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Task Force on Competition Policy and Antitrust Laws

Hearing on "Net Neutrality and Free Speech on the Internet"

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I. Introduction

Mr. Chairman and Members of the Task Force, thank you for your invitation to testify on net neutrality and free speech on the Internet. I am Caroline Fredrickson and I am the Director of the American Civil Liberties Union's (ACLU) Washington Legislative Office. As Director, I lead all federal lobbying for the national ACLU before Congress, the White House and all federal agencies. The ACLU is a non-partisan organization with over half a million members and activists and 53 affiliates nationwide. We have been a long-time leader on the issues raised in this hearing both in the courts and before Congress. Since 1920, the ACLU has been a leading defender of First Amendment rights.

The ACLU has been a principal participant in nearly all of the Internet censorship and neutrality cases that have been decided by the United States Supreme Court in the past two decades. In the landmark case of *Reno v. ACLU*, a challenge to the Communications Decency Act, the Supreme Court held that the government cannot engage in blanket censorship of speech in cyberspace.[1] In *Ashcroft v. ACLU*, the Supreme Court upheld a preliminary injunction of the Child Online Protection Act, which imposed unconstitutionally overbroad restrictions on adult access to protected online speech.[2] The ACLU also participated as amicus curiae in *Ashcroft v. Free Speech Coalition*, in which the Court struck down restrictions on so-called "virtual child pornography" that restricted a substantial amount of lawful speech.[3] In 2005, the ACLU participated as amicus curiae in the *Brand X* decision, in which the Court held that cable

[1] 521 U.S. 844 (1997).

[2] 542 U.S. 656 (2004).

[3] 535 U.S. 234 (2002). The ACLU's amicus brief is available at 2001 WL 740913 (June 28, 2001).

companies providing broadband Internet access were "information service providers" for purposes of regulation by the FCC under the Communications Act.[4]

I commend Chairman Conyers, Ranking Member Chabot, and the Task Force for their commitment to addressing net neutrality, which is vital to safeguarding free speech rights on the Internet. In the past, the House Judiciary Committee has considered alternative solutions for addressing the rapidly increasing consolidation of broadband services into a handful of providers, and the threats that consolidation poses to free speech on the Internet. The Court's ruling in *Brand X*, combined with the FCC's inaction in addressing increasing censorship by broadband Internet Service Providers (ISPs)[5] has brought us to where we are today. There is a growing bipartisan outcry for Congress to promptly enact meaningful net neutrality legislation that protects the rights of all Internet users to send and receive lawful content, free of censorship by either government or corporate censors. This hearing marks an important step towards ensuring that the marketplace of ideas for the 21st century, the Internet, remains the bastion of freedom that it has been since its creation.

My testimony will focus on both topics that are the subjects of this hearing: freedom of speech on the Internet and the growing threat to that freedom posed by network providers that actively censor groups or content with which they disagree. I will begin by discussing the importance of freedom of speech on the Internet, and how the courts have protected it under the First Amendment. Next, I will describe the explosive growth of the Internet under neutrality rules. I then will summarize several examples of Internet discrimination that have occurred following the elimination of neutrality rules for broadband ISPs in the aftermath of the *Brand X* decision in 2005.

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[4] *See National Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005). The ACLU's amicus brief is available at 2005 WL 470933 (Feb. 22, 2005).

[5] For purposes of my testimony, I have used "ISP" and "network provider" interchangeably.

Restoration of meaningful rules protecting Internet users from corporate censorship is vital to the future of free speech on the Internet. These neutrality rules should simply return us to where we were before the *Brand X* decision in 2005, prohibiting ISPs from picking and choosing which users can access what lawful content through the gateways they provide to their paying customers. Legislation that establishes mechanisms to enforce the "Four Freedoms" established by the FCC in its 2005 policy statement, including "access to the lawful Internet content of their choice" and running "applications and services of their choice,"[6] with penalties for violations of those freedoms, is essential. Examples of the sorts of bills with those protections include H.R. 5273 from the 109th Congress, the Network Neutrality Act sponsored by Representative Markey, and S. 215, the Internet Freedom Preservation Act, sponsored by Senators Dorgan and Snowe. Without those protections, online content discrimination by IPSs will continue to grow unabated.

II. Freedom of Speech on the Internet

A. The Internet is a Leading Marketplace of Ideas.

The Internet is one of today's most important means 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."[7] It also provides "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[8] These qualities make the Internet a shining example of a modern day marketplace of ideas.[9]

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[6] *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf.

[7] *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 (D.D.C. 1998).

[8] 47 U.S.C. § 230(a)(1)(3).

[9] 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 Wendell Holmes eloquently

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 in which the content is chosen by the broadcaster. 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 worldwide audience at little cost."[10] "Any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[11]

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."[12] No one "owns" the Internet. Instead, the Internet belongs to everyone who uses it. The combination of these

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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. at 885 (rejecting government censorship of content in "the new marketplace of ideas," the Internet).

