NET NEUTRALITY AND FREE SPEECH ON THE INTERNET

HEARING

BEFORE THE

TASK FORCE ON COMPETITION POLICY AND ANTITRUST LAWS

OF THE

COMMITTEE ON THE JUDICIARY
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ONE HUNDRED TENTH CONGRESS

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MATERIAL SUBMITTED FOR THE HEARING RECORD

NET NEUTRALITY AND FREE SPEECH ON THE INTERNET

TUESDAY, MARCH 11, 2008

HOUSE OF REPRESENTATIVES,
TASK FORCE ON COMPETITION POLICY
AND ANTITRUST LAWS
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Task Force met, pursuant to notice, at 2:04 p.m., in Room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr., (Chairman of the Task Force) presiding.

Present: Representatives Conyers, Lofgren, Jackson Lee, Waters, Cohen, Wasserman Schultz, Smith, Sensenbrenner, Goodlatte, Chabot, Keller, and Feeney.

Staff Present: Stacey Dansky, Majority Antitrust Counsel; Benjamin Staub, Professional Staff Member; and Stuart Jeffries, Minority Antitrust Counsel.

Mr. CONYERS. The Task Force on Antitrust will come to order. I am happy to see so many of our friends here. I know that Jack and Jill, Incorporated's national board is here for the annual legislative event and so is its President, Jacqueline Moore Bowles. We welcome all of you. Would you just stand up for 1 second? Thank you. Very good to see you all. Ladies and gentlemen, over the last 10 years, the Internet has gone from its infancy through a period of exponential growth. Today, over 1⅓ billion people use the Internet, which is approximately 20 percent of the world's population. In the last 7 years alone, worldwide use has jumped 265 percent. The Internet has become the dominant venue for the expression of ideas and public discourse. From social networking to get-out-the-vote drives, the Internet is now a leading tool for speech and action.

Web sites like Facebook, MySpace, LinkedIn, and Monster have changed the way people of all ages connect socially and professionally. Political candidates raise more money online with each election cycle. Newspaper Web sites and independent blogs have revolutionized the ways in which news and media are disseminated and consumed. And the Internet has opened up new performance venues to emerging artists and entertainers. In these and other ways, the technological innovation and communication made possible by Internet has made it among the most powerful outlets for creativity and for free speech.

So when it comes to the Internet, we should proceed cautiously. Unless we have clearly documented the existence of a significant

problem that needs regulating, I do not believe Congress should regulate. And even in those instances, we should tread lightly. Today the open architecture of the Internet is under siege. On today's Internet, a blogger can compete on a level playing field with news giants like CNN or *The New York Times*; an independent musician can stand equal with a record label; and citizen advocates can have as loud a voice as politicians themselves.

However, some of the Internet service providers, which control 96 percent of the residential market for high speed Internet access, are either monopolies or duopolies in the most of the areas of the country. There are either one company or two companies controlling it, and they have proposed now to give favored treatment to some Internet content and disfavored treatment to others. Under these proposed business models, what treatment you get will be determined by how much you pay or potentially whether the Internet service provider approves of the content that you are sending if you are sending it over their pipes. Or perhaps the Internet service provider may have a financial interest. The problem is that many of the innovations we have enjoyed on the Internet would never have occurred under this proposed regime. We never would have had a Google search engine or YouTube videos or Daily Kos blogs if paid to play had been our national policy. To be sure, if we go in this direction it will stifle future innovation on the Internet. And so I am concerned that if Congress stands by and does nothing, we will soon find ourselves living in a world where those who pay can play but those who don't are simply out of luck, where politicians will be able to stifle the voices of citizen activists through deals with Internet service providers, where an increasingly consolidated entertainment industry might be able to prevent independent artists and filmmakers from being heard.

