

4 Things GCs Need To Know About Net Neutrality

By **Michele Gorman and Kelcee Griffis**

Law360 (May 29, 2018, 5:21 PM EDT) -- In the wake of the Federal Communications Commission's decision to undo Obama-era net neutrality rules, it's become apparent that the change-up is poised to affect more than just tech firms, landing the issue on the radar of many general counsel.

Although the effects of the deregulation remain to be seen, companies are scrambling to figure out what an era without strict net neutrality rules means for their bottom lines and for their customers.

The FCC voted in December to dismantle a set of rules requiring internet service providers to treat all online traffic equally and deliver it without interference. Starting June 11, without the bright-line conduct rules, ISPs must simply disclose the ways in which they transmit — and possibly prioritize — online content. Critics worry that ISPs will use this opportunity to package internet access into "tiers," charging more for faster access.

With that complex history and uncertain effects, corporate counsel now face an internet regulation landscape littered with unanswered questions and traps for the unwary. Here is a look at four things GCs need to know about net neutrality.

Every Business Can Be Affected

Most businesses now have an online component, whether they use or offer an online marketplace, cloud-hosted training materials, over-the-internet video conferencing or any of a number of other features. Any changes to online access policies on an ISP's end will ultimately affect those businesses' models, experts told Law360.

"If you are a company that has any sort of internet presence that is critical to your work, you should care about net neutrality," said Evan Engstrom, executive director of startup advocacy group Engine.

Each industry has its own web-related needs and concerns that could be affected. For some, it's transmitting medical imaging, uploading large insurance claims files, syncing legal documents across devices or even simply conducting conference calls. Although the net neutrality rules were only in place for about two years, how ISPs will respond to the change still remains unknown. That's a source of anxiety for many in-house attorneys.

"As a GC generally, what would concern me most is uncertainty. There are always costs to uncertainty,"

said Jim Dunstan, general counsel for TechFreedom, an advocacy group that opposes net neutrality regulation.

The rule change also raises concerns for small businesses, including those with larger aspirations.

When Reddit Inc. vice president and general counsel Melissa Tidwell joined the company in 2015, the web forum had about 65 employees. In that context, the company would not have been able to grow had it been subject to a "pay-to-play" internet access model, she said.

"Net neutrality has to be a consideration as you think through" the impact of the law on your company's growth, Tidwell said. The company now has more than 300 employees.

Consumer-Facing Offerings Could Suffer

If the net neutrality rollback interrupts web service on either a company's or a user's end, customers are likely to attribute delays to a company instead of outside factors, Engstrom said.

"If you don't have the goodwill to withstand poor loading times, you're going to lose a lot of business, and consumers will blame your company," he said.

Changes to internet service plans could also get between a service and the users who need it the most, Tidwell said. For example, some Reddit users turn to the forum for support on important issues, including handling suicidal thoughts.

"That to me is also really bothersome," she said. "It's not just about the bottom line of Reddit; it's also about what Reddit is providing, and we want our users to be able to have Reddit as a place to come to express what they think."

High-Bandwidth Applications Could Be on the Chopping Block

If high bandwidth becomes more expensive, companies may have to rethink the ways they run applications on the internet, experts say.

Most enterprise applications that companies commonly rely on, such as scheduling, sales tracking and document collaboration platforms, were not designed with efficient bandwidth usage in mind, said Frank Gillman, chief information security officer at Lewis Brisbois Bisgaard & Smith LLP. That could bump a company's online activities into the next, more costly tier of internet service.

"If it's suddenly more cost-prohibitive to reach the data you've just put up there, you're going to have a trickle-down effect," he said.

If that comes to pass, it may lead more firms to once again store the bulk of their files on-site instead of paying to maintain and access cloud-storage plans.

"The cynic in me says net neutrality is going to be the thing that drives it right back to on-premise," Gillman said.

Watch What You Say

The high-profile nature of the net neutrality issue can lead otherwise unconnected companies and execs to weigh in on the debate. And indeed, some non-tech-related companies have already taken the bait.

Take Burger King, for example. The fast food chain made waves in January when it released a short, viral video that explained internet regulation in terms of burger orders. In the clip, customers who wanted "priority access" to their Whoppers had to pay a premium to get their food immediately, while the customers paying regular prices were bumped to the back of the line.

Companies like Burger King that choose to wade into a hot-button political debate have likely "decided to ignore their general counsels and go ahead and make these statements because they believe it's right — whether or not that's going to increase or decrease their bottom line," Dunstan said.

He cautioned that companies may risk alienating parts of their customer base. "Unless you have a lead dog in the fight, you don't want to get in the fight," said.

That applies to more private conversations, too. Some GCs may be grappling with whether to advise their clients on net neutrality-related issues at all, since some experts say that the regime will keep flip-flopping with Republican and Democratic administrations unless Congress codifies firm "open internet" principles. Meanwhile, the effects of the latest rule change — and whether anything will even noticeably change at all — are still open for debate.

The last thing an attorney wants is to advise a client on risks associated with net neutrality, only to later find the advice was based on overblown concerns, said Christopher Ballod, a data privacy attorney with Lewis Brisbois.

"GCs have to be worried about their credibility," he said. "It puts all of our credibility in jeopardy if we make any some sort of [false] prognostication."

--Editing by Brian Baresch and Alanna Weissman.