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Editorial:

International Perspectives on Network Neutrality—

Exploring the Politics of Internet Traffic Management and

Policy Implications for Canada and the U.S.

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The idea of "network neutrality" has become one of the most prominent policy concerns for lawmakers, telecommunications industries, media reformers, and communication scholars. In short, network neutrality is the idea that Internet service providers (ISPs) should afford equal interconnection among content providers and users of the network, so that those who control access to the network do not censor lawful content or enact discriminatory routing of content. The outcome of this debate has significant implications for the participatory-democratic nature of the Internet, the free flow of information and speech, user's privacy rights, Internet governance, efficacy of independent media, and political participation, as well as the continued vitality of libraries and educational systems. Given these stakes, network neutrality may well be ***the*** telecommunication policy issue of the 21st Century.

In North America, battles over network neutrality have already emerged in Canada and the United States (U.S.). While mobilization for network neutrality has been slower in Canada than in the U.S., in the last year alone activism has taken many forms, including online and offline actions and politicizing a range of citizens and policy-makers. Canada's media regulator, the Canadian Radio-television Telecommunications Commission (CRTC), issued a call for network neutrality and held a public hearing on issues related to traffic management in July 2009. Proponents of network neutrality in the U.S. scored their biggest victory to date when President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009, which included language supporting neutrality principles as part of its Broadband Technology Opportunities Program. Nevertheless, any subsequent legislation or agency action seeking comprehensive enforcement of network neutrality will surely face intense opposition. This was

the case when Comcast Corporation defeated the Federal Communications Commission (FCC) in U.S. federal court in a dispute over the agency's authority to regulate Internet traffic (see *Comcast Corp. v. FCC*, 2010).

This issue of *Global Media Journal -- Canadian Edition* spotlights international perspectives on network neutrality focusing on the politics, policies and practices of network management. Our issue begins with John Harris Stevenson and Andrew Clement's article, "Regulatory Lessons for Internet Traffic Management from Japan, the European Union, and the United States: Toward Equity, Neutrality and Transparency". Their comparative public policy analysis identified several lessons from network management practices in Japan, the European Union (EU) and the U.S., and propounds a policy for Canada that would embrace competition, limited network management by ISPs, and require full disclosure of Internet traffic management. Although Stevenson and Clement's policy recommendations are focused on Canada, we would suggest that these lessons be heeded elsewhere in North America, especially the U.S., as the issue of network management practices has been wrapped in a heated political discourse about government intervention into private enterprise.

Of course, conversations about network neutrality have not been confined to policy experts, but have become political debates affecting public understanding of the nature of the problem, and the range of appropriate solutions. This is addressed in the second article of our special issue by Christine Quail and Christine Larabie, "Network Neutrality: Media Discourses and Public Perception", which shows that media coverage of network neutrality is lacking in quantity and quality. Quail and Larabie suggest that such marginal coverage does not adequately inform or engage the public, and the authors call for more education on an issue that has significant implications for public life. However, the question remains: Who will serve that need? The report by Quail and Larabie indicates that journalists have not adequately fulfilled that role. In the U.S., the very agency tasked with protecting the public interest, the FCC, was roundly chastised for its closed meetings with the largest ISPs on the issue of network neutrality (see Tady, 2010, June 29). Even worse, four of the agency's five commissioners failed to attend a *public* hearing in Chicago two weeks later to consider Comcast's proposed take over of NBC Universal (see McAvoy, 2010, July 8). Comcast has been at the center of the network neutrality debate in the U.S. after it blocked user access to BitTorrent's peer-to-peer file sharing service (see *Comcast Corp v. FCC*, 2010). Nonetheless, the FCC's noticeable absence from a hearing that is, at least ostensibly, for the purpose of taking *public* input speaks volumes about the public's role in this political battle.

And, our third article, by Fenwick McKelvey takes on yet another political dimension of the network neutrality debate in **"**Ends and Ways: The Algorithmic Politics of Network Neutrality". Based on the Canadian system of private and public networks, McKelvey shows the conflicts that arose when commercial ISPs began managing traffic on their network using sophisticated routing algorithms. While the parties involved called for legislation to solve the problem, McKelvey shows that the inherent conflict between Quality of Service (QoS) and End-to-End (E2E) algorithms is unworkable over the long term. Rather, as a political matter, McKelvey suggests that network neutrality advocates embrace a "normative concept" of what algorithms are supposed to do, such as preserving the participatory democratic culture of the Internet, which has fostered social media, citizen journalism, and a creative commons; each of which depends upon an E2E architecture.

In sum, we can take three important points away from the articles published here to consider as part of the network neutrality debates taking place in Canada and the U.S.: (1) the

need for transparency in network management practices; (2) public involvement in network management policymaking; and (3) critical attention paid to the participatory democratic nature of E2E algorithms. We elaborate on these points below.

