of users. In the UK, Kiss noted, ISPs have also commonly demoted and blocked P2P traffic, and indicated that they are also concerned about other services that put pressure on their networks, such as the BBC's video traffic.

Even as telecom companies laid out extensive new fiber-optic broadband networks, telecom executives have argued that they face a reduced incentive for such costly investments if they are not allowed to establish corresponding new revenue streams, such as charging companies that want to use the new capacities of such networks. Back in 2006 already, executives such as the CEO of AT&T, Edward E. Whitacre Jr., and Verizon's Senior Vice President John Thorne suggested that companies like Google should have to pay for preferred access to consumers over these new networks. Thorne asserted that “the only way we are going to attract the truly huge amounts of capital needed to build out these networks is to strike down governmental entry barriers and allow providers to realize profits”. Critics of this argument might point to the profits telecom companies have been making, the relatively successful expansion, in recent years, of broadband in Europe, where the regulatory regime is no more relaxed, and the push for enshrining access to broadband internet as a legal right, such as it has been made in Finland, where telecom operators are legally obliged to provide it.

In the US, debate about net neutrality has centered on the role of the Federal Communications Commission (FCC). The FCC's defense of net neutrality was showcased when it upheld a complaint against ComCast in 2007 for illegally restricting paying web users from using file sharing services. But its strategy was called into question when the U.S. Court of Appeals for the District of Columbia sided with Comcast in the company's appeal.

Backstory: The controversial April court ruling and Genachowski's "third-way" solution

During the Bush era, a series of policy decisions were geared at deregulating broadband. In 2002, the FCC officially declared that cable, DSL, and other high-speed Internet services were not "telecommunications services" belonging under Title II in the Telecommunications Act, which could be regulated like the phone system. Instead, the FCC classified them as "information services" under the jurisdiction of Title I in the Act. This meant that they were subject to fewer regulations, and largely outside the FCC's regulatory power.

The FCC did, however, issue a set of principles, the so-called "four freedoms", which it expected service providers to adhere to. They stipulated that, within the boundaries of the law, broadband Internet users had the freedom to access any content they chose, run any application they chose, attach any devices they chose to their Internet connections, and choose among competing network, application, and content providers.

The appointment of Genachowski as new FCC Chairman in June 2009 created expectations that the commission would formulate more binding regulations to secure net neutrality. President Obama had promised to safeguard an open Internet during the 2008 election campaign, and he reiterated in early 2010 that he remained "a strong supporter" of net neutrality. The FCC chairman also leads a 3-2 Democratic majority on the commission. Last fall, the FCC announced that it was going to formally adopt the "four freedoms" as rules, and that it would add two more: broadband providers cannot discriminate against services or applications by slowing them down, and broadband providers must tell customers how its engineers manage the network congestion.

The consequences of the Bush-era decisions, however, were suddenly brought to the fore by a controversial ruling by a US appeals court on April 6, 2010, in a case brought by the Comcast Corporation.

Comcast had blocked or slowed down certain services, such as the file sharing application BitTorrent, to a number of customers in 2007. Acting in line with the "four freedoms", the FCC upheld a formal complaint against the company and required it to end the practice in 2008. Although the company complied with the FCC order, it also turned to the U.S. Court of Appeals for the District of Columbia to review whether the FCC had the authority to impose such requirements on broadband service providers.

On April 6, the court ruled that it does not. Siding with Comcast, it ruled that the FCC had not been granted the legal authority by Congress to impose restrictions on the network management practices of ISPs. Since broadband was not classified under Title II, the FCC had no status to enforce its net neutrality policies as binding on broadband providers.

According to its critics, the court ruling opened the doors wide to any ISP to agree with any content producer to give its content preferential treatment – much along the lines of the Google / Verizon deal that was initially rumored to be in the pipeline – or to single out certain kinds of content to slow down.

Moreover, by denying the FCC the authority of regulating ISP network practices, the Court had made it questionable whether the FCC would still be able to implement the National Broadband Plan it had just launched in March, which seeks a 90% broadband adoption rate in the United States by 2020 and aims to provide 100 million U.S. households with broadband connections of 100 megabits per second by that year.

After the ruling, the FCC was defiant. "Today's court decision invalidated the prior Commission's approach to preserving an open internet," FCC spokeswoman Jen Howard declared, "but the Court in no way disagreed with the importance of preserving a free and open internet; nor did it close the door to other methods for achieving this important end."