Now, if Congress acts, it will not be because we have decided to regulate. It will be because the Internet service providers have imposed their own new regulation on the Internet and are interfering with its healthy growth. I believe that antitrust law is the most appropriate way to deal with this problem, and antitrust law is not regulation. It exists to correct distortions of the free market where monopolies or cartels have cornered the market and competition is not being allowed to work. The antitrust laws can help maintain a free and open market place

So Congress should help maintain a free and open Internet. So this is a very interesting subject and I would recognize our Ranking minority Member, Steve Chabot of Ohio, for his opening comments.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, TASK FORCE ON COMPETITION POLICY AND ANTITRUST LAWS

Over the last ten years, the Internet has gone from its infancy through a period of exponential growth. Today, it is estimated that over 1.3 billion people use the Internet—that is almost twenty percent of the world's population.

In the last seven years alone, the worldwide use of the Internet has jumped **265 percent.**

(1) The Internet is speech

The Internet has become the dominant venue for the expression of ideas and public discourse. From social networking to get-out-the-vote drives, the Internet is now a leading tool for speech and action.

Web sites like Facebook, MySpace, LinkedIn, and Monster have changed the way people of all ages connect socially and professionally.

Political candidates raise more money online with each election cycle.

Newspaper web sites and independent blogs have revolutionized the ways in which news and media are disseminated and consumed.

And the Internet has opened up new performance venues to emerging artists and entertainers.

In these and other ways, the technological innovation in communication made possible by the Internet has made it among the most powerful outlets for creativity and free speech.

So when it comes to the Internet, we should always proceed cautiously. Unless we have clearly documented the existence of a significant problem that needs regulating, I do not believe Congress should regulate. And even in those instances, we should tread lightly.

(2) Today, the open architecture of the Internet is under siege

On today's Internet, a blogger can compete on a level playing field with news giants like CNN or the New York Times. An independent musician can stand equal with a record label. And citizen advocates can have as loud a voice as politicians.

However, some of the Internet Service Providers, which control 96% of the residential market for high-speed Internet access, and are either monopolies or duopolies in most areas of the country, have proposed to give favored treatment to some Internet content and disfavored treatment to other content.

Under these proposed business models, what treatment you get will be determined by how much you pay or, potentially, whether the Internet Service Provider approves of the content you are sending over their pipes or, perhaps, has a financial interest.

The problem is that many of the innovations we have enjoyed on the Internet would never have occurred under this proposed regime.

We would never have had a Google search engine, or You Tube videos, or Daily Kos blogs, if "pay to play" had been our national policy.

To be sure, if we go in this direction, it will stifle future innovation on the Internet.

(3) Congress should act to preserve Net Neutrality

I am concerned that if Congress stands by and does nothing, we will soon find ourselves living in a world where those who pay can play, but those who don't are simply out of luck.

Where politicians will be able to stifle the voices of citizen activists through deals with Internet Service Providers.

Where an increasingly consolidated entertainment industry will be able to prevent independent artists and filmmakers from being heard.

Let's not get confused. If Congress acts, it will not be because we have decided to regulate. It will be because the Internet Service Providers have imposed their own new regulation on the Internet, and are interfering with its healthy growth.

I believe that antitrust law is the most appropriate way to deal with this problem—and antitrust law is not regulation. It exists to correct distortions of the free market, where monopolies or cartels have cornered the market, and competition is not being allowed to work. The antitrust laws can help maintain a free and open Internet.

I look forward to hearing from our witnesses today, and to a meaningful discussion of the various perspectives on this important topic.

Mr. CHABOT. Thank you, Mr. Chairman. I would like to thank Chairman Conyers for holding this hearing today. I would also like to thank our witnesses for taking the time to discuss this important issue. Net Neutrality is not a new issue to this Committee or to Congress. And debate in the past has been, quite frankly, very passionate. I think we can all agree, though, that the Internet has changed the way that we communicate, learn, and do business. It has changed the way we access and use information and technology. The Internet has flourished in a relatively regulation free

environment. For example, the Internet tax moratorium first enacted back in 1998, that was recently extended for an additional 7 years will continue to allow greater public access benefiting everyone from consumers to teachers and students, to the corporate sector and rural and urban areas alike. And it is a free market that will continue to allow the best possible service at the best possible price.