[10] *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).

[11] *Reno v. ACLU*, 521 U.S. at 870.

[12] *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)).

distinctive attributes allows the Internet to provide "a vast platform from which to address and hear from a worldwide audience of millions."[13]

> 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.[14]

"It is 'no exaggeration to conclude that the content on the Internet is as diverse as human thought.'"[15] "Such broad access to the public carries with it the potential to influence thought and opinion on a grand scale."[16] The Internet truly has become the leading 21st century marketplace of ideas because of neutrality rules that promote nondiscriminatory speech, association, and content.

B. Recognition by Congress and Courts of the Need to Protect Speech on the Internet.

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 posed some challenges in protecting the Internet.[17] Courts have confronted those challenges head on by observing, "Each medium of expression … may present its own problems."[18] Nevertheless, our "profound national commitment to the free exchange of ideas" requires that we meet those challenges to preserve Internet freedom.[19] We cannot sit idly by and let any censor stifle those freedoms, regardless of whether it is the government or a handful of network providers. In many

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[13] *Reno v. ACLU*, 521 U.S. at 853.

[14] *Blumenthal*, 992 F. Supp. at 48 n.7 (quoting Sanford & Lorenger, *supra* note 12).

[15] *Reno v. ACLU*, 521 U.S. at 852 (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

[16] *Oja v. United States Army Corps of Eng'rs*, 440 F.3d 1122, 1129 (9th Cir. 2006).

[17] *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 433 (2d Cir. 2001).

[18] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

[19] *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 686 (1989).

communities, local governments have granted network providers monopolies to provide paying consumers with open Internet access. Widespread violations by ISPs highlight the need for congressional action to reinstate Internet nondiscrimination rules.

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.[20] 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.[21] Indeed, the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[22] The Internet has become the principle source for the public to access this diversity of ideas.[23]

Courts also understand that "the Internet represents a brave new world of free speech."[24] Specifically, the Internet provides unique opportunities for speech and discourse. Unlike other media, "the Internet has no 'gatekeepers' – no publishers or editors controlling the distribution of information."[25] As a result, the Internet does not suffer from many of the limitations of

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[20] *See, e.g., Ashcroft v. ACLU*, 542 U.S. at 656 (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).

[21] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

[22] *Metro Broad. Inc. v. FCC*, 497 U.S. 547, 566-67 (1990) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

[23] 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).

[24] *Blumenthal*, 992 F. Supp. at 48 n.7 (quoting Sanford & Lorenger, *supra* note 12).

[25] *Id.* (emphasis added).

alternative markets for the free exchange of ideas.[26] Therefore, courts have vigorously protected the public's right to uncensored Internet access on First Amendment grounds.[27]

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."[28] 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."[29] Congress therefore immunized Internet providers and users from any liability for publishing "any information provided by another information content provider."[30]

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.[31] 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."[32] Net neutrality advances that goal. As Congress has recognized

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[26] 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).

[27] *See supra* note 20 and accompanying text.

[28] 47 U.S.C. § 230(a)(1).

[29] 47 U.S.C. § 230(b)(3) (emphasis added).

[30] 47 U.S.C. § 230(c)(1).

[31] *See* Pub. L. No. 107-347, 116 Stat. 2899 (2002).

[32] 44 U.S.C. § 3606(a).

on repeated occasions, it is in the public interest to promote the Internet's use as a forum to disseminate information and engage in free speech. Meaningful nondiscrimination rules will help ensure that happens.

III. A Nondiscriminatory Internet Always Existed Through Regulation of ISPs

A. The Internet Has Flourished Under Nondiscrimination Rules.

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, any more than it can with government censors.

During previous House and Senate hearings on net neutrality, several witnesses who represent telecommunications and cable companies that provide broadband services argued that nondiscrimination principles have never been applied to the Internet.[33] For example, Tom Tauke, Executive Vice President for Verizon, testified that network providers have operated Internet gateways without nondiscrimination regulations.[34] Similarly, Kyle McSlarrow, the President and CEO of the National Cable and Telecommunications Association, defined Internet

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[33] *See Communications Revision and Broadband Deployment Act: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (June 13, 2006) (statement of Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association); *Communications Revision and Broadband Deployment Act: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (May 25, 2006) (statement of Tom Tauke, Executive Vice President, Verizon); *Network Neutrality: Competition, Innovation, and Nondiscriminatory Access: Hearing Before the Task Force on Telecom and Antitrust of the House Comm. on the Judiciary*, 109th Cong. 101-105 (2006) (statement of Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association); *Communications Promotion and Enhancement: Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. on Energy and Commerce*, 109th Cong. (Mar. 30, 2006) (statements of Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association, and Walter McCormick, President and Chief Executive Officer, United States Telecom Association); *Internet Protocol and Broadband Services Legislation: Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. on Energy and Commerce*, 109th Cong. 75-83 (2005) (statement of Michael Willner, President and Chief Executive Officer, Insight Communications).