The ruling left the FCC with few options, however. They included seeking review by the US Supreme Court or turning to Congress to pass a law, either authorizing FCC to regulate broadband internet or reclassifying broadband as a telecommunications service. It was clear, however, that any such law would be vigorously opposed by the telecom industry and the Republican opposition.

A coalition of thousands of nonprofit organizations, businesses and bloggers, "Save The Internet," weighed in and rallied users to sign a letter to the FCC to "reclassify broadband as a Title II "telecommunications

service" so that it can keep the Internet open and free of corporate gatekeepers," and the letter was signed by almost 250,000 people.

On 6 May, Genachowski presented his own "third way" solution. The FCC would not fully reclassify Internet communications as a telecommunications service, which would have restored the FCC's direct authority over broadband networks but would also, Genachowski argued, have imposed dozens of new regulatory requirements on broadband providers. However, the FCC would also not muddle on, continuing to rely on Title I "ancillary" authority, and trying "to anchor actions like reforming universal service and preserving an open Internet by *indirectly* drawing on provisions in Title II". This, he argued, would "involve a protracted, piecemeal approach" that would be likely to spur multiple court battles that could well yield the same result as the Comcast case.

Instead, in a "narrow and tailored" third-way approach, the FCC would:

- Reclassify only the transmission component of broadband access service as a telecommunications service;
- Apply only six of the four dozen or so provisions of Title II that apply to phones to broadband as well;
- Put in place meaningful boundaries to guard against regulatory overreach.

All in all, Genachowski emphasized, the proposed approach would merely "restore the status quo," as it "would not change the range of obligations that broadband access service providers faced pre-Comcast" and "would not give the FCC greater authority than the Commission was understood to have pre-Comcast." Promoting his plan as a compromise approach, Genachowski wrote that "heavy-handed prescriptive regulation can chill investment and innovation and a do-nothing approach can leave consumers unprotected and competition unpromoted."

Implementing the approach, however, will be a lengthy, public, regulatory process that will take many months if it is successful at all, and Genachowski has declined to say when he might put such phone-style rules to a vote by the FCC. Indeed, if Genachowski does try to apply the phone rules to broadband, he will have to confront carriers and congressional Republicans. Cable and phone companies say phone-style rules could lead to rate regulation, and that prospect would delay investments to upgrade the Internet.

If Genachowski goes that route, "he's going to be sued," said Representative Cliff Stearns of Florida, the top Republican on the House subcommittee on communications, technology, and the Internet. "We're not going to get innovation if the government steps in." On May 12, the Republican Party leaders in the House of Representatives, John Boehner and Eric Cantor, wrote President Obama telling him to immediately reconsider "your administration's plan for federal regulation of the Internet" and criticizing the FCC's "counterproductive crusade to regulate the Internet".

The conservative political advocacy group Americans for Prosperity launched a \$1.4 million advertising blitz on 11 May to warn against what it called "nothing less than a Washington takeover of the Internet". It joined long-running advertizing campaigns by groups like Hands Off the Internet! (HOTI), which styles itself as a grassroots Internet users initiative but is made up primarily of telecom companies and conservative lobby groups. Telecom giant AT&T has funneled hundreds of thousands of dollars over the years into HOTI ad campaigns.

Larry Downes, who argues that the "rejection of the FCC's efforts to reclassify broadband may be the most significant feature of the Google-Verizon framework," makes the case against reclassification as follows: "Reclassification would impose onerous "common carrier" rules on network operators, rules that predate the invention of computers. It would open the door to micromanagement of the broadband industry, new consumer taxes and the chance state and local regulators have been waiting for to get into the rule-making game. It's also illegal. Only Congress can effect such a radical change in the law. The FCC's reclassification end-run [...] will lead to withering lawsuits that could take years to resolve. In the interim, the investment climate for continued innovation in our broadband infrastructure will sour." It is unclear, however, whether this criticism is taking into account the limited number of Title II provisions that Genachowski is proposing the FCC would apply to broadband ISPs

The two Republicans on the FCC, Commissioners McDowell and Baker, characterized their chairman's "third way plan" as a disincentive to investment in infrastructure and a "job killer" which crosses "a regulatory Rubicon". They invited the courts to issue a "stinging rebuke" and strike down this attempt "to shatter the boundaries" of the commission's authority. In reply, Commissioner Clyburn shot back: "I can understand why

powerful companies balk at government oversight. [...] Indeed, if it were up to them, we would not enact rules; but rather, rely on 'voluntary organizations and forums' made up solely of industry personnel to give us advice on how to serve as a backstop for consumers."

