

NOCALL *News*

Northern California Association of Law Libraries

A Chapter of the American Association of Law Libraries

March-April 2014

Volume 34, Issue 4

President's Message

Happy Spring, everyone! Hope everyone is enjoying this lovely weather. The March & early April showers definitely bring out flowers in the Sierra foothills, which I was lucky enough to visit this past weekend at the [North Mountain Ecological Preserve](#) near Oroville. Fabulous! On to the business at hand.

First, a huge thank you and hearty congratulations go out to Vice President, Michele Finerty, and her Spring Institute Committee members for an excellent Spring Institute this past March 21/22 in San Francisco. The theme was Navigating Rough Seas: Charting a Course for Success. There was a higher than expected turn-out at this continuing education event, which has gained high marks in the evaluations by both attendees and vendors. I met a number of first-time NOCALL Spring Institute attendees, and I hope everyone felt welcome! The vendors consistently tell us that the NOCALL SI is one of their favorite events, and they especially enjoy being located in the meeting room to take advantage of the educational programs.

And what presentations we enjoyed! Kudos to the Committee for hosting Karen Coyle, who encouraged us to "Think Different" about digital library practices, metadata and linked data. NOCALL has invited Karen to speak to us for a number of years, and we're delighted she could finally fit us into her busy speaking schedule. I kept hearing from attendees that the programs really flowed well together, and they did. Jen King spoke about Social Media Privacy and the Law, Laurel Rosenthal informed us about how laws are created and the interest groups who write them, and Titi Nguyen discussed the role of the California AG's Privacy Enforcement and Protection Unit. And that was just on Friday!

Saturday's programs flowed equally well and included a number of area law librarians, who provided good information on cost-recovery and current law library management issues. Please see the [Spring Institute](#) information on our website for more details. Plus stay tuned, as Michele was awarded an AALL/Bloomberg CPE grant which enabled this event to be videotaped. It will soon be loaded on the AALL2Go website. I saw that the round table discussions on Friday concerning Family Health Care issues were very well attended. Thanks to our Networking Committee for organizing this program, as well as the Networking event on Friday evening at the Library Bar at the Hotel Rex (fun!). Kudos to all concerned and thanks to those who attended. Your presence, enthusiasm and interest make it all worthwhile.

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Secondly, a big shout-out to our incoming NOCALL Board members recently elected: Tara Crabtree is our next Vice-President/President Elect. Tara is the Librarian at the California Court of Appeals, 5th District, Law Library in Fresno. Rachel Smith is the incoming Treasurer. Rachel is the Electronic Services Librarian at the University of California at Davis Law Library. Two incoming Board members are: Hadi Amjadi, who is the Systems Librarian at the Golden Gate School of Law Library, and Sherry Takacs, who is the Senior Reference Librarian at Skadden, Arps, et. al., LLP in Palo Alto. Current Secretary Jen Fell (Just Married!), Technical Services Librarian at Sacramento County Public Law Library, continues on the Board as Secretary.

NOCALL's industrious Education Committee Chair, Jodi Collova, along with Committee members, have done it again! Please join them for another brown bag lunch with Doug Obegi, a staff attorney with the Natural Resources Defense Council and a UC Hastings graduate. Doug will discuss the current challenges facing California's water management system, as well as potential solutions. The event is on Wednesday, April 16, from noon to 1 PM at UC Hastings in Classroom 640 in the 200 McAllister Building. The event is free for NOCALL members. Beverages and cookies will be provided. Lunch will be available for purchase in the Law Café on the 2nd floor of the building. Please RSVP via email to education@nocall.org.

NOCALL is already planning for the upcoming annual [AALL Conference](#) to be held this year in San Antonio, TX, July 12 – 15, 2014. This year's theme is Beyond the Boundaries and looks like it will be another excellent continuing education event. Cathy Hardy, Chair of NOCALL's Grants Committee, is accepting [Grant applications](#) for the AALL Annual Conference. The deadline for applications is April 25th and recipients will be notified in time to meet the June 6th Advance Pricing deadline. Please fill out a Grant Application found on the [NOCALL](#)

[Grants webpage](#) and submit to CHardy at Hansonbridgett dot com.