[34] *See* Tauke, *supra* note 33.

nondiscrimination as "a first-time regulation of the Internet that will freeze investment and innovation."[35] Nothing could be further from the truth. Network providers have been regulated by nondiscrimination rules since the Internet's creation.

The Internet was born and flourished under well-established nondiscrimination protections. Those protections are derived from Title II of the Communications Act of 1934, which grants the FCC the authority to regulate telephone companies as common carriers. As computer technology was developed, data began to flow over telephone lines. In the 1970's and 1980's, the FCC responded by ensuring that network providers would provide access for data transmissions on a nondiscriminatory basis by protecting them like other communications services.[36] Title II was strengthened by making common carrier telephone networks available to independent equipment manufacturers and ISPs. Internet nondiscrimination simply ensures that this same nondiscriminatory common carrier model continues to apply to the Internet when accessed through broadband connections.

Nevertheless, network providers ignore this lengthy history by wrongly suggesting that Internet nondiscrimination regulates the Internet itself.[37] In reality, the opposite is true.

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[35] *See* McSlarrow, *supra* note 33, 109th Cong. at 101-105.

[36] For more background of the development of neutrality policy on the Internet, *see* Cybertelecom Federal Internet Law & Policy – An Educational Project, http://www.cybertelecom.org/ci/index.htm.

[37] *See* McSlarrow, *supra* note 34 (see Mr. McSlarrow's statements at all three hearings listed in note 30); *Communications Laws: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (June 14, 2006) (statement of David Cohen, Executive Vice President, Comcast Corporation); *Communications Revision and Broadband Deployment Act: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (June 13, 2006) (statements of Dr. John Rutledge, President, Rutledge Capital, Consultant to the United States Chamber of Commerce and Steve Largent, President and Chief Executive Officer, CTIA); *Communications Revision and Broadband Deployment Act: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (May 25, 2006) (statement of Roger Cochetti, Group Director, U.S. Public Policy, CompTIA); *Communications Issues: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (Feb. 7, 2006) (statement of Walter McCormick, President and Chief Executive Officer, United States Telecom Association); *Communications Promotion and Enhancement: Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. on Energy and Commerce*, 109th Cong. (Mar. 30, 2006) (statement of James Makawa, Co-Founder, CEO, The Africa Channel); *Network Neutrality: Competition, Innovation, and Nondiscriminatory Access: Hearing Before the Task Force on Telecom and Antitrust of the House*

Nondiscrimination ensures that lawful activity on the Internet remains free from regulation by both the government and network providers. Those rules merely would prohibit telecommunications and cable companies from engaging in content-based discrimination against Internet users.

Network providers' criticism that nondiscrimination rules will impede innovation and stifle growth of the Internet is completely unfounded.[38] The Internet has blossomed under longstanding nondiscrimination protections. An April 2006 Pew study found that three-quarters of all adults in the United States, 147 million people, use the Internet.[39] Over half of all teens go online on a daily basis, and 84 percent report owning at least one personal media device.[40] Two-thirds of all American adults use the Internet daily.[41] Internet use for working, shopping, pursuing hobbies and interests, and obtaining information continues to skyrocket.[42]

The dynamic growth and vitality of the Internet is largely attributable to longstanding nondiscrimination rules. Until recently, all network providers were barred from censoring lawful Internet speech and webpages. A handful of providers also have been bound by temporary nondiscrimination restrictions included in merger agreements: SBC/AT&T and Verizon/MCI,

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Comm. on the Judiciary, 109th Cong. 47-53 (2006) (statement of Walter McCormick, President and Chief Executive Officer, United States Telecom Association).

[38] *See supra* note 34.

[39] PEW INTERNET & AMERICAN LIFE PROJECT, DATA MEMO; INTERNET PENETRATION AND IMPACT, at 3 (April 2006).

[40] PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND TECHNOLOGY: YOUTH ARE LEADING THE TRANSITION TO A FULLY WIRED AND MOBILE NATION ii, 4, 9 (July 27, 2005). A "personal media device" is defined as a desktop or laptop computer, a cell phone or a Personal Digital Assistant (PDA). *Id.* at ii, 9.

[41] PEW INTERNET & AMERICAN LIFE PROJECT, INTERNET: THE MAINSTREAMING OF ONLINE LIFE TRENDS 2005, at 58 (2005); PEW INTERNET & AMERICAN LIFE PROJECT, LATEST TRENDS: ONLINE ACTIVITIES – DAILY, *available at* http://www.pewinternet.org (visited on August 7, 2006).