Backstory II: Initial reports of a deal between Verizon and Google

One of the ways to lessen the risk of a protracted political battle and increase the chances that Congress would successfully pass legislation, Genachowski and his allies concluded, was to reach a consensus with the industry players first. When he announced his plan, Genachowski called "on all stakeholders to work with us productively to solve the problem the Comcast decision has created in order to ensure a solid legal foundation for protecting consumers, promoting innovation and job creation".

Subsequently, the FCC started talks with the main corporate actors in the debate, including Google and Verizon as well as AT&T, a cable industry group, Skype and the Open Internet Coalition, to strike an accord on the way forward. While some consumer groups objected to the make-up of the private meetings, arguing that too many stakeholders were being left out of discussions, proponents of net neutrality were counting on companies such as Google, Amazon, eBay and Skype to weigh in on this debate to support the FCC approach, and counterbalance the opposition by owners of broadband networks like Comcast and AT&T. The talks, jokingly referred to as "the secret meeting" at the FCC headquarters, began in June and took place every week.

Genachowski suspended the discussions only after reports of a Google-Verizon deal first emerged. At the time, he warned that "any deal that doesn't preserve the freedom and openness of the Internet for consumers and entrepreneurs will be unacceptable".

It is not entirely clear how the talks had been progressing. On 4 August, the New York Times reported that the talks produced "some common ground among the participants on smaller matters" but that "one participant, who spoke on the condition of anonymity [...], said there had been little movement "on the few big issues that are the most important." Frustration with the lack of progress had reportedly "accelerated" the direct talks between Google and Verizon. But on 16 August, the New York Times reported that the participants had actually "been close to producing a draft compromise agreement, according to three people briefed on the talks who agreed to speak to the New York Times anonymously".

An initial report about the direct talks between Google and Verizon appeared in the New York Times story of 4 August 2010. It suggested that Google was preparing to make a secret back-room deal to buy preferred access for its own services on Verizon's networks. Google and Verizon "are nearing an agreement that could allow Verizon to speed some online content to Internet users more quickly if the content's creators are willing to pay for the privilege," the newspaper reported. "The charges could be paid by companies, like YouTube, owned by Google, for example, to Verizon [...] to ensure that its content received priority as it made its way to consumers."

The problem in this would have been obvious, Kevin Drum noted. "[O]nce Google would enter such a deal, they would set off an arms race. Can Yahoo or Microsoft really afford to be second class citizens? Or Disney or Fox? [...] Before long, pretty much every deep-pocketed content provider has signed a deal paying to get speedier Web access from Verizon and companies like it." The kind of deal Google was reported to be striking with Verizon "would have meant that each of the major Internet service providers would have immediately cut separate deals with a variety of media companies, essentially auctioning off the "fast lanes" to their services," Siva Vaidyanathan was to write.

Such a stampede for favored access would confront the FCC with a fait accompli, leaving its attempts to assert its authority to enforce net neutrality in the dust. Make no mistake, Drum wrote, "if the major content providers get guarantees of better service, every other content provider will almost certainly end up with worse service than they have now."

Advocates responded with alarm. Josh Silver from Free Press called the alleged deal "the beginning of the end of the Internet as you know it," explaining that "since its beginnings, the Net was a level playing field that allowed all content to move at the same speed, whether it's ABC News or your uncle's video blog. That's all about to change, and the result couldn't be more bleak for the future of the Internet [...] and independent voices."

Reports of the deal turned out to be mistaken, however. Instead, three days later, the two companies proposed the "legislative framework" described above, ostensibly to protect net neutrality. Is that better or worse? According to Siva Vaidhyanathan, it's better: "Google is innocent of the charge of dealing away its principles for an unfair advantage". But Prof. James Boyle was skeptical. Instead of the "individual violation of the principle of network neutrality by one of its most ardent prior proponents" which a mere business deal would have amounted to, he wrote, the two companies have come up with "a proposal that would legislatively gut that principle in general for everyone. The newspaper accounts thought too small."

