

# Netflix and the trap of Title II

Fred Campbell 12:07 a.m. EST January 9, 2015



(Photo: Paul Sakuma / AP)

President Barack Obama's post-election left turn has led him to join a handful of online activists and tech company special interests seeking to regulate the Internet as a public utility style service.

This has roiled what was already a contentious debate over Internet regulation, and could do serious damage to the web. The "Title II" approach advocates are pushing isn't needed to protect the open Internet. The courts have said the FCC has the power to prevent blocking and discriminatory fast lanes without resorting to Title II.

Ironically, Title II actually permits discrimination in pricing and services, which could result in the very fast lanes its own supporters decry while choking the Internet's growth with unnecessary price and service regulations that would kill deployment of faster, more reliable networks.

But these weaknesses pale in comparison to a far more serious problem with Title II – its destabilizing impact on the critical "back office" systems that link networks and services together and make the Internet work, known as "interconnection." Interconnection sets the rules by which vast troves of data – everything from email to music and movies – are passed from one backbone network to the next on their way to the "last mile" connections to individual subscriber homes.

It's widely acknowledged that this system works well today. It's a free and efficient market in which different backbone operators and other companies work out deals to cover the cost of moving data across the Internet's vast backbone. Sometimes this involves direct connections between large networks, such as those run by Comcast or AT&T; other times it involves "middleman" companies that specialize in carrying data for a price. Competition in this market is fierce, and as technology has galloped forward, prices have fallen 99 percent.

The specter of utility style rules is nevertheless giving companies that send a lot of data – the "edge providers" who offer applications, movies and videos, and services online – a whole new set of games they can play to shift their costs of doing business with backbone operators onto consumers.

For a better idea of how these edge providers can game the system and leave consumers holding the bag, take the case of Netflix. In order to lower its traffic costs, Netflix recently cut deals to eliminate the middlemen and connect its network directly to Comcast, Verizon and other Internet service providers.

Netflix then cynically asked the government to use Title II as a hammer to force backbone operators to eliminate Netflix's backbone payments altogether – even the reduced payments it had just negotiated. Why on Earth would regulators agree to that? Because Netflix claimed the Internet providers had "throttled" (or slowed down) its movies to pressure it into interconnection agreements.

It's a captivating story that's been repeated online for months – and it's a lie. Netflix's own CFO has acknowledged "there was no throttling going on," and a recent MIT study proved it.

The study found that Netflix's traffic slowed down because Netflix chose to route it through a middleman called Cogent whose networks were too saturated to handle the load. Cogent admits the crush of traffic was so bad that it delayed Netflix's traffic in order to ensure timely delivery of other customers' data. Ironically, as the net neutrality debate focused on the risk of ISPs creating "slow lanes" – which no ISP ever has – it turns out that Netflix's partner Cogent had created a secret slow lane of its own.

Cogent even manipulated data from supposedly independent speed tests to shift the blame for this slowdown away from itself and Netflix and onto the ISPs – a very convenient storyline for Netflix as it worked to convince unhappy customers that ISPs were to blame. Netflix and Cogent also cited this bogus record to pressure regulators into considering Title II. It was a disgraceful, but clever scam that was difficult to debunk.

Netflix was particularly clever in the way it has conflated interconnection with net neutrality. The world of interconnection on the Internet's backbone has nothing to do with the open Internet. Interconnection deals with traffic on commercial backbone networks, while open Internet or "net neutrality" rules protect consumers as traffic moves over "last mile" connections to their homes.

The heavy artillery of Title II threatens to destroy the healthy competition among backbone operators. That might create an opening for regulatory profiteers like Netflix, but it will leave the rest of us mourning the loss of the thriving Internet we were somehow hoodwinked into giving up.

Fred Campbell is director of the Center for Boundless Innovation in Technology and served as chief of the FCC Wireless Telecommunications Bureau.

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