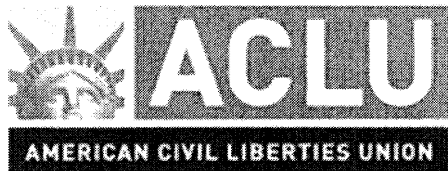


WASHINGTON  
LEGISLATIVE OFFICE



January 24, 2007

The Honorable Byron L. Dorgan  
Committee on Commerce, Science and Transportation  
322 Hart Senate Office Building  
United States Senate  
Washington, D.C. 20510

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The Honorable Olympia J. Snowe  
Committee on Commerce, Science and Transportation  
154 Russell Senate Office Building  
United States Senate  
Washington, D.C. 20510

Re: **Support for S. 215, "The Internet Freedom Preservation Act," To Restore Net Neutrality Protections**

Dear Senator Dorgan and Senator Snowe:

On behalf of the ACLU, a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nationwide, we are writing to express our support for your bipartisan bill, S. 215, "The Internet Freedom Preservation Act."

S. 215 would reinstate Network Neutrality ("Net Neutrality") protections in place before June 2005. The bill requires that any content, application, or service offered through the Internet be provided on a basis that is "reasonable and non-discriminatory." It further prohibits network providers from blocking or degrading lawful Internet content. S. 215 also leaves the choice of equipment to access Internet gateways squarely in the hands of consumers, where it rightfully belongs.

In contrast, a bill offered in the 109th Congress, S. 2686, "The Communications, Consumer's Choice, and Broadband Deployment Act of 2006" or Stevens bill, provided no protection for Internet users and entrepreneurs. Instead, it merely included a toothless requirement that the Federal Communications Commission (FCC) study the Internet market for five years and file annual reports to Congress on the activities of network providers. The Stevens bill would have given network providers *carte blanche* to engage in content and access discrimination. Nothing in the Stevens bill prevented network providers from blocking lawful content with

which they disagree. Under the Stevens bill, network providers had substantial financial incentives to discriminate by blocking access to competing application and service providers and redirecting Internet traffic to their own preferred sites. The recent actions and statements of network providers establish their intention to do both.

### **The Internet is the Leading Twenty-First Century Marketplace of Ideas**

The Internet is one of today's most important mediums of disseminating information. "It enables people to communicate with one another with unprecedented speed and efficiency and is rapidly revolutionizing how people share and receive information."<sup>1</sup> It also provides "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."<sup>2</sup> These qualities make the Internet a shining example of a modern day marketplace of ideas.<sup>3</sup>

The Internet's marketplace enhances speech through its decentralized, neutral, nondiscriminatory "pipe" that automatically carries data from origin to destination without interference. Neutrality promotes open discourse. Consumers decide what sites to access, among millions of choices, and "pull" information from sites rather than having information chosen by others "pushed" out to them, as with television and other media. The Internet's structure facilitates free speech, innovation, and competition on a global scale.

Accessibility to a mass audience at little or no cost makes the Internet a particularly unique forum for speech. "The Internet presents low entry barriers to anyone who wishes to provide or distribute information. Unlike television, cable, radio, newspapers, magazines or books, the Internet provides an opportunity for those with access to it to communicate with a

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<sup>1</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 (D.D.C. 1998).

<sup>2</sup> 47 U.S.C. § 230(a)(1)(3).

<sup>3</sup> The "marketplace of ideas" is grounded in the belief that speech must be protected as a fundamental right for the discovery of truth. See *JOHN STUART MILL, ON LIBERTY* 76 (1859). Justice Oliver Wendall Holmes eloquently invoked the metaphor by observing, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the basic test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting). The marketplace of ideas metaphor aptly applies to an Internet free of corporate or government censors of lawful content. See generally *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (rejecting government censorship of content in "the new marketplace of ideas," the Internet).

worldwide audience at little cost.”<sup>4</sup> “Any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”<sup>5</sup>

Furthermore, the Internet differs from other forms of mass communication because it “is really more idea than entity. It is an agreement we have made to hook our computers together and communicate by way of binary impulses and digitized signals.”<sup>6</sup> No one “owns” the Internet. Instead, the Internet belongs to everyone who uses it.