Joel Kelsey, political advisor for Free Press, agrees. "Google and Verizon can try all they want to disguise this deal as a reasonable path forward, but the simple fact is this framework [...] would transform the free and open Internet into a closed platform like cable television," he said in a statement. "This is much worse than a business arrangement between two companies. It's a signed-sealed-and-delivered policy framework [...] that blesses the carving up of the Internet for a few deep-pocketed Internet companies and carriers."

The EFF's Cindy Cohn brought the issue back to where it was left in April, when the appeals court sided with ComCast against the FCC. "For EFF, the first test for a network neutrality proposal is this: would it have clearly prevented Comcast from interfering with BitTorrent? In the Google / Verizon proposal, because of ambiguous exceptions like the one that allows an ISP "otherwise to manage the daily operation of its network", we can't be sure that that's true."

The view from Europe

In a speech on Europe's digital agenda on 6 October 2009, EU Commissioner for Information Society and Media Viviane Reding promised "to be Europe's first line of defence whenever it comes to real threats to net neutrality". There are "many reasons for being very vigilant", she said at the time. While challenges to the capacity of the Internet were real, tackling them through traffic prioritization techniques could prove detrimental for its open and neutral character, she warned.

Reding touted the reformed Telecoms Package as a way to "provide additional safeguards against anti-competitive behaviour": But the measures to promote net neutrality that were included in that package fall well short of guaranteeing net neutrality. What they stipulate is that national telecoms authorities will be able to set minimum quality levels for network transmission services, so traffic management techniques being used by Internet service providers can not degrade the quality of access to online services by competing market players, or at least not beyond those minimal standards. They also oblige ISPs to inform consumers, before they sign a contract, about any traffic management techniques being applied and their impact on service quality - a stipulation which seems comparable to the transparency rule which the Google / Verizon plan applies to both wireline and wireless service.

Last June, The DG Information Society and Media launched a public consultation on the issue of net neutrality. The consultation covers such issues as whether internet providers should be allowed to adopt certain traffic management practices, prioritizing one kind of internet traffic over another; whether such traffic management practices may create problems and have unfair effects for users; whether the level of competition between different internet service providers and the transparency requirements of the new telecom framework may be sufficient to avoid potential problems by allowing consumers' choice; and whether the EU needs to act further to ensure fairness in the internet market, or whether industry should take the lead. Service and content providers, consumers, businesses, researchers and other interested parties are invited to respond to the consultation by 30 September 2010. The Commission will subsequently report on the state of play on net neutrality later this year.

An alternative source of intergovernmental pressure on behalf of net neutrality is the Council of Europe, which has reportedly been developing a declaration on human rights and net neutrality that would stress users' rights and legal remedies for unlawful actions by ISPs.

Joost van Beek

Appendix I: Research institutes and advocacy organizations

A non-exhaustive list of links to research institutes that have focused on the issue of net neutrality and non-profit organizations that have advocated for net neutrality.

Free Press

<http://www.freepress.net/>

Public Knowledge

<http://www.publicknowledge.org/>

Electronic Frontier Foundation

<http://www.eff.org>

Media Access Project

<http://www.mediaaccess.org/>

The Save the Internet coalition

<http://www.savetheinternet.com>

Center for Democracy & Technology - "Keeping the Internet open, innovative, free"

<http://www.cdt.org>

The New America Foundation

<http://www.newamerica.net/>

Brookings Institution Center for Technology and Innovation

<http://www.brookings.edu/techinnovation.aspx>

The Center for Internet and Society (CIS) at Stanford Law School

<http://cyberlaw.stanford.edu/>

Advanced Communications Law & Policy Institute (ACLPI) at New York Law School

http://www.nyls.edu/centers/projects/advanced_communications_law_and_policy_institute

I/S: A Journal of Law and Policy for the Information Society

<http://www.is-journal.org/>

Open Forum Europe

<http://www.openforumeurope.org>

Appendix II: Advocates, experts and reporters

A number of organizations and individual experts are quoted in this review. The below overview provides more information on who they are.

Craig Aaron. Managing Director of the media reform NGO Free Press. Writes regularly for the Guardian and the Huffington Post.