I am currently in negotiation with the [Marine's Memorial Club](#) in San Francisco to plan for our upcoming NOCALL May Business meeting. The meeting will be held on Thursday, May 22, 2014. Save the Date! And look for more information soon. This year the NOCALL Awards Committee has selected two very dedicated NOCALL volunteers to receive awards: Diane Rodriguez, Librarian at Hassard Bonnington, is receiving the NOCALL Professional Achievement Award, and Vice President Michele Finerty, Assistant Director for Technical Services at McGeorge School of Law Library, is receiving the NOCALL Advocacy Award. Congratulations to Diane and Michele, who have served not just NOCALL, but the law library and legal communities at large. Well done! I look forward to seeing many NOCALL members at this meeting, where we traditionally have a "changing of the guard." The new Board will be inducted at this meeting, and the gavel and San Francisco trolley bell will be passed on to incoming Board President, Michele Finerty.

Spring is also the time of year for NOCALL members to consider volunteering on Committees next year. NOCALL's "year" runs from June through May, so there's no time like the present to have a look at the [NOCALL Committees](#) and consider volunteering for next year. Incoming Board President, Michele Finerty, will soon be soliciting your interest in volunteering for NOCALL. Committee work is typically not too time consuming; it's a great way to get involved and serve NOCALL; and it provides the means of meeting and networking with other NOCALL members. If you have any questions about Committees or volunteering, please don't hesitate to contact me or Michele for more information.

Hope to see many of you soon.

Cheers,
Jean Willis
NOCALL President



MUSINGS FROM MARK

Mark Mackler
California Department of Justice
San Francisco

THE BOSTON PUBLIC LIBRARY...An old joke about libraries goes like this: A boy walks into a library and asks for a burger and fries. “Young man,” the startled librarian says, “You are in a library!” So the boy repeats his order. Only this time, he whispers. So began a recent article in the *New York Times* about the remodeling of the Boston Public Library. As Boston’s central library, the number of physical visits jumped to 1.72 million in 2013, up by almost half a million from 2012. Library usage has increased across the country for a variety of reasons: the recession, the availability of new technology, and because libraries have been reimagining themselves. According to one librarian: “When I started out in the 70’s, you would walk up to the reference desk and ask a question and I would find an answer. Today it’s the opposite. People turn to librarians to help them sift through the 10 million answers they find on the Internet. We’re more like navigators.”

WHO WAS MAJOR OWENS?...My very first AALL Annual Meeting took place in Washington, DC. Although it was years ago, I still remember the keynote address delivered by Major Owens. At the time, Mr. Owens was a member of Congress representing Brooklyn. What’s most notable about this is the fact that Congressman Owens was the only member of Congress who had a library degree. Yes, it’s true. Congressman Owens earned an MLS from Atlanta University (which later became Clark Atlanta). He worked as a librarian in Brooklyn from 1958 to the mid-1960’s when he successfully ran for the State Senate. Then, in 1982, he ran for the Congressional seat vacated by the retiring Shirley Chisholm in 1982. Congressman Owens retired from Congress in 2006. He always supported library funding, as well as

legislation that improved education and aided minorities, the poor, and the disabled. Owens was famous for saying that librarians always donated money to his campaign, but they were the only special interest group that never asked him for anything in return. As someone who has recently discovered “House of Cards” that really resonates with me.

PROFESSIONAL READING IN REVIEW

Elisabeth McKechnie and Susan Llano
U.C. Davis Law Library

“The Deep Web You Don’t Know About,” Jose Paglieri, *CNN Money*, March 10, 2014 <http://money.cnn.com/2014/03/10/technology/deep-web/index.html?iid=GM>

An article on the deep web that names names and gives URLs, allowing any librarian who really wants to dig deep into the recesses that only spies know. Yes, the deep web is now available to us ordinary-types, including links to articles about the Onion Project and Shodan, the search engine of evil.

“Their Brains on Google: How Digital Technologies are Altering the Millennial Generation’s Brain and Impacting Legal Education,” by Kari Mercer Dalton, *16 SMU Science and Technology Law Review* 409, Winter 2013

If you have ever wondered whether the current crop of law students and young lawyers seem to have shorter attention spans and minimal critical reading skills, it wasn’t your imagination. According to Prof. Dalton, the Millennial generation’s very brain patterns have been altered by their hyper-dependence on the technology of cell phones, tablets and laptops. Because of this alteration, they are physically unable to read and comprehend as well as generations before them, whose attention wasn’t cluttered by a need to constantly ‘check-in’

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to an electronic world. But there is hope. The condition can be reversed by simply setting aside the various devices, getting adequate sleep and exercise, and eating a healthy diet.