Network Neutrality in Canada: Towards Consumer Transparency

> Under the heading of "net neutrality" lies a whole range of questions affecting consumers and service providers. Fundamental issues of technology, economics, competition, access and freedom of speech are all involved . . . it is one of the polarizing issues of the day. It will have to be addressed and debated by all of us.
>
> (CRTC, 2008)

So declared Konrad von Finckenstein, Chairman of the CRTC, with respect to the increasingly vexed debates over net neutrality, at the 2008 Canadian Telecom Summit, an annual event bringing together the top telecom firms and regulators in the country to discuss emergent technical and policy issues in telecommunications. Since von Finckenstein issued this comment, the CRTC held a public hearing in July 2009 to discuss traffic shaping practices of ISPs, released a decision on the hearings in October 2009, and has since issued a new ruling applying net neutrality to wireless Internet providers. In many ways, Canada appears to be a global leader in calling for transparent policies and traffic management practices by ISPs; but their decision is not without its critics.

The CRTC traffic shaping hearings generated much activity amongst Canadians. In their final decision released in October 2009, the Commission cited "437 initial comments, 35 reply comments, and 34 final replies from parties (companies and advocacy groups) and individuals" with an online campaign resulting "in over 13,000 email submissions to the Commission from individuals". Twenty-six presentations were heard at the July oral hearing, and the CRTC's online consultation resulted in 1,400 additional individual comments (CRTC, October 2009: para. 10).

In addition, public interest groups and the independent media also promoted net neutrality and urged citizens to be cognizant of the issues. OpenMedia.ca (the recently branded incarnation of the Campaign for Democratic Media) released a short, snappy video created by Matt Thompson, "Canada's Internet Explained", which described the necessity for net neutrality for Canadian content, businesses and entrepreneurs, community groups and activists; as of the date of this writing the video has been downloaded more than 8,000 times on YouTube alone (Thompson, 2009). A *Rabble* article asked whether net neutrality was *the* most important free speech issue of the information age (Allen, 2009), with editor Kim Elliott commenting that "the free and open Internet has served as a crucial medium for gay rights and other progressive movements to reach out to communities beyond urban centres and across borders" (Krajnc, 2009). OpenMedia.ca and SaveOurNet set up town halls in Ottawa, Toronto and Vancouver to discuss the issues, which were also live-streamed.

The federal opposition parties called for net neutrality legislation. The New Democratic Party took the lead by introducing a private member's bill for net neutrality principles in Parliament (NDP, 2008) and a year later reintroduced into Parliament Bill C-398, An Act to amend the *Telecommunications Act* (Internet neutrality), which adds a new section to the *Act* that

defines net neutrality and lists several prohibitions for ISPs (Canada, House of Commons, 2009). The Liberal party also released a statement in support of net neutrality (Liberal Party, 2009).

In October 2009 the CRTC issued their decision on traffic management practices with four considerations underlying their determination: transparency, innovation, clarity, and competitive neutrality. These were created, the Commission said, to strike a balance between maintaining open Internet innovation and the rights of carriers to manage the generated traffic (CRTC, October 2009). But as Christine Stover points out in her comparative policy review of network neutrality in this special issue, the CRTC's decision has received some criticisms from public interest groups concerned that mandating compliance from ISPs of their traffic shaping policies has not been sufficiently achieved by many of them, and that because the regime is complaints-driven, the onus remains on consumers to hold ISPs accountable.

In July 2010 the Canadian Internet Policy and Public Interest Law Clinic (CIPPIC), acting with OpenMedia.ca, alongside several ISPs, the Canadian Wireless Telecommunications Association (CWTA) and the Public Interest Advocacy Centre, was successful in a request to the CRTC that the Internet traffic management policies on net neutrality be applied as well to the mobile Internet (CRTC, 2010). According to CIPPIC, these new rules stipulate that

> service providers will only be permitted to discriminate by throttling particular mobile data services where there is a problem that cannot be addressed by without throttling, and where the chosen method of throttling is narrowly tailored to the problem and minimally intrusive of user experiences.
>
> (CIPPIC, 2010)

As such, these rules are a progressive step of which other states could take heed.

Network Neutrality in the United States: Free Markets v. Free Speech

In the U.S., the Comcast case is a focal point for the lessons learned here about the value of transparency in network management, public involvement in the policymaking process, and E2E algorithms. In the wake of the *Comcast v. FCC* (2010) court decision, FCC Chairman Julius Genachowski (2010, May 6) suggested a "third way" to provide network neutrality in the U.S., which would reclassify the "transport component" of broadband services as "telecommunication services" under Title II of the Communications Act. Currently, broadband ISPs are considered "information services" and are not subject to common carrier expectations that are implicit under Title II. Although the proposal is novel, it would not fully address the concerns presented here. Moreover, any way the FCC approaches network neutrality at this moment in the battle will surely result in another court fight.