James Boyle. Professor of Law and co-founder of the Center for the Study of the Public Domain at Duke Law School. Author of *Shamans, Software and Spleens: Law and Construction of the Information Society*. Member of the academic advisory board of Public Knowledge.

Cindy Cohn. Legal Director and General Counsel of the Electronic Frontier Foundation.

Larry Downes. Fellow at the Stanford Law School Center for Internet & Society and author of *The Laws of Disruption: Harnessing the New Forces that Govern Business and Life in the Digital Age*.

David Farber. Distinguished Career Professor of Computer Science and Public Policy in the School of Computer Science at Carnegie Mellon University. Member of the FCC's Technological Advisory Council, Trustee of the Electronic Frontier Foundation, former member of the US Presidential Advisory Board on Information Technology.

Dan Gillmor. Director of the Knight Center for Digital Media Entrepreneurship at Arizona State University's Walter Cronkite School of Journalism & Mass Communication, and author of *We the Media: Grassroots Journalism by the People, for the People*. Writes regularly on technology at Salon.com. Website: <http://dangillmor.com>

Leslie Harris. President and CEO of the Center for Democracy & Technology. Regular contributor to online publications such as the Huffington Post. Serves on the Steering Committee of the Open the Government coalition and the Board of Directors of the Global Network Initiative.

Cecilia Kang. Technology policy reporter at the Washington Post, where she covers the FCC, telecommunications industry trends and the intersection of technology and culture. Website: <http://voices.washingtonpost.com/posttech/>

Jemima Kiss. Media reporter who has written about digital publishing since 2002, and joined MediaGuardian.co.uk in 2006. Website: <http://www.jemimakiss.com>

Alexis Madrigal. Senior editor and lead technology writer for TheAtlantic.com and former staff writer for Wired.com. Visiting scholar at University of California, Berkeley's Office for the History of Science and Technology.

Lowell Peterson. Executive director of the Eastern division of the Writers Guild of America. Launched the Writers Guild 2.0 Initiative to address how digital media impact the work of Guild members.

David Post. I. Herman Stern Professor of Law at the Beasley School of Law at Temple University, Fellow of the Center for Democracy and Technology, Fellow of the Institute for Information Law and Policy at New York Law School, and Adjunct Scholar at the Cato Institute. Author of *In Search of Jeffersons Moose: Notes on the State of Cyberspace* and co-author of *Cyberlaw: Problems of Policy and Jurisprudence in the Information Age*.

Gigi B. Sohn. President and co-founder of public interest group Public Knowledge. Senior Adjunct Fellow at the Silicon Flatirons Center for Law, Technology and Entrepreneurship at the University of Colorado, and Senior Fellow at the University of Melbourne's Faculty of Law, Graduate Studies Program.

S. Derek Turner. Research Director of the media reform NGO Free Press. Lead author of *Changing Media: Public Interest Policies for the Digital Age*.

Siva Vaidhyanathan. Cultural historian and media scholar at the University of Virginia. Regularly writes for MSNBC and has written for The New York Times Magazine, Salon.com, openDemocracy.net, Columbia Journalism Review and The Nation. Author of the forthcoming book *The Googlization of Everything*. Blog: <http://www.sivavaidhyanathan.com/>

Darrell M. West. Vice president and director of Governance Studies and director of the Center for Technology Innovation at the Brookings Institution. Author of *Digital Medicine: Health Care in the Internet Era* and *Digital Government: Technology and Public Sector Performance*.

Appendix III: Sources

The Google / Verizon and FCC documents:

<http://googlepublicpolicy.blogspot.com/2010/08/joint-policy-proposal-for-open-internet.html>

A joint policy proposal for an open Internet

http://www.google.com/googleblogs/pdfs/verizon_google_legislative_framework_proposal_081010.pdf

Verizon-Google Legislative Framework Proposal

<http://www.washingtonpost.com/wp-dyn/content/article/2010/08/09/AR2010080905647.html>

From Google and Verizon, a path to an open Internet

<http://googlepublicpolicy.blogspot.com/2010/08/facts-about-our-network-neutrality.html>

Facts about our network neutrality policy proposal

http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0901/DOC-301262A1.pdf

FCC chairman Julius Genachowski statement on open internet public notice

http://www.fcc.gov/daily_releases/daily_business/2010/db0901/da-10-1667a1.pdf

Further inquiry into two under-developed issues in the open internet proceeding

On net neutrality:

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