Too often Congress sees a problem that it believes it can fix. But legislation is not always the right answer. Competition is. Competition drives the market to become as efficient and effective as possible. Providing consumers with the right quantity at the right price. It has worked in the past and I believe that it will continue to work in the future, particularly as it relates to the Internet. Unbeknownst to many of us, there is an entire network structure that manages data traffic, enabling anyone to access virtually anything at any time. It is necessary to ensure that the most effective network infrastructure is in place to connect consumers to content. I am concerned that the heavy hand of government could deter investment and innovation and technology that will enable networks to advance in the future.

Burdensome regulations, particularly in this case, may actually slow the development of bandwidth, reducing the efficiency and effectiveness of the Internet, ultimately harming consumers. I look forward to addressing these concerns with our panel of experts today, and again, I want to thank the Chairman for this important hearing and I yield back the balance of my time.

Mr. CONYERS. Thank you. You are welcome. Mr. Smith, the Ranking Member of the full Committee, do you have a comment?

Mr. SMITH. Thank you, Mr. Chairman. Like you, I welcome all witnesses here today. I do have an opening statement, but I would like to ask unanimous consent that it simply be made part of the record.

Mr. CONYERS. Without objection.

Mr. SMITH. And I yield back, Mr. Chairman.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Mr. Chairman, thank you for calling this hearing on net neutrality and free speech on the Internet.

Our Committee has always played a vital role in ensuring fair competition in the telecommunications industry. We must continue to be vigilant of our jurisdiction in the constantly evolving environment of the Internet.

What has happened in the almost two years since the Judiciary Committee last considered this issue?

Proponents of Net Neutrality point to three episodes in 2007 involving Internet service providers AT&T, Verizon Wireless, and Comcast.

Without going into the details of every case, it seems clear that each company was taking these actions to serve a broader public good. In the case of AT&T's vendor, there was an effort to make the broadcast more family friendly. For Verizon, it was to block spam text messages. For Comcast, it was to manage their broadband network to provide the best experience for all of its users.

In every case, there was an acknowledgment that the problem could have been handled better or should have not happened at all.

But the companies took corrective action, issued apologies, and had to accept public criticism. The question is whether these limited examples provide a basis for Congress to broadly regulate the Internet.

Experience suggests not. Both the Department of Justice's Antitrust Division and the Federal Trade Commission have issued reports in the last year urging Congress and the Federal Communications Commission to be wary of enacting regulation affecting the Internet.

DOJ and the FTC point out that competition in consumer broadband is strong and growing.

For example, in each of the markets where AT&T, Verizon Wireless, and Comcast compete, they undoubtedly lost some customers to other broadband providers who were unhappy with the company's conduct.

They also note that network management is an essential function for any Internet service provider and that net neutrality regulation could have many unintended consequences.

Proponents of Net Neutrality are now casting this as a First Amendment issue. But that argument ignores the fact that not all speech is created equal.

For example, Congress has protected certain speech—in the form of copyrights—to preserve individual's intellectual property rights.

As NBC observed in its official comments to the FCC, "The record . . . confirms that fewer than five percent of Internet users consume at least 60 to 70 percent of broadband network capacity through peer-to-peer file-sharing and that some *90 percent* of this traffic consists of illegal, pirated content."

Congress attempted to address these concerns with the Digital Millennium Copyright Act of 1998. We should not be undercutting those efforts by implementing new laws and regulations that prevent ISPs from utilizing new technologies to deter this illegal downloading of pirated materials.

Similarly, Congress has long recognized that certain pornographic materials—particularly those that exploit children—should be off limits entirely. To that end, the Christian Coalition, among others, filed comments with the FCC expressing concern that the proposed net neutrality rules "might make it more difficult for [ISPs] to monitor and filter the use of . . . [P2P] networks to facilitate crimes against children. . . ."

These examples highlight how very difficult it is to write rules for how the Internet should grow. Instead of writing restrictive rules to solve this problem, I think it would be better to focus our efforts on preserving the application of current antitrust laws to safeguard against anticompetitive practices on the Internet.