[42] *Id.* at 1-3.

until 2007[43] and AT&T/BellSouth until December 2008.[44] In other cases, such as the July 2006 acquisition of Adelphia by Comcast and Time-Warner, the FCC has declined to impose nondiscrimination requirements altogether.[45] Only the continuation of existing nondiscrimination protections will achieve what its detractors profess to support: a forum for speech and innovation that "has derived its strength by virtue of its freedom from regulation,"[46] corporate or otherwise.

B. Nondiscrimination Rules Do Not Violate the First Amendment Rights of ISPs.

Recently, commentator Randolph May argued that restoring pre-*Brand X* neutrality rules may violate the First Amendment rights of ISPs.[47] According to his argument, "like newspapers, magazines, cable operators, movie and music producers, and even a man or woman preaching on a soapbox, ISPs such as Comcast and Verizon possess free speech rights."[48] Mr. May reaches that conclusion by making the broad generalization that for all of their online activities, ISPs are speakers "entitled to use their facilities to convey messages of their own choosing."[49]

It is true that for some purposes, network providers engage in online speech entitled to at least some protection under the First Amendment. The level of protection that speech receives depends upon whether it is noncommercial or commercial in nature.[50] The best example is the

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[43] FCC Approves SBC/AT&T and Verizon/MCI Mergers, Oct. 31, 2005, SBC/AT&T Docket No. 05-65, Verizon/MCI Docket No. 05-75, at 2-3.

[44] *See* Alan Sipress & Sara Kehaulani Goo, *AT&T Completes BellSouth Takeover*, WASH. POST, Dec. 30, 2006, at A1.

[45] *See Communications Law Bulletin – July 2006*, MONDAQ BUS. BRIEFING, Aug. 10, 2006, *available at* 2006 WLNR 13834962.

[46] *See* Largent, *supra* note 37.

[47] *See* Randolph May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 I/S J. L. & POL'Y FOR INFO. SOC'Y 197 (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=994470.

[48] *Id.* at 202.

[49] *Id.*

[50] *See generally* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (defining commercial speech, which is less protected than non-commercial speech, as speech that merely proposes "a commercial transaction").

one identified by Mr. May: the content of a network provider's home pages or "other specialty pages."[51] However, neutrality rules would have no impact on an ISP's right to post whatever lawful content it wants on its own pages. Indeed, by their very nature, neutrality rules say exactly the opposite: like any online user, ISPs would be protected to say whatever they want on their pages free of outside censorship.

But that does not mean that neutrality rules violate the First Amendment rights of an ISP by barring the ISP from censoring its customers. Aside from Internet content that they create, edit, and maintain, network providers are not speakers. They are merely providing the wires through which each of its paying customers accesses the Internet, in much the same manner as telephone companies do for our phone lines. That is why the FCC was allowed to regulate ISPs as common carriers until 2005, when the Supreme Court ruled in *Brand X* that they instead may be regulated as "information services."[52] If telephone companies are not allowed to choose who can use their phone services, censor their phone calls, and disconnect calls when something is said that they dislike, then ISPs – many of which are also telephone companies – certainly cannot do those same things on the Internet. ISPs exist to provide customer access to the Internet and the range of online expressive and associational activities free of censorship, not the other way around. Otherwise, it would be a case of the tail wagging the dog.

IV. The Growth of ISP Censorship Following the *Brand X* Decision

A. The FCC Eliminated Nondiscrimination Rules for Most Network Providers in 2005.

The cornerstone nondiscrimination principle ensures an Internet based upon the user's right to engage in speech and to send and receive information free of censorship by network providers. In October 2004, the Chairman of the FCC acknowledged these principles by

[51] May, *supra* note 47, at 204.

[52] *See* 545 U.S. at 995-1001.

describing them as "Internet Consumer Freedoms."[53] Despite the FCC Chairman's recognition of the Four Freedoms, in 2002 the FCC began attempting to reverse the Internet nondiscrimination principles that applied to ISPs under the common carrier provisions by reclassifying cable modem services as "information services" not subject to those principles. Federal courts initially rejected the FCC's efforts.[54]

All of that changed abruptly in June 2005 following the Supreme Court's decision in *NCTA v. Brand X*.[55] In *Brand X*, the Supreme Court for the first time concluded that broadband access constituted "information services."[56] Therefore, the Court found that the FCC had discretion to choose whether to retain nondiscrimination protections for all broadband users.[57] Shortly after the *Brand X* decision, the FCC further curtailed nondiscrimination protections by reclassifying Digital Subscriber Line (DSL) services as "information services."[58] Within a span of a few months, the FCC and the Supreme Court managed to destroy decades of nondiscrimination protections for millions of Americans who currently use broadband and the millions more who will in the next few years.[59]

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[53] The Chairman referred to net neutrality as part of his "Four Freedoms" of web access and use. In addition to the three core Net neutrality freedoms mentioned above, the fourth freedom would require that consumers be provided with sufficient information about service plans to make informed choices.