The combination of these distinctive attributes allows the Internet to provide “a vast platform from which to address and hear from a worldwide audience of millions.”<sup>7</sup>

Never before has it been so easy to circulate speech among so many people. John Doe can now communicate with millions of people from the comfort, safety and privacy of his own home. His communication requires minimal investment and minimal time – once the word is written, it is disseminated to a mass audience literally with the touch of a button. Moreover, Internet speakers are not restricted by the ordinary trappings of polite conversation; they tend to speak more freely online.<sup>8</sup>

“It is ‘no exaggeration to conclude that the content on the Internet is as diverse as human thought.’”<sup>9</sup> “Such broad access to the public carries with it the potential to influence thought and opinion on a grand scale.”<sup>10</sup> The Internet truly has become the leading Twenty-First Century marketplace of ideas.

### **Free Speech on the Internet Must Be Protected**

It is vital to the freedom of all Americans that free speech on the Internet be protected. Without question, the unique nature of the cyber revolution has

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<sup>4</sup> *American Library Ass’n v. United States*, 201 F. Supp.2d 401, 416 (E.D. Pa. 2002), *rev’d on other grounds*, 539 U.S. 194 (2003).

<sup>5</sup> *Reno v. ACLU*, 521 U.S. at 870.

<sup>6</sup> *Blumenthal*, 992 F. Supp. at 48 n.7 (quoting Bruce W. Sanford & Michael J. Lorenger, *Teaching An Old Dog New Tricks; The First Amendment In An Online World*, 28 CONN. L. REV. 1137, 1139-43 (1996)).

<sup>7</sup> *Reno v. ACLU*, 521 U.S. at 853.

<sup>8</sup> *Blumenthal*, 992 F. Supp. at 48 n.7 (quoting Sanford & Lorenger, *supra* note 6).

<sup>9</sup> *Reno v. ACLU*, 521 U.S. at 852 (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

<sup>10</sup> *Oja v. United States Army Corps of Eng’rs*, 440 F.3d 1122, 1129 (9th Cir. 2006).

posed some challenges in protecting the Internet.<sup>11</sup> “Each medium of expression ... may present its own problems.”<sup>12</sup> Nevertheless, our “profound national commitment to the free exchange of ideas” requires that we meet those challenges to preserve Internet freedom.<sup>13</sup>

Courts acknowledge the importance of keeping the Web’s channels of communication open and free from discrimination. The United States Supreme Court has concluded that speech on the Internet is entitled to the highest level of protection under the First Amendment. Any attempts to censor its content or silence its speakers are viewed with extreme disfavor.<sup>14</sup>

In addition, courts recognize that the public has a First Amendment interest in receiving the speech and expression of others. “[T]he right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences” is one of the purposes served by the First Amendment.<sup>15</sup> Indeed, the “widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”<sup>16</sup> The Internet has become the principle source for the public to access this diversity of ideas.<sup>17</sup>

Courts also understand that “the Internet represents a brave new world of free speech.”<sup>18</sup> Specifically, the Internet provides unique opportunities for speech and discourse. Unlike other communication media, “the Internet has no ‘gatekeepers’ – no publishers or editors controlling the distribution of information.”<sup>19</sup> As a result, the Internet does not suffer from many of the limitations of alternative markets for the free exchange of ideas.<sup>20</sup> Therefore,

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<sup>11</sup> See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 433 (2d Cir. 2001).

<sup>12</sup> *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

<sup>13</sup> *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 686 (1989).

<sup>14</sup> See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (upholding a preliminary injunction of the Child Online Protection Act); *Reno v. ACLU*, 521 U.S. at 844 (striking down certain provisions of the Communications Decency Act).

<sup>15</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>16</sup> *Metro Broad. Inc. v. FCC*, 497 U.S. 547, 566-67 (1990) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

<sup>17</sup> Over one billion people have used the Internet, including nearly 70 percent of all people in North America. See <http://www.internetworldstats.com/stats.htm> (visited on Oct. 4, 2006).

<sup>18</sup> *Blumenthal*, 992 F. Supp. at 48 n.7 (quoting Sanford & Lorenger, *supra* note 6).