“Library Consortium Tests Interlibrary Loan of E-books,” by Jennifer Howard, *Chronicle of Higher Education*, February 17, 2014, available to subscribers at <http://chronicle.com/article/Library-Consortium-Tests/144743/>

This article describes a pilot project developed by Texas Tech University and the University of Hawaii-Manoa that is experimenting with interlibrary loans of e-books. The project is called Occam’s Reader (the phrase “occam’s razor” refers to the scientific and philosophical concept that the simplest of competing theories be preferred to the more complex). The developers tried to make the software as straightforward and as simple as possible. Springer books is participating in this pilot project that is set to begin in March 2014.

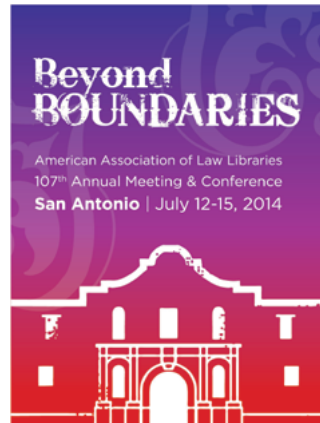
“Textual Citations Make Legal Writing Onerous for Lawyers and Nonlawyers Alike,”

by Bryan A. Garner, *ABA Journal*, February 2014, available at http://www.abajournal.com/magazine/article/textual_citations_make_legal_writing_onerous_for_lawyers_and_nonlawyers/

Bryan Garner writes a persuasive essay on the advantages of eliminating textual citations and instead putting citations into footnotes. He has several reasons why he believes this to be a good idea, such as shorter, clearer paragraphs and less energy spent by the reader trying to make sense of paragraphs with numerous imbedded citations. His chief detractors have been Judge Richard Posner and Justice Scalia. Justice Scalia claimed that having footnotes would “force eyes to bounce repeatedly from text to footnote.” But the author claims that having to stop and start within the text to skip over the citations “saps the reader’s energy and encourages a less focused frame of mind.” He may have an uphill battle convincing others to change this long-standing tradition.

“Ithika Study Shows Shifting Priorities Among Academic Librarians,” by Ian Chant, *Library Journal*, March 14, 2014, available at <http://lj.libraryjournal.com/2014/03/academic-libraries/ithaka-study-shows-shifting-priorities-among-academic-librarians/>

Academic research nonprofit Ithika released its latest survey of academic library leaders, the first follow-up since 2010. The study shows shifts in priorities by library deans and directors from faculty research support to information literacy training for students. See the entire study at http://www.sr.ithaka.org/sites/default/files/reports/SR_LibraryReport_20140310_0.pdf.



REGISTRATION OPEN FOR THE 2014 AALL ANNUAL MEETING

Registration is open for the 107th Annual Meeting and Conference in San Antonio! Did you know that deeply discounted registration

rates are available for students and retirees, too? Also, spread the word to your nonmember colleagues: Nonmember Conference Registration packages include a complimentary one-year AALL membership. By joining us in San Antonio, they'll be joining AALL!

Check out the fantastic lineup of educational opportunities - including the keynote address by Andrew Keen - and start building your schedule for San Antonio. Stay tuned for more details about the return of the wildly popular Monday Morning Recharge, as well as programming developed in collaboration with related partner associations. And we want to hear from you, too! Calls for hot topics, posters sessions, and coffee talks are now open.



Spotlight on...

Tina Dumas

Who or what has had the greatest impact on your law librarian career?

Well, it's definitely not a what, but a who. To be more precise, it's the many people who have mentored me, mostly in an informal way, and the NOCALL members who welcomed me into the fold from far away Washington, DC when I first moved here in 1996. I've been fortunate to work with amazing, smart, efficient, clever, and talented Librarians throughout my career, and they (you?) inspire me and motivate me to be fabulous every day!

What do you see as the biggest challenge facing law libraries, law librarianship and/or legal publishing today?