[54] *See In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (F.C.C. Mar 15, 2002), *aff'd in part and vacated in part sub nom., Brand X Internet Servs. v. F.C.C.*, 345 F.3d 1120 (9th Cir. 2003).

[55] 545 U.S. at 967.

[56] *See id.* at 985-1000.

[57] *See id.* at 995-1001.

[58] *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, CC Docket No. 02-33, FCC 05-150, *available at* 2005 WL 2347773 (released Sept. 23, 2005).

[59] *See* PEW INTERNET & AMERICAN LIFE PROJECT, HOME BROADBAND ADOPTION 2006 (May 2006). According to the Pew study, 84 million Americans had high-speed broadband access at home in March 2006. *See id.* at i. This number represents a forty percent increase in just one year and twice the rate of growth over the year before. *Id.*

Without those protections, most network providers are free to discriminate. Although ISPs offer the public gateways to the Internet and often have service monopolies within local communities, some courts have declined to recognize their position acting on behalf of the government. Therefore, companies such as Time Warner/AOL have been allowed to stop e-mail traffic[60] or block access to content[61] without facing liability under the First Amendment for infringing upon protected speech. As I described in Section III, historically, the nondiscrimination protections under the Communications Act filled any gap that might exist from not treating ISPs and other monopolies as state actors.

B. The Absence of Neutrality Rules Has Led to Internet Discrimination by ISPs.

Since nondiscrimination rules were removed in 2005, nothing has prevented most network providers from discriminating against Internet users. Even with heightened congressional scrutiny to determine whether to restore neutrality rules, ISPs have been engaging in content and user discrimination. At the same time, some ISP executives such as David Cohen, Executive Vice President of Comcast, have argued that nondiscrimination rules would prevent those same companies from *protecting* the Internet.[62] However, network providers have clearly shown that they cannot be trusted to be gatekeepers for Internet content and access, any more than other censors can be.

There are now multiple examples of discrimination by ISPs against certain groups and particular content. These rather stark instances of censorship in the face of very close public scrutiny highlight the need for Congressional action. Network providers have established

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[60] *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).

[61] *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. 2004).

[62] *See* Cohen, *supra* note 37.

through their own actions that Internet censorship is a growing reality, and not merely the speculative hypothetical that ISPs and their phalanx of lobbyists claims it to be.

(1) AOL/Time Warner's censorship of an online protest.

Early in 2006, Time Warner's America On-Line (AOL) began censoring e-mails that linked to the technology blog[63] Slashdot,[64] which criticized the ISP's e-mail "tax." The tax, more commonly known as a pay-to-send fee, is a quarter-penny charge for e-mail senders so that their electronic messages can bypass an AOL junk mail filter. E-mails also would appear to be stamped and certified in the receiver's inbox with a blue ribbon stating, "This mail has been certified."[65] The e-mail sending option is an enhanced version of a free whitelist program, which allows users to bypass junk mail filters without a certification.

The pay-to-send e-mail certification system is a joint venture between AOL and GoodMail, a contracted company that runs background checks on e-mail senders. Since its introduction, the program has been popular with groups such as banks and charities, who use it to verify their legitimacy. Although AOL and GoodMail, which share the profits from the joint venture, claim that their program is nondiscriminatory, the facts tell us otherwise. Since the program's introduction in February 2006, AOL has blocked e-mails that referenced the Slashdot blog report that criticized the program. AOL's blatant censorship impaired e-mail services to over 300 individuals, including customers and non-customers,[66] who reported receiving an automated message saying their e-mail had "failed permanently." In response, the

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[63] A blog, more formally known as a web log, is "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer." MERRIAM-WEBSTER ONLINE DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/blog.

[64] Rob Malda, *Pay-per-e-mail and the "Market Myth,"* Slashdot, March 29, 2006, *available at* http://it.slashdot.org/article.pl?sid=06/03/29/1411221.

[65] *Id.*

[66] Timothy Karr, *AOL Censors Internet Speech*, FreePress, Apr. 13, 2006, http://www.freepress.net/news/14960.

DearAOL.com Coalition, headed by Free Press, MoveOn and the Electronic Frontier Foundation, posted an open online petition disapproving of AOL's actions.[67] Since AOL first instituted the e-mail tax, over 35,000 people have signed onto the DearAOL.com letter opposing the fee.[68] AOL spokesperson Nicholas Graham responded by claiming that the automated messages were due to faulty software and that AOL had lifted its block of the e-mail protests.

Though AOL's unwarranted e-mail blockage appears to have been resolved, the pay-to-send fee creates the potential for additional problems. The removal of free whitelists and implementation of mandatory verification fees already have materialized with other Internet providers such as Hotmail. After the implementation of its pay-to-send fee, Hotmail began demanding a $2,000 fee for customers to be placed on their whitelist. Hotmail's actions prevented legitimate organizations that could not afford the fee from communicating with their members and customers. The absence of neutrality rules would allow AOL to follow suit or to simply reinstate its e-mail block at its own whim.