This approach preserves the jurisdiction of this Committee and ensures that we don't put a straightjacket on this important sector of the economy.

Mr. CONYERS. Jim Sensenbrenner, Chairman Emeritus, have you a comment?

Mr. SENSENBRENNER. A little bit, Mr. Chairman. Thank you very much. In the last Congress, when I was Chairman of the Committee, I joined with then-Ranking Member Conyers to introduce legislation. And the purpose was based on two principles. One is that the antitrust law should apply to the telecommunications industry. That remains my position. And the second was that I believe that it was important that this Committee exercise its jurisdiction in this area because antitrust laws are not regulations in that some Federal agency tells you what you can do and what you can't do. But if somebody is aggrieved they can file a lawsuit. And if they are able to prove anticompetitive action, then they can win triple damages.

I would hope that the debate on Net Neutrality and what to do about telecom and Internet regulation, or lack thereof, goes on in this Congress. The current Chairman and Ranking Member at all costs moved together to make sure that the Judiciary Committee maintains its jurisdiction on this subject because if we allow our jurisdiction to go to the Energy and Commerce Committee, I think you'll see a regulatory structure over the Internet that is not going to be good for the American public, and it is not going to be good for artists and others that use the Internet as an essential means of communication such as the witnesses that we have here today. Thank you.

Mr. CONYERS. Thank you, sir. Ric Keller, have you a comment?

Mr. KELLER. No, I don't, Mr. Chairman. But thanks for asking. I just appreciate all the witnesses being here.

Mr. CONYERS. Mr. Feeney, welcome.

Mr. FEENEY. Thank you, Mr. Chairman. This is my first hearing, and I am very anxious to hear the various issues explored. I am somewhat familiar with the Internet and intellectual property and even antitrust. I have heard of horizontal monopolies. I have heard of vertical monopolies. I guess when we are talking about wireless, I guess it is sort of a ubiquitous monopoly. That is a new thing for me to understand. With that I would yield back and listen very carefully.

Mr. CONYERS. Thank you. Our witnesses are Susan Crawford, professor; Professor Christopher Yoo; our old friend, Director of ACLU, Washington office, Caroline Fredrickson; Rick Carnes, President of the Songwriters Guild of America; Michele Combs, Vice President of Communications, Christian Coalition of America; and, of course, our lead vocalist and guitarist, OK Go, Damian Kulash. A vocalist and a musician, a native of our capital, a graduate from Brown University, Kulash formed his organization in 1999 with three others. His band released 2 albums and won a Grammy award for one of its music videos in 2007. They attribute their breakthrough in part to the popularity of their videos, which the group has uploaded and disseminated, or it looks like he is trying to play them here, disseminated across the world on video Web sites like YouTube.com. Welcome, Mr. Kulash. We would love to hear, see, and listen to your remarks.

TESTIMONY OF DAMIAN KULASH, LEAD VOCALIST AND GUITARIST, OK Go

Mr. KULASH. Thank you, Mr. Chairman. Mr. Chairman, Ranking Members—I am sorry—Mr. Ranking Member and Members of the Committee, it is a real honor to be here. I am a rock singer, so I have some experience getting up in front of a microphone, but to put it this way, you are not my usual crowd. I am here today because my band, OK Go, is among the first to have truly found success on the Internet. I don't know if I need to tell all of you guys my story or not. I am getting the sense that maybe you guys are the "Cool Rep 2000" and "Chairman Rock" that we already see on our message boards every day.

But just in case, I am going to tell you a little bit about our story and the videos that we put on the Internet, and I want to show you a couple of those videos today. Our band started out the way that every band did 10 years ago. The traditional music industry was still very much in full swing, and it served a real purpose which was to connect musicians who wanted to get their music out there in the world, and there were people all over the world that wanted to hear that music.