The shrinking legal profession. The recession caused big corporations to tighten their belts, which also caused them to use fewer outside law firms and rely more on internal counsel. The law firms are cutting staff and lawyers, which means that law school graduates are less likely to get a job at a Big Law Firm (assuming that's what they want), and are less able to repay student loans. Fewer students are applying to law school, which causes the schools to tighten their belts, too, affecting law library funding. And of course, the courts are struggling for funding. Fewer lawsuits are being filed because corporations don't want to spend money on costly litigation, and filing fees are down, which of course fund our public law libraries.

See "Growth is Dead: Now What?" <http://www.adamsmithesq.com/2012/09/growth-is-dead-part-i>

NLJ ranking of Go-To Law Schools:

<http://www.nationallawjournal.com/id=1202543436520/THE-GO-TO-LAW-SCHOOLS?slreturn=20140128194814>

If you were not working as a law librarian, what would you most likely be doing?

I've fantasized about being the Librarian for America's Test Kitchen. I think that would be fascinating. But I would have to do it remotely, since I wouldn't be able to handle another Massachusetts winter.

What would people be most surprised to learn about you?

I think many people already know this, but I often make new acquaintances guess what instrument I played in high school marching band. They usually guess flute or clarinet. Nope, I rocked the French horn!

What was the last book you read that you really enjoyed and why?

Thud! by Terry Pratchett. I'm reading it right now, actually. I love sarcastic, British humor, and Terry Pratchett delivers. He writes fantasy parodies. If you like the Douglas Adams' Hitchhiker series, you'll probably like Terry Pratchett's work, too.

Some repeating characters to give you the flavor:

THE LIBRARIAN ... It's the primary function of the Librarian of Unseen University (for wizards) to keep people from using the books, lest they wear out from all that reading. It also happens



to be a primate function, given the fact that he’s also a 300-lb. orangutan (transformed by a magic spell, but he prefers it so much he refuses to be re-transformed). Don’t ever call him a monkey. Ever.

DEATH ... An obvious sort of fellow: tall, thin (skeletal, as a matter of fact), and ALWAYS SPEAKS IN CAPITAL LETTERS. Generally shows up when you’re dead, or just when he thinks you ought to be. Not a bad chap when you get to know him (and sooner or later, everyone gets to know him).

GYTHA “NANNY” OGG ... The broad-minded, understanding, and grandmotherly matriarch of a somewhat extensive family, with fifteen children and countless grandchildren. She’s had many husbands (and was married to three of them). Very knowledgeable on matters of the heart and associated organs. Likes a drink. Likes another drink. Likes a third drink. Make that a double, will you? She is the second member of the coven.

**TECH TALK:
“NET NEUTRALITY” DEVELOPMENTS
by Walt Cook**

You may have read about recent changes afoot regarding the FCC’s efforts to re-impose “net neutrality” rules. All three branches of the Federal government as well as major companies (including Comcast, AT&T, Verizon, and Netflix) are playing parts in the unfolding drama. The purpose of this article is to provide a concise summary of these developments.

AALL’s Position on “Net Neutrality”

“Net neutrality” (or, as the FCC prefers to call it, an “Open Internet,”) “compels broadband providers to treat all Internet traffic the same regardless of source.”¹ There are various aspects

to “net neutrality,” but at bottom is whether Internet Service Providers (ISPs) be allowed to grant certain users preferential Internet access, and whether ISPs should be allowed to charge all customers, big and small alike, the same amount of money, regardless of how much bandwidth they consume. Advocates in favor of net neutrality want the FCC to force ISPs (especially large ones like AT&T, Verizon, Comcast, and Time Warner) to grant equal access to the Web, and to not charge different rates based on the size of the content (such as video) being sent over the Internet.

Some ISPs and other opponents of net neutrality want a two-tiered system that would allow ISPs, including broadband providers, to charge a fee for faster service, arguing that “there is no such thing as a free lunch.”

AALL has been a vocal supporter of net neutrality and its preservation, and is a member of the Save the Internet Coalition and the Open Internet Coalition. AALL maintains that net neutrality is important to law librarians because it protects the unique, open nature of the internet, and promotes innovation, competition, and intellectual freedom. The AALL’s February 2014 *Washington E-Bulletin* states:

AALL strongly supports the principle of net neutrality, which ensures that all Internet traffic is treated equally. Without net neutrality, commercial Internet service providers may charge different fees for content and may tamper with the speed at which you can access certain services. If that happens, law library users may not be able to dependably access the online legal information or research materials they need. A lack of net neutrality threatens law libraries’ ability to provide unfettered access to the Internet and impedes the free flow of information, particularly if libraries cannot afford imposed fees.