(2) AT&T: Censorship, filtering and Terms of Service agreement.

AT&T has been one of the more prolific violators of neutrality principles. In each case, AT&T initially denied its actions, only to later reverse its discriminatory policies after being subject to withering public criticism. AT&T's increasing boldness in censoring content provides a compelling example of why neutrality rules must be restored.

(a) Jamming Eddie Vedder's political protest.

During a performance by the rock group Pearl Jam at the August 2007 Lollapalooza concert in Chicago, Illinois, AT&T censored words from lead singer Eddie Vedder's

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[67] The petition is no longer available online. More information about the petition is available from Saul Hansel, *Plan for Fees on Some E-Mail Spurs Protest*, N.Y. TIMES, Feb. 28, 2006, *available at* http://www.nytimes.com/2006/02/28/technology/28mail.html?scp=2&sq=AOL+Goodmail+&st=nyt.

[68] Karr, *supra* note 65.

performance. The ISP, which was responsible for airing the concert via a Blue Room webpage, shut off the sound as Vedder sang, "George Bush, leave this world alone" and "George Bush find yourself another home."[69] By doing so, AT&T, the self-advertised presenting sponsor of the concert series,[70] denied Blue Room visitors the complete exclusive coverage they were promised. Although Vedder's words contained no profanity, AT&T spokeswoman Tiffany Nels claimed that the words were censored to prevent youth visiting the website from being exposed to "excessive profanity."[71] Nels also blamed the censorship on an external Website contractor hired to screen the Lollapalooza performances, calling it a mistake and pledging to restore the unedited version of Vedder's performance on Blue Room.

(b) Threats to censor its customers through draconian Terms of Service.

In October 2007, AT&T unilaterally revised its customer Terms of Service ("TOS") agreement to give itself the right to terminate a customer's DSL service for any activity that it considered "damaging" to its reputation, or that of its parents, affiliates or subsidiaries. ISPs routinely use TOS agreements to create a binding contract with their customers. AT&T's new contract does not specify any types of actions that it would consider to be "damaging," thereby giving the company unfettered discretion to decide on its own. An AT&T spokesperson claimed that the TOS term was meant to "disassociate" the company from language that promotes violence or threatens children.[72] After vehement protests by AT&T customers, AT&T revised

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[69] Reuters, *AT&T Calls Censorship of Pearl Jam Lyrics an Error*, Aug. 9, 2007, http://www.reuters.com/article/technologyNews/idUSN0918213200708O9?feedType=RSS&rpc=22&sp=true

[70] AT&T, *AT&T Blue Room to Feature Exclusive Webcast of Lollapalooza Acts*, July 31, 2007, http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=24172.

[71] Jon Healy, *AT&T Drops Pearl Jam's Call*, LA TIMES, Aug. 8, 2007, http://opinion.latimes.com/bitplayer/2007/08/att-drops-pearl.html.

[72] Ken Fisher, *AT&T Relents on Controversial Terms of Service, Announces Changes*, ArsTechnica, Oct. 10, 2007, http://arstechnica.com/news.ars/post/20071010-att-relents-on-controversial-terms-of-service-announces-changes.html?rel

the TOS by removing its broad discretionary language. Verizon followed suit after it was publicized that the ISP's TOS contained a similar provision. Without neutrality rules, nothing prevents either company from readopting those provisions.

(c) Proposed filtering in the name of anti-piracy.

In January 2008, AT&T announced that it is considering installing a copyright filter on its subscribers' broadband connection. Filtering technology would permit AT&T to examine all of its users' transmissions, facilitating the company's ability to search and block digital transfers under the pretext of preventing the dissemination of pirated materials.

(3) Bell South's censorship of MySpace.

In 2006, BellSouth blocked its customers in Florida and Tennessee from using MySpace and YouTube. Both sites are interactive social networks that are especially popular with younger users, with MySpace currently the second most utilized site on the Internet.[73] It appears that BellSouth blocked the websites to test a tiered system of usage that would block certain websites if their administrators refused to pay for BellSouth's quality of service package.[74] Bill Smith, the Chief Technology Officer of BellSouth, has openly supported the principle of tiered access for his company.

In response to customer complaints, BellSouth Media Director Joe Chandler stated, "To my knowledge, we're not blocking any site right now."[75] Chandler's vague statement did little to allay the concerns of BellSouth customers and media interest groups. BellSouth separately claimed that users who downloaded the latest version of its FastAccess DSL tool may have been

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[73] Steve Rosenbush, *The MySpace Ecosystem*, BUSINESS WEEK, July 25, 2006, http://www.businessweek.com/technology/content/jul2006/tc20060721_833338.htm.

