



As I See It: Permissionless Neutrality

By Victor Rozek

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It happened to radio, it happened to television, and there is no reason to believe it won't happen to the Internet. Communication media--at least in their infancy--have always been idealized for their potential to serve our better angels. But in the end, the hopes of visionaries are reduced to a single dominant construct: entertainment. And the more successful the medium, the more vacuous the entertainment. Once the potential for revenue is evident, the medium quickly becomes co-opted, and the greatest good for the greatest number devolves to the greatest profit for the fewest number.

For all its flaws, the Internet has been the embodiment of Jefferson's dictum that "all men are created equal." Their content may not be equal, their inventiveness and creativity may not be equal, but their treatment as a user of the Internet is uniform. The rules governing the use of the Internet's infrastructure are, for the most part, equally applied. Preferential status was never intended to be a purchasable commodity.

But whether for financial or ideological reasons, many users long to be first among equals, and telecommunications companies see untapped opportunity in that longing. As early as 2005, AT&T proposed charging Yahoo! and Google an extra tithe to ensure reliable access to their users. Stripped of economic justifications, it was essentially a plan to charge protection money. Pay us, or bad things may happen to your business.

The fight was on, and the process of co-opting the Internet began with a furious lobbying effort during which more than a few dollars changed hands. But in an era when regulatory agencies almost never side with populist causes, the unthinkable happened.

In 2010, the concept of "net neutrality," arguably the foundational principle of the Internet, was uncharacteristically embraced by the Federal Communications Commission--an agency that never met a monopoly it didn't like. The proponents of neutrality who had been holding their collective breaths, exhaled. But their relief was premature. Fighting to protect individual freedoms is like fighting to save the environment: victories are always temporary, while defeats tend to be permanent. No matter how noble the cause, there is always someone eager to secure a meal for themselves at the expense of destroying the food supply for others. And so, net neutrality is being challenged in the DC Circuit Court, and observers who attended the hearing fear it did not go well.

Companies that control the infrastructure of the web want the right to discriminate, and to be paid for doing so. Verizon, which sued the FCC to void its 2010 ruling, as well as AT&T and Comcast, would like to negotiate preferential deals with deep-pocket clients. For a price, they will ensure that selected offerings have the highest visibility and the broadest bandwidth. It's a marketing strategy that proposes to sell not just access, but favored access. From a holistic perspective, it makes no sense. Having those responsible for the infrastructure of the Internet delimit its content, is akin to the vascular system choosing which organs will receive an adequate supply of blood. And since the Internet now carries the life-blood of the nation, the lesser organs have much reason for concern.

At stake, claim proponents of neutrality, is the concept of permissionless innovation. Presently, anyone can create, innovate, share their thoughts, or offer their services over existing networks, using open standards, common communications protocols, and sharable application development tools without paying tribute to an assortment of Caesars.

The benefits of a level playing field have increased what Adam Thierer calls our "tolerance for unabated innovation." But here's where it gets messy. There are no purists. Telecommunications companies aren't the only ones who wish to bend the Internet to their will. While no one wants to preemptively restrict innovation, almost everyone would like to regulate some portions of the Internet they dislike.

Thierer, who spent time thinking deep thoughts at the Cato Institute and the Heritage Foundation, is now a research fellow for technology policy at the Mercatus Center at George Mason. He champions a laissez faire option, but is realistic about the contradictions inherent in absolutism. "The same crowd that preaches about how essential permissionless innovation is when it comes to overly restrictive copyright laws," he says, "is often among the first to advocate 'permissioned' regulations for online data collection and advertising practices." While "many conservatives who demand permissionless innovation on the economic infrastructure front are quick to call for preemptive content controls to restrict objectionable online content."

If neutrality is all about freedom, the question then becomes whose freedom? Should companies be free to create a tiered system based on market demand and ability to pay, or should all users enjoy the freedoms afforded by equal treatment? Should we have the freedom to use copyrighted materials, or the freedom not to have our work ripped-off? Few would debate the necessity for some restrictions when the online safety of children is involved. Likewise, digital privacy would be (and perhaps already is) nothing more than an oxymoron if left to the vicissitudes of a permissionless Internet. Seeking permission after the fact is not permission at all.

Thierer is willing to embrace the risks on behalf of the rest of us. He quotes economist Friedrich August Hayek: "Humiliating to human pride as it may be, we must recognize that the advance and even preservation of civilization are dependent upon a maximum of opportunity for accidents to happen." Great, it should be noted, however, that Hayek was born in 1899. Unrestrained risk was all well and good when "accidents" were local and produced minimal impacts. But the Internet is global with the potential to impact the lives of hundreds of millions.

Thierer concludes that "policy should not be shaped by hypothetical fears and worst-case 'boogeyman' scenarios." True, as long as the worst-case scenarios can be walked back. But if there is a possibility that the consequences can become unalterable, it is both foolish and arrogant to presume the worst can't happen--just ask the Japanese how they feel about Fukushima. Prudence is why people wear two parachutes when they jump out of planes.

Perhaps the worst thing that can happen to the Internet will be unleashed by the pending DC Circuit Court decision. Regardless, some restrictions are inevitable if only because it doesn't seem to be in our nature to leave good things alone. The only question is: who decides? If the decision goes against net neutrality, it will be a risk the court imposes on everyone. Either way, the decision may eventually be challenged in the Supreme Court where progressive causes go to die.

Jefferson would not be pleased. One wonders if he were alive today would he have concluded that among our unalienable rights are life, liberty, and a broadband connection.