1. *Verizon v. FCC*, 740 F.3rd 623 (D.C. Cir. 2014).



Governmental Developments

The FCC's Statutory Authority to Regulate Internet Traffic

The FCC's statutory authority to regulate certain aspects of the Internet is the central issue being sorted out by the FCC, Congress, and the Federal courts. In 2005, the U.S. Supreme Court confirmed that the Federal Communications Commission had the statutory authority to issue a 2002 ruling which classifies cable modem service (*i.e.*, cable television Internet service) as an interstate "information service" under Title I of the Communications Act of 1934 (the "1934 Act"), rather than a "common carrier" provider under Title II of the 1934 Act.² "Common carriers" are subject to more rigorous anti-discrimination, interconnection, and access requirements under Title II of the 1934 Act than "information service" providers under Title I of the 1934 Act. In a separate action, the FCC extended the same "information service" classification to telephone company Internet services (*i.e.*, wireless broadband Internet access and DSL).

In 2008, the FCC ruled that Comcast Corp. violated the FCC's 2002 rule when it selectively blocked peer-to-peer connections in its attempt to manage its Internet traffic. Comcast appealed this ruling to the U. S. Court of Appeals for the District of Columbia, arguing that the FCC lacked statutory authority to impose its 2002 rule in such a case. The FCC argued that it derived its statutory authority from the "ancillary authority" granted to it under Title I of the 1934 Act. The appeals court disagreed, vacating the 2002 rules and ruling that the FCC's exercise of such "ancillary authority" must be linked to specific "statutorily mandated responsibility," which did not exist in this case.³

In response to the *Comcast* ruling, on December 21, 2010, the FCC adopted an "Open Internet Order" establishing rules to govern the network

2. *National Cable & Telecommunications Association v. Brand X Internet Service*, 545 U.S. 967 (2005).

3. *Comcast Corporation v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

management practices of broadband Internet access providers.⁴ In adopting its Open Internet Order, and in response to the appellate court ruling requiring that such regulation be grounded in a specific statutory mandate, the FCC claimed that Section 706 of the 1996 Telecommunications Act provides such statutory authority. Section 706 requires the FCC to "engage in the deployment on a reasonable and timely basis" of "advanced telecommunications capability" to all Americans. In addition, the FCC claimed that its statutory authority for the Open Internet Order derives from other provisions of the 1934 Act.

The Open Internet Order attempts to maintain "network neutrality" by establishing three rules:

- **The Transparency Rule:** Fixed and mobile broadband Internet service providers are required to publicly disclose accurate information regarding network management practices, performance, and commercial terms to both consumers and content, application, service, and device providers;
- **The No Blocking Rule:** Fixed and mobile broadband Internet service providers are both subject, to varying degrees, to no blocking requirements. Fixed providers are prohibited from blocking lawful content, applications, services, or non-harmful devices, subject to reasonable network management. Mobile providers are prohibited from blocking consumers from accessing lawful websites, subject to reasonable network management, and cannot block applications that compete with the provider's voice or video telephony services, subject to reasonable network management; and
- **The No Unreasonable Discrimination Rule:** States that "fixed broadband Internet service providers" shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management

4. *In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010).



shall not constitute unreasonable discrimination.

Soon after the Open Internet Order became effective, Verizon filed a lawsuit saying that the Open Internet Order unlawfully abridged its freedom of speech and that the FCC exceeded its statutory authority by issuing its Order. On January 14, 2014, the U.S. Court of Appeals for the District of Columbia made its ruling in *Verizon v. FCC*, vacating and remanding parts of the FCC Order. The D.C. Circuit affirmed the Commission's authority to regulate broadband Internet access service and upheld the transparency rule, but vacated the no-blocking and no unreasonable-discrimination rules as impermissible "common carrier" regulation of an "information service."

