



Neutering the net

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By Thomas W. Hazlett

[Richard A. Epstein: What we need is regulatory bed rest](#)

The legendary Vint Cerf, co-creator of the Internet Protocol (IP) standard in the 1970s, is pleading for “network neutrality.” Cerf, now Google’s chief internet evangelist, argues for government regulation to ensure that broadband subscribers can use any network application or device, without extra fees.

The fear is that cable modem and digital subscriber line (DSL) networks will forge their own content deals, and then “click block” rival websites. In 2005, a small phone company prevented its DSL customers from using independent voice-over-internet (VoIP) services, reversing course when confronted with possible regulatory sanctions. Broadband network executives, however, say that they may start charging content suppliers – say, sticking Google with a 10 cents per search fee – to reach their customers.

Hence, the horror. “The internet was designed with no gatekeepers over new content or services,” Cerf writes. “By placing intelligence at the edges rather than control in the middle of the network, the internet has created a platform for innovation.”

Net neutrality advocates embrace flat rate, all-you-can-eat internet pricing, and are willing to mandate it. Broadband networks that charge content providers undermine the “open architecture” that Stanford law professor Lawrence Lessig claims as the internet’s “[basic design](#).” Both Cerf and Lessig argue that government regulation is needed to save the internet as we know it.

Wrong prognosis, faulty diagnosis. The network economy has evolved through unregulated market transactions. Internet backbone carriers, for instance, exercise complete pricing freedom. Highly preferential treatment results, as the top backbones “peer” – charging themselves, the largest carriers, nothing to send traffic, while imposing hefty fees on smaller networks. This outcome yields incentives to construct larger and better facilities, improving bargaining power to obtain superior rates.

The internet is built, and grows, on the back of private property rights. Market structures that nurture innovative entrants have not been imposed by “design,” but have spontaneously emerged from “invisible hand” of self-interest.

Net neutrality is the current iteration of “open access,” the argument that cable TV operators be mandated to allow independent internet service providers (ISPs) to use their conduits, at regulated rates, to provide retail broadband service. Cerf is disappointed that regulators under both Presidents Clinton and Bush failed to enact open access. When rejecting a 1999 proposal, Federal Communications Commission Chair William Kennard said, “we don’t have a duopoly, we don’t have a monopoly, we have a no-opoly.”

That *laissez faire* cable modem policy, upheld in last June's Brand X decision by the US Supreme Court, focused on encouraging new network creation. But the government's policy on telephone company DSL service has differed. Extensive access rules were put in place in the 1990s, then relaxed following a February 2003 ruling. By September 2005, the FCC had substantially eliminated them, bringing DSL regulations into rough parity with cable modems.

The object of "open" rules is to provide consumers greater network value. The market test now reveals how consumers judge the results. Unregulated cable modems sprinted to a commanding lead among broadband subscribers, dominating regulated DSL networks nearly two-to-one, 1999 through year-end 2002. When DSL network access obligations were reduced in early 2003, however, the trend quickly switched. By 2004, new DSL subscribers pulled even with new cable modem customers. By 2005, DSL subscriber additions surged ahead. Overall, broadband penetration in the US increased from trend. The [empirical evidence](#) demonstrates that regulating open access failed to improve broadband networks.

While Google hawks "neutrality" for ISPs, its business is selling preferential access to advertisers, and its remarkable success owes much to its privately-managed IP network. This yields users lightning-fast searches by linking Google servers with conduits excluding competitors' traffic. An upstart innovator would have to pay extra to duplicate this performance advantage, exactly the advantage that whetted Google's creative juices.

The process whereby content owners and networks tailor terms and conditions is highly productive. Take Hughes DirecWay, a satellite broadband service that blocks video streaming. The policy is designed to rationally allocate capacity among customers, as attested to by the fact that DirecWay lacks market power. Rules forcing the network "open" its network would pre-empt economies and thwart competition.

Policies to invigorate such rivalry are the answer. There are crucial steps to take, such as unplugging local government franchise barriers and the asphyxiating constraints applied by the spectrum allocation regime. A recent [statement](#) on US broadband policy by 25 policy economists (including myself) states the pro-competitive case.

Cerf is aware that the alternative path, crafting regulations, is a tall order. He takes it as a challenge to find "language that would give us an objective measure of neutrality." But no single policy mandate, articulate or clumsy, would capture the efficiencies that emerge from the trials and errors of the market. An irresistible irony is that cable TV systems are being hammered for flat, all-you-can-eat video pricing, with regulators threatening to impose a la carte menus, customers paying for each network separately. But flat rate pricing, politically popular in some instances and controversial in others, has thus far proven highly efficient, and has been widely adopted for both basic cable television and broadband access.

Allowing continued market-based evolution will not end the internet as we know it. Commencing to impose regulated solutions just might.

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