So a big industry grew to connect those dots. We worked in that system. We started out playing shows in Chicago, at local clubs where we started. We plastered our posters all over town. We took as much time off from our day jobs as we could to go touring and eventually we developed a big enough fan base that we landed that rare prize, the major label record deal. Our first record, which we

put out in 2002, did moderately well. We got to about 100 on the billboard charts and just barely broke into the top 20 of the modern rock radio charts which is something of a feat.

And to translate these numbers, we basically were in the middle of the pack. We were doing much better than most musicians, felt very, very lucky to be doing what we love for a living, but we were still struggling for every fan we could find and frankly struggling to pay our bills as well. So we put out a second record, and this time we thought maybe we would add our own promotional ideas into the mix a little bit.

We still did everything that our record label asked us to do, and everything that every band would do, you know, the free shows for radio stations, the nonstop touring, we would go to the Fox morning news studios and play an acoustic song for the people of Houston. But we also decided we would start our own online campaign. So If you don't mind, I will show you the first video here that we put on line. Uh-oh. Well, I thought I would play it. There we go. I don't know if you can hear the song here. But that is us dancing in my backyard. My sister helped us choreograph this pretty ludicrous routine as basically as something—let me turn this down. This was something we were going to do on stage. It was just planned as sort of a way to surprise our fans. There is really nothing more exciting than seeing a rock band in the middle of a show just drop their instruments and break into dance.

All we really wanted was to see, you know, was 500 or a 1,000 jaws on the floor at the end of the show. So we came up with this routine and we were practicing it in my backyard and we shot this videotape. And the clip itself, there is just something really compelling about it. And when we saw it, we realized we have got to put this out for our fans. So we put it on the Internet thinking, you know, just our most hard core fans, you know, the dedicated few would see it. And within a month, it had been streamed and downloaded, viewed several hundred thousand times. So we realized that more people had actually clicked through to this video than had purchased our first record after 18 months of touring.

So then what was really pretty crazy is—let me go to the next video here. The next thing that started happening was our fans started posting their own versions of the video. Our fans would go and learn the choreography and then tape it themselves and post it on the Internet. What I am about to show you, it is pretty crazy. This is—a fan of ours found hundreds of these homemade videos on line and compiled several of them together, and it is sort of a composite video. So here are some of them. We got these videos from all over the world. We have gotten them now from 5 or 6 continents.

We have seen them performed at people's weddings, in the middle of Wal-Mart. That right there, that is my backyard. They blue screen themselves into my backyard. We have—we saw them in churches, we saw them in local firehouses. Thousands of people were involved in sending us these videos and it really is something that never could have happened 5 years ago. I mean, this is a connection to our fans that simply was unthinkable before. You are usually held at arm's length from your fans, but here we were con-

nected directly to them and them to us. And that is, you know, a really amazing feeling for someone making music.

But not to be outdone by our fans, of course, we decided we needed to post another video. And so we went to my sister's house and we made this one. Once again, of course, this is just a home video that we made and it is just one long shot again. As you can see, we are dancing again but this time on moving treadmills.

For the record, I would like to say that we assume no medical liability for any of our fans that may try to duplicate this one. This video we figured—we put it on line, it would probably do about what the first one had. We thought we had basically done as well as anyone can do on line with a video. We had already broken all sorts of records. And in the first 2 days, we put this on line, we posted it to YouTube, we had 1 million views. As you may have seen in the full screen view there, this video now has been—this single posting of this video has now been viewed 31 million times.

Let me stop this. Sorry. So, you know, this video, of course, 31 million views—I mean, this has taken us all over the world and it has been incredible for our band. We can now play in countries to thousands of people where our records are not even commercially released. And what is most impressive is that we are actually making money for our standard model record label as well. We now license music all over the place and we sell real records, and it is clear that our creativity has actually been a success for everyone. No matter how you slice it, we are a successful band now.

So people are wondering if the music industry will benefit from Net Neutrality. I don't think they need to look any farther than us. We are musicians and we are part of the music industry. I don't think there is really anyone out there who wants to see this business flourish more than we do. I am here today representing Future Music—excuse me—the Future of Music's Coalition to Rock the Net campaign. There are 800 other bands who have signed up with us in the last year, and 125 labels who are on board.