On February 19, 2014, the FCC opened a new docket, GN Docket No. 14-28, established to address how to respond to remand of the Order. In announcing the docket, FCC Chairman Thomas Wheeler said the FCC will "consider all available options... to ensure that these networks on which Internet access depends continue to provide a free and open platform for innovation and expression, and operate in the interest of all Americans." As AALL notes in its February 2014 *Washington E-Bulletin*, "more than a million people signed a petition calling on the FCC to 'reassert the agency's clear authority over our nation's communications infrastructure' by reclassifying broadband as a telecommunications service subject to the common carriage rules [of Title I of the 1934 Act]. President Obama also recently reaffirmed his support for net neutrality during a chat on Google Plus Hangout."

As a result of the *Verizon* ruling, the FCC must go back to the drawing board. Any future regulation of this nature must be based on a specific statutory mandate, and will most certainly be challenged in the courts. It remains to be seen whether the FCC will take the plunge and

reclassify broadband under the "common carrier" provisions of the 1934, after decades of not doing so; and if it does so, whether such reclassification will survive judicial scrutiny. The FCC is accepting public comments on new proposed rules and is expected to announce formal proposed rules by late spring or early summer. So far, the FCC announced on February 20 that it will be promulgating proposed rules, the statutory authority of which will continue to be derived from Section 706 of the 1996 Telecommunications Act, rather than the "common carrier" authority of the 1934 Act. On the other hand, the FCC may have no other recourse than to reclassify broadband under the "common carrier" provisions (absent Congressional legislation to grant it new powers), and hope that such reclassification will withstand judicial challenge.

The *Verizon* ruling has also prompted the introduction of opposing bills in Congress as to what should be happen during the pendency of the regulatory process. Democrats have introduced the Open Internet Preservation Act in both chambers of Congress, which would allow the FCC to revive its Open Internet Order until it can devise a policy to replace it.⁵ Rep. Marsha Blackburn (R-TN) has introduced the Internet Freedom Act, H. R. 4070, which would block the FCC from doing so. All of these bills have been referred to committee, and no further action has been taken. AALL supports the Democratic initiative and other steps to ensure net neutrality, but admits in the February 2014 *Washington E-Bulletin* that the Democratic initiatives "face a tough climb in the House, where several members of the Energy and Commerce Committee have spoken out in opposition of net neutrality since the ruling." The most likely legal course, then, is that the FCC will promulgate some new regulations this year in support of net neutrality, but they will face another judicial challenge with an uncertain outcome.

5. H.R. 3982 and S. 1981.



Recent Industry Developments

Landmark Comcast-Netflix Interconnection Agreement

While the issue of the FCC's statutory authority continues on one track, some major players in the Internet industry have been negotiating landmark contracts among themselves that promise to change the landscape of some aspects of the net neutrality debate. Until now, "net neutrality" has been understood to mean that ISPs should not offer preferential treatment to one end user over another. However, last month, Comcast and Netflix entered into a historic peering or "interconnection" agreement which grants Netflix direct access to Comcast's network. You may have noticed over the last six months that it has been taking much longer to download certain things such as a video from Netflix or YouTube. In response to this, some ISPs and content providers would like to have "tiered pricing," to generate income to offset the cost of building out the fiber optic network and better handling of the ever-burgeoning amount of traffic that goes through the Internet. Netflix was prompted to enter into this agreement after its customers had complained in recent months that its streaming performance was deteriorating. Under the agreement, Netflix will pay Comcast for faster and more reliable access to Comcast's subscribers. This agreement is one of the first where a broadband provider like Comcast has extracted payment to send specific content through the "on ramp" to its network.

While the Comcast-Netflix interconnection agreement concerns a "front gate" connection between an ISP and an "edge provider" like Netflix rather than discriminatory treatment between an edge provider and end users, it still constitutes a "toll" for preferential treatment, the cost of which will most likely be passed on to consumers. Columbia Law School Prof. Tim Wu calls this interconnection agreement "water in the basement for the Internet industry."

"This is the water in the basement for the Internet industry," Mr. Wu said, the first in what could be a flood of such arrangements. "I think it is going to be bad for consumers," he added, because such costs are often passed through to the customer.⁶ In recent months, Netflix had reported that delivery speed of its content to Comcast subscribers had declined by more than 25 percent, resulting in frequent interruptions and delays for customers trying to stream television shows and movies delivered through Netflix. Customers of other providers, including Verizon, also reported delays.