[74] Mark Hachman, *BellSouth Says It's Not Blocking MySpace*, PC MAGAZINE, June 2, 2006, http://www.pcmag.com/article2/0,2704,1971082,00.asp.

[75] *Id.*

blocked from accessing the Internet. However, BellSouth's reasoning does not explain its users' inability to access only specific social sites like MySpace and YouTube.

(4) Cingular Wireless blocks PayPal.

Cingular Wireless, part of AT&T, recently blocked attempts by its customers to use any competing online billing services to make purchases on eBay, an online auction site. PayPal, an electronic commerce company owned by eBay, gives Internet users the option of making online payments without sharing their financial information directly with payment recipients. Instead, users send their credit card or account information to PayPal, which sets up an agreement with the recipient. Cingular blocked PayPal after contracting with another online payment service called Direct Bill. Cingular made its discriminatory motives apparent in a leaked memo by stating, "Please be aware that Cingular customers should always and only be offered the Direct Bill option for payment of content and/or services. Any programs that offer Paypal and/or credit card options to Cingular Wireless customers will be escalated and reviewed by Cingular Wireless for possible immediate shut off."[76]

(5) Comcast's impairment of online file-sharing through BitTorrant.

Comcast Corporation, the nation's largest cable TV operator and second largest ISP, has discriminated against an entire class of online activities.[77] In fall 2007, Comcast engaged in "traffic shaping," which is the management of data flows over the Internet. While traffic shaping is a common practice among ISPs, Comcast went further by blocking file transfers from customers using popular peer-to-peer networks such as BitTorrent, eDonkey, and Gnutella.[78] To

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[76] Scott Smith, *Cingular Playing Tough on Content Payments*, The Mobile Weblog, July 7, 2006, http://www.mobile-weblog.com/50226711/cingular_playing_tough_on_content_payment.php.

[77] Peter Svensson, *Comcast Blocks Some Internet Traffic*, S.F. CHRON., Oct. 19, 2007, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/10/19/financial/f061526D54.DTL&feed=rss.business.

[78] Peer-to-peer technology allows customers to share files on their personal computers with other Internet users.

prevent the successful transmission of materials, Comcast delivered messages to users involved in file-sharing that forced them to terminate the transmission. It succeeded in its attempts by using hacking technology to pose as a party involved in the file-sharing process, contrary to company statements that it "[respects its] customers' privacy."[79] Comcast's actions were confirmed by nationwide tests conducted by the Associated Press. Comcast's online discrimination is contrary to the FCC's Internet Policy Statement, which provides that "consumers are entitled to access the lawful Internet content of their choice" and "are entitled to run applications and use services of their choice, subject to the needs of law enforcement."[80]

Comcast's censorship has severely impaired business operations of its customers who rely upon file-sharing for their livelihood. Many independent filmmakers, small business owners, and entrepreneurs use file-sharing as the primary avenue to advertise their productions and products. If ISPs like Comcast are allowed to discriminate against peer-to-peer networks, sites like BitTorrent may be shut down, preventing users from maintaining their businesses. In the process of shutting down innovation that relies on file-sharing, Comcast is "closing the door on a whole new generation of services," according to Fred von Lohmann, an attorney at the Electronic Frontier Foundation.[81]

In response to Comcast's online discrimination, one of its customers filed suit in California.[82] The customer had upgraded to Comcast's High Speed Internet Performance Plus

[79] Comcast, http://www.comcast.com/customers/faq/FaqDetails.ashx?ID=4391.

[80] Complaint at 10, Hart v. Comcast, PG 07355993 (Cal. Super. Ct., Alameda County, Nov. 13, 2007), *available at* http://www.digitalmusicnews.com/legal_docs/comcast_bittorrent.

[81] Vindu Goel, *Comcast Often Pulls Plug on Some File Sharing*¸ FreePress. Oct. 27, 2007, http://www.freepress.net/news/27420.

[82] Complaint at 1, Hart v. Comcast, PG 07355993 (Cal. Super. Ct., Alameda County, Nov. 13, 2007), *available at* http://www.digitalmusicnews.com/legal_docs/comcast_bittorrent.

service in order to have access to higher bandwidth[83] for peer-to-peer sharing.[84] Several public advocacy groups representing customers affected by Comcast's actions, including Free Press and Public Knowledge, have filed a separate complaint with the FCC,[85] which was the subject of an FCC field hearing at Harvard Law School a few weeks ago.

Some industry experts believe that Comcast may be blocking file-sharing attempts to prevent the consumption of too much bandwidth by its customers. However, according to a Comcast customer service center, there are no restrictions on customer bandwidth usage in the company's TOS agreement.[86] BitTorrent's President, Ashwin Navin, noted that Comcast could apply the funds it currently uses to falsify communications between users to effectively address the problem of low bandwidth. Economic scholars from Loyola University of Chicago Law School and Stanford University Law School advanced Navin's argument, stating that groups like Comcast actually lose more funds and significantly reduce the immeasurable social value of file-sharing by actively engaging in Internet discrimination.[87]

(6) Verizon Wireless's censorship of NARAL Pro-Choice America.