The FCC is embattled on two fronts. On one side, the telecommunications industry has contended that any effort by the agency to regulate Internet traffic management is unlawful interference with free enterprise. That position is now entrenched by the *Comcast* decision. Paradoxically, on another front, the FCC is taking fire for seemingly turning a deaf ear to public concerns about Comcast's network management practices when four of its five commissioners skipped a hearing on the matter in Chicago where consumer anxiety has run high. Any way the FCC goes, its decision will ultimately be challenged in court, and as the legal process plays out, ISPs may further a QoS regime in practice. Rather, than leaving the matter of network neutrality to the FCC to decide, legislative action is needed for more than one reason. As the *Comcast* court

implied, the FCC needs a clearer mandate to regulate the Internet medium in this way. Also, legislative action is more likely to further engage journalists and citizens alike, as a massive public relations battle will likely encompass any sustained legislative debate. More importantly, the public should be further engaged in this debate.

Taking the "third way", as FCC Chairman Genachowski has proposed, would involve an uneven regulatory terrain that has already come into question by the courts. Even more troubling, the FCC in its proposal is limiting its ability to protect the public interest and consumer rights. However, an omnibus broadband law could tie together many other issues that are vital to consumers, such as privacy, ownership consolidation (in which ISPs control both content and conduit), and of course the allocation of speech rights over the Internet medium.

What is also lost in the FCC's "third way" approach is the aggrandizement of corporate power and speech rights as seen through ownership consolidation and QoS network management. Although disparate philosophies were espoused in the FCC's proposed limited reclassification of broadband service providers as common carriers and the court decision in *Comcast v. FCC*, together they point to need for statutory clarity about how broadband networks should be viewed under the law, and now some in Congress have called for a rewrite of the Communications Act to address the problem (see Gross, 2010, May 24).

Of course, the last time such a rewrite of communications law occurred in the U.S. was the 1996 Telecommunications Act, which focused primarily on stimulating competition in the media industries through free market economics and the deregulation of ownership rules. The law did little to articulate a comprehensive jurisprudential philosophy for broadband Internet that balances the concerns of the telecommunications industry with the public it purports to serve.

To avoid a similar pitfall, the speech freedoms of the public who use and depend on broadband services must be given equal platform in any rewrite of U.S. communications law. Without government mandated network neutrality provisions, consumer Internet access is diminished when service providers censor content or enact discriminatory routing of content. As the telecommunication industries become increasingly concentrated there is more economic incentive for ISPs to act as gatekeepers, and thereby constrain users' speech freedoms.

In view of this, a rewrite of U.S. telecommunication law should comprehensively address broadband Internet issues while grounded in First Amendment jurisprudence that balances speech rights between broadband service providers and the public. The Supreme Court has historically fashioned medium-specific rationales for the regulation of media by affording rights according to the unique aspects of the medium; and due to the participatory-democratic nature of broadband Internet a legal framework that protects the medium from unbridled corporate power over information and discourse is in order (see Blevins & Barrow, 2009).

Additionally, network neutrality principles would be consistent with key parts of the Communications Decency Act (CDA) and the Digital Millennium Copyright Act (DMCA) that have been broadly and consistently enforced by the courts. Section 230 of the CDA protects ISPs from libel suits for comments posted by users (unless the ISP enacts significant editorial control over users comments). Similarly, the DMCA exempts ISPs from copyright liability for simply transmitting information posted by users (unless ISPs are notified about infringing activity). In both cases, the law tends to assume that ISPs are neutral networks, like common carriers, without significant editorial control over user speech. A comprehensive telecommunication law should require the same and balance free speech with corporate power.

Net Neutrality as a Moving Target

From a critical communication studies perspective, writing in the academic arena about policy issues can be vexatious, given that policy moments, legislation, and activism can happen quicker than the peer-review process will allow. Writing about net neutrality can especially be a moving target. Christine Stover's policy scan of network neutrality from a global perspective thus provides a very useful compendium of thematic perspectives. Looking at legal regulation, transparency, non-neutrality, and government control, Stover outlines and elucidates a range of positions from North America, Europe, Asia, and Australia.

Several book reviews accompany this special issue. Gregory Taylor reviews Chris Marsden's book on net neutrality, which outlines his balanced approach that argues for increasing competitive choice for consumers while concomitantly preserving the "fundamental right for citizens to access the public Internet" (2010: 19), along with his argument for a "light touch" approach to regulation which he calls a co-regulatory approach. Co-regulation includes diverse stakeholders such as government, consumers, industry, and non-profits and according to Marsden, is "clearly a finely balanced concept, a middle way between state regulation and 'pure' industry self-regulation", reflecting a "more complex dynamic interaction of state and market, a break with more stable previous arrangements" (163).

Heather Polinsky reviews William Lehr and Lorenzo Maria Pupillo's book on Internet economics and policy, which specifically interrogates the policy, development, privacy, and economic challenges. And, Virginie Mesana's review of two books—one by Paul Mathias and the other by Pierre Mounier, deal with the politics of Internet infrastructure.

Returning to the central themes that emerge from this special issue, we call on academics to become more cognizant of the complex technical issues that net neutrality engenders, to participate and intervene in policymaking regarding network neutrality, and to promote, in our pedagogy and practices, the role of network neutrality for our sustained democratic mediascape.

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