Comcast, Verizon and other Internet service providers denied that they were playing any role in slowing down traffic. Instead, they blamed the intermediaries that Netflix used to deliver its content to Comcast on its way to consumers. They said that those middlemen — companies like Cogent Communications — were trying to shove too much data through too small a pipe. Comcast and Netflix defend the new arrangement, claiming in a joint announcement that it will result in an "even better user experience to consumers, while also allowing for future growth in Netflix traffic." Once Netflix agreed to pay Comcast for a better connection, it admits that its customers no longer experienced delays streaming video.

Netflix has been trying to have it both ways, in regards to the policy debate over net neutrality. Not long ago, Netflix CEO Reed Hastings commented in a [blog post](#) that "[s]ome big ISPs are extracting a toll because they can — they effectively control access to millions of consumers." He maintains that this toll violates Netflix's definition of true and total net neutrality. Nonetheless, Netflix yielded to Comcast, commenting that "Netflix believes strong net neutrality is critical, but in the near term we will in cases pay the toll to the powerful ISPs to protect our consumer experience."

6. Wyatt, Edward and Noam Cohen. "Comcast and Netflix Reach Deal on Service." *New York Times*. New York edition. Feb 21, 2014.



The Comcast-Netflix deal is only the first of these preferred access agreements. The two other major ISPs, Verizon and AT&T, have signaled interest in entering into similar agreements with Netflix. In addition, Apple is now in talks with Comcast to build a streaming television service that would bolster its digital content portfolio and guarantee a high level of quality (via prioritization) to Comcast subscribers' homes. If content distributors such as Netflix and Apple will have to pay for access to cable customers and pass along that cost to consumers, the market will deliver a potentially fatal blow to net neutrality. The bottom line: "Some big ISPs are extracting a toll because they can," according to Hastings.

Proposed \$45 Billion Merger of Comcast and Times Warner Cable

If all of this were not enough, on February 14, 2014, Comcast, the nation's # 1 cable operator, announced that it had entered into a definitive merger agreement to acquire Time Warner Cable, the nation's #2 cable operator, for \$45 billion. The Justice Department and FTC must review the transaction to determine whether it violates the Federal anti-trust laws because of the amount of market power it would bestow on Comcast, and the FCC must also determine whether the transaction is in the public interest. Comcast argues that Comcast and Time Warner Cable do not operate in the same zip codes, for the most part. Nonetheless, the *New York Times* points out that if approved, "Comcast will operate in 43 of the 50 largest metropolitan markets, and will have about 30 percent of the national pay television subscribers and about one-third of all broadband Internet subscribers." ⁷ Some lawmakers, led by Sen. Al Franken (D-MN), have vocally opposed this transaction, and a hearing of the Senate Judiciary Committee is scheduled for April 9, 2014, regarding the implications of this transaction moving forward. However, despite such objections, such hearings will not stop the transaction from closing, and most legal experts

7. *New York Times* op-ed, February 13, 2014.

believe that neither the Justice Department nor the FTC will sue to stop the transaction on anti-trust grounds, despite the fact 52% of consumers believe that the deal will result in less competition and will be bad for consumers, according to a Reuters/Ipsos survey published on March 26, 2014. ⁸

If there is a silver lining to the proposed transaction, Comcast previously agreed to abide the rules contained in the Open Internet Order until April 2018, as a pre-condition for obtaining approval of its acquisition of NBC Universal a few years ago. Despite the recent appeals court's ruling on the Open Internet Ruling, this contractual agreement will remain and place and its protection will likely extend to Time Warner Cable subscribers, if the merger transaction goes forward. Nonetheless, Comcast's agreement to abide by the terms of the Open Internet Order until April 2018 does not bind other major ISPs, such as Verizon and AT&T, unless Federal regulators are able to extract a similar concession for approval of future transactions that such ISPs may enter into which require regulatory approval. Any such restrictions would be limited in time, however, and will not provide a definitive end to the policy debate over net neutrality.

Stay tuned...

(The views expressed herein are not necessarily those of the AALL or NOCALL, and are my personal views only.)

8. "Americans take dim view of Comcast, Time Warner Cable deal," Reuters, March 26, 2014.

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