There really is some consensus here that Net Neutrality is good for music and good for musicians. It has allowed us to innovate and to create in ways that just were never possible before. Keep in mind, all of us are businessmen, too. We want to get paid. I mean, everybody wants their hard work to be recognized. And what we really need is a legitimate digital marketplace for music. The only way that is going to happen is if we build on a level playing field. So Members of the Committee, Mr. Chairman, I am here to ask you today to preserve Net Neutrality and the openness of the Internet. I believe it is critical to the future of music.

Mr. CONYERS. Mr. Kulash, I don't know how to break this to you, but there are a number of people up here that think that we could do that too. And it may be better than some of the ones that you have seen.

Mr. KULASH. I don't doubt it, sir.

Mr. CONYERS. Would you be willing to accept a Judiciary Committee video showing our steps?

Mr. KULASH. It will have to be submitted by the same means as everyone else, sir, but, yes.

[The prepared statement of Mr. Kulash follows:]

PREPARED STATEMENT OF DAMIAN KULASH

Testimony of Damian Kulash
Hearing on Net Neutrality
House Judiciary Anti-Trust Task Force
Tuesday, March 11, 2008

Thank you Mr. Chairman and Mr. Ranking Member, members of the task force – thank you all for this opportunity to testify before you today on an issue so critical to the future of this country, the issue of Net Neutrality. I'm a rock singer, so I have some experience getting in front of people and speaking my mind, but to be honest, you guys aren't really the demographic I'm used to dealing with. So this is very exciting for me.

My name is Damian Kulash my band is called OK Go. We've been around for nearly 10 years, during which time we've sold over a half a million records, won a Grammy, played over 1200 shows in 45 States and on 5 continents, and most important to us here today, had the good fortune to be one of the first bands to become truly successful via the internet, where we've had tens of millions – maybe hundreds of millions – of streams, downloads, and website hits. We are among the tiny percentage of the world's musicians lucky enough to earn a living doing what we love, and we owe our livelihood in large part to our online success, a type of success that couldn't have been imagined just a decade ago. I'm here to ask you to protect the principles that have made the internet great, and that have made it a place where a band like mine can succeed.

Mr. Chairman, the music business is experiencing a profound transformation right now – one that could mean either the dawn of a new era for American art and commerce, or its continued consolidation, coming at the expense of not just artists and musicians, but all Americans.

Since the dawn of recorded music early last century, the industry that emerged around it has been based on the natural bottleneck that existed between musicians and the music listening public. Musicians needed a way to reach all those people, and people needed a way to get all that music, and a complicated and profitable system emerged to connect the dots.

The mechanics of making and distributing records were formidable: professional recording studios were expensive to maintain and operate, manufacturing and packaging records was costly and complicated, and getting those records onto the turntables of America required a vast and complex network of warehouses, shippers, distributors, and retailers.

On top of that there was the question of exposing and promoting music to the public. Commercial radio has long been the only medium for reaching most people, and a handful of radio programmers effectively choose what music the country would hear. Naturally, there is intense and expensive competition for their attention. Later came MTV, where once again a few people pick a few songs for the whole country.

As I'm sure you're well aware, the extreme bottlenecks of this system encouraged pretty ethically challenged behavior at times. Some songs succeeded primarily on the merits of the drugs and Superbowl tickets that were delivered to radio stations with them. But I'm not here today to question or condemn how business was done, but rather to simply recognize that the architecture of the industry, the system of powerful gatekeepers, had a profound influence on what music got made and listened to in America, and under what conditions. Gatekeepers, of course, sometimes used their power to compel artists to enter onerous contracts.