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> For example, under Net Neutrality, the Internet does not suffer from a criticism that Professor Laurence Tribe and other First Amendment scholars frequently have leveled at traditional marketplaces: “Especially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that ‘free trade in ideas’ is likely to generate truth?” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 786 (2d ed. 1988).

courts have vigorously protected the public's right to uncensored Internet access on First Amendment grounds.<sup>21</sup>

In a similar vein, Congress has enacted legislation to protect and promote free speech on the Internet. In the 1996 Telecommunications Act, Congress found that “[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.”<sup>22</sup> Congress further declared that it is the policy of the United States “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet.”<sup>23</sup> Congress therefore immunized Internet providers and users from any liability for publishing “any information provided by another information content provider.”<sup>24</sup>

Congressional creation and funding of federal agency web pages is further evidence of the need to facilitate the free flow of information on the Internet. In response to growing demand for online government resources, Congress enacted the E-Government Act of 2002 that created the Office of Electronic Government.<sup>25</sup> The Act’s purpose “is to improve the methods by which Government information, including information on the Internet, is organized, preserved, and made accessible to the public.”<sup>26</sup> Net Neutrality advances that goal.

It is in the public interest to promote the Internet’s use as a forum for all Americans to disseminate information and engage in free speech. Meaningful nondiscrimination rules will help ensure that happens.

### **Net Neutrality Promotes Free Speech on the Internet**

Although network providers offer the public gateways to the Internet, they are not considered “state actors” that are barred by the First Amendment from infringing on free speech. Therefore, companies such as Time Warner/AOL can stop e-mail traffic<sup>27</sup> or block access to content<sup>28</sup> without facing liability

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<sup>21</sup> See *supra* note 14 and accompanying text.

<sup>22</sup> 47 U.S.C. § 230(a)(1).

<sup>23</sup> 47 U.S.C. § 230(b)(3) (emphasis added).

<sup>24</sup> 47 U.S.C. § 230(c)(1).

<sup>25</sup> See Pub. L. No. 107-347, 116 Stat. 2899 (2002).

<sup>26</sup> 44 U.S.C. § 3606(a).

<sup>27</sup> See, e.g., *Green v. America Online, Inc.*, 318 F.3d 465 (3d Cir.), cert. denied, 540 U.S. 877 (2003); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996).

under the First Amendment. Historically, the Net Neutrality protections under the Communications Act filled that free speech gap.<sup>29</sup>

Net Neutrality rests on three guiding principles that promote free speech on the Internet:

- **No discrimination against lawful content.** Net Neutrality ensures that Internet users have the right to access lawful websites of their choice and to post lawful content, free of discrimination or degradation by network providers. In other words, network providers cannot block or slow down lawful content that they dislike. A vibrant marketplace of ideas on the Internet cannot function with corporate censors.
- **Equal Internet access at an equal price.** Under Net Neutrality, network providers cannot give preferential treatment to their own services at the expense of competing sites consumers want to use. In many markets, Internet access is only available through one or two providers. Equal access at an equal price means that network providers cannot abuse their monopoly by barring access, providing slower access, or charging higher premiums to services competing with their own. The free market, and not tollbooths run by a few corporate monopolies, must be allowed to decide Internet winners and losers.
- **Consumers choose network equipment.** Since 1968, Net Neutrality has allowed consumers to choose the equipment they want, or make it themselves, and attach it to any network.<sup>30</sup> In 1996, Congress reaffirmed this right by directing the FCC to adopt regulations permitting consumers to have the final choice of cable boxes used to convert television signals.<sup>31</sup> Net Neutrality prevents network providers from eliminating competing equipment by making it incompatible with their gateway. In the process, it advances congressional intent by promoting new technologies and ensuring that equipment

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<sup>28</sup> See, e.g., *Noah v. AOL Time Warner, Inc.*, 261 F. Supp.2d 532 (E.D. Va. 2003), *aff'd*, 2004 WL 602711 (4th Cir. Mar. 24, 2004).

<sup>29</sup> See generally *Kuczo v. Western Conn. Broad. Co.*, 566 F.2d 384, 388 (2d Cir. 1977) (holding that a radio station's censorship of radio ads was not subject to First Amendment protections, in part because the Communications Act specifically prohibited the conduct and the FCC had "prescribed appropriate rules for the enforcement of the statute").

<sup>30</sup> See *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968), *reh'g denied*, 14 F.C.C.2d 571 (1968).

<sup>31</sup> See 47 U.S.C. § 549 (1996).