In late 2007, Verizon Wireless committed one of the most egregious examples of online discrimination documented to date. Claiming it had the right to block what it determined to be

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[83] The amount of bandwidth an Internet user has available dictates the speed with which the user can navigate through the Internet; high bandwidths indicates a faster flow of information on the Internet.

[84] *See* Complaint at 1, Hart v. Comcast, PG 07355993 (Cal. Super. Ct., Alameda County, Nov. 13, 2007), *available at* http://www.digitalmusicnews.com/legal_docs/comcast_bittorrent. The customer's complaint includes claims of breach of contract, breach of the covenant of good faith and fair dealing, breach of the Consumer Legal Remedies Act, and "unlawful, unfair and fraudulent business practice" under the Business and Professions Code. *Id.* According to the customer, Comcast violated their contract by failing to uphold their offer of "unfettered access to all the internet has to offer." *Id.*

[85] *See* http://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf.

[86] Art Brodsky, *Silence of the Regulatory Lambs*, The Huffington Post, Oct. 24, 2007, http://www.huffingtonpost.com/art-brodsky/silence-of-the-regulatory_b_69773.html.

[87] See Brett M. Frischmann & Barbara van Schewick, Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo, 47 JURIMETRICS 383 (Summer 2007).

contentious text messages, the company cut off NARAL Pro-Choice America's access to a text-messaging program that the right-to-choose group uses to communicate messages to its supporters. Verizon Wireless stated it would not service programs from any group "that seeks to promote an agenda or distribute content that, in its discretion, may be seen as controversial or unsavory to any of our users."[88] Verizon claimed that it had the right to ban NARAL's messages because current laws that prohibit carriers from blocking voice transmissions do not apply to text messages. In addition, Verizon argued that the Communications Act, which requires that commercial cellular providers must be nondiscriminatory for commercial mobile services, does not apply to non-traditional uses of phone services such as text-messaging.

In response to Verizon's censorship, a group of consumer advocacy organizations including Public Knowledge, Consumers Union, the New America Foundation and Free Press, filed a petition with the FCC in November 2007. The petition asks the FCC to forbid wireless carriers from preventing the transmission of text messages from any group, regardless of their political convictions. The groups also urged the Commission to create rules regulating the level of control cell phone providers have over communications sent using their networks. As the groups explained in their petition, "Mobile carriers currently can and do arbitrarily decide what customers to serve and which speech to allow on text messages, refusing to serve those that they find controversial or that compete with the mobile carriers' services…. This type of discrimination would be unthinkable and illegal in the world of voice communications, and it should be so in the world of text messaging as well."[89]

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[88] Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, http://www.nytimes.com/2007/09/27/us/27verizon.html?_r=1&oref=login.

[89] Kim Hart, *Groups to Press FCC to Prohibit Blocking of Text Messages*, N.Y TIMES, Dec. 11, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/12/10/AR2007121001634.html?hpid=sec-tech.

Verizon Wireless reversed its censorship of NARAL only after widespread public outrage. Verizon's spokesperson Jeffrey Nelson claimed the company's initial resistance to NARAL's messages was merely "an incorrect interpretation of a dusty internal policy" that was implemented before text messaging technology could ensure that customers would not receive unwanted messages.[90] However, according to Congressman John Dingell, "[Verizon's] latest statement does not identify any substantive change in policy. I ask Verizon to decisively state that it will no longer discriminate against any legal content its customers request from any organization."[91] Verizon Wireless's readiness to exercise unfettered discretion to censor groups or content with which it disagrees, such as NARAL Pro Choice America, provides the most compelling evidence that Congress must act to stop Internet discrimination.

V. Conclusion

The growing prevalence of online censorship in the absence of neutrality rules no longer can be denied. Internet discrimination by ISPs is on the rise, and will only increase as more Americans rely upon the broadband services that they provide. I recommend in the strongest terms that the Task Force begin consideration of legislation that will protect the rights of all Internet users to send and receive content free of corporate censorship and provide meaningful remedies for violations. Otherwise, the Internet will be transformed from a shining oasis of speech to a desert of discrimination that serves to promote only the ISPs' commercial products. Thank you very much for your attention. I will welcome the opportunity to answer any questions you may have.

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[90] Adam Liptak, *Verizon Reverses Itself on Abortion Message*, N.Y TIMES, Sept. 27, 2007, http://www.nytimes.com/2007/09/27/business/27cnd-verizon.html?_r=1&oref=slogin.

[91] House Energy and Commerce Committee. Statement on the Public Record, Statement of Chairman John Dingell, Sept. 27, 2007, http://energycommerce.house.gov/Press_110/110st93.shtml.