Today, that system has been turned on its head. Digital technologies have begun to remove the bottlenecks, and the industry founded on them faces a crisis, even as music itself enters a new golden age. Making, distributing, and listening to music is easier now than ever before. Anyone with access to a decent computer now has recording tools that the professionals of my parents' generation couldn't have dreamt of – making high quality recordings is now nearly as easy as word processing. With a few clicks of a mouse, recordings can be distributed to pretty much any place on the globe, and listened to practically anywhere. If you've been on the Metro recently, you've no doubt noticed that the entire commuting community has headphones on – they're all listening to digital music players. I'd bet that more music is being listened to now than ever before in

history. Musical ideas are spreading and combining and growing, even as the rigid structure of the traditional music business is crumbling. All sorts of exciting new things are possible. It's an exhilarating time.

It certainly has been for my band. Let me give you a quick overview of how we got where we are. OK Go started in 1999 and followed a pretty well-worn path for the first few years. We developed a following at local clubs in our hometown of Chicago, spent as much time on the road as we could afford to, eventually landed ourselves a record deal with a major label, and then played the promotional game as it is generally played in the majors: a ton of no-profit touring, a lot of free shows for radio stations, as many interviews as we could get, and the occasional music video, where the cost is advanced by our label and deducted from our royalties. Our first record, which came out in 2002, did decently well: on the Modern Rock radio charts we just barely broke into the top 20, and on Billboard's sales charts we made it to about 100. We were in the middle of the pack: successful enough to keep going, but struggling for every fan we could find.

In 2005 we released a second album and that's when our story takes a turn pertinent to the subject at hand today. When the record came out, we did all the standard promotion that our label advised, but we also decided to launch our own online campaign with simple, absurd videos we made ourselves.

With the help of my sister, we choreographed a parodic dance routine and shot a single-take home video of us performing it in my back yard. If you include the Starbucks run, the total budget for the video was about $20. We posted the clip online, and it caught on like wildfire. We watched, astonished, as the video racked up hundreds of thousands, then millions, then tens of millions of hits at online video sites. Before long, we were getting offers to play to thousands in countries where our record had never even been released.

And something even wilder started happening: fans started posting their own versions of the video. Thrilled by the direct connection with our fans, we launched a dance contest, and received homemade remakes of our video from all over the world. We got hundreds

of entries, videos of the dance at weddings, in churches, at high school talent shows, in firehouses, and even a version performed by animated legos. This is a whole new phenomenon, a feedback loop of creativity that allows us to be more than just a commercial product to our fans – we are the center of an active, creative community.

We followed that video up with another that we shot at my sister's home in Orlando. It was a single take again, and we were dancing again, but this time on eight moving treadmills. To my knowledge, this routine has only been repeated four times (once in Japan, once in Mexico, and twice in the US), and for the record we assume no liability for those dumb enough to try it. In the first two days after we posted the clip on YouTube, it was viewed a million times. In the month after it went online, our album sales increased nearly 4000%. We won a Grammy for the video, beating out much bigger acts with exponentially bigger budgets and promotional campaigns. Now we get stopped in Times Square by people old enough to be our grandparents. To date, it's been viewed over 30 million times on YouTube alone.

Whether you think our videos are brilliant or gimmicky—I'd be the first to say they're a little of both—they've done more to promote our music to an audience around the world than anything else we or our label has produced. For seven years we barely covered our bills, and since our internet success, we've become a very successful operation. We believe the videos were so loved because they came directly from us. There was no one telling us what we could or couldn't do, no middlemen or marketers, and we didn't have to sell a committee of gatekeepers on our idea before we could take it to our fans. Our success couldn't have happened in the pay-to-play music industry of ten years ago, or in a world without an open, unbiased, and unfettered internet.

Of course, like most bands, we use the internet for everything today; it's not just a medium for our videos. We connect with fans through our website, our online forums, and through social networking sites like MySpace and Facebook. We alert our online fans to concerts and television and radio appearances, and we promote those appearances to new fans. We sell our merchandise and CDs, and book our tours online. We broadcast some concerts online, and have done many performances solely for an online

audience. Today, as I speak to you, some dedicated portion of our fans is listening to this testimony, online. (Hi guys). Basically, the internet stops just short of writing our music for us, but it takes care of just about everything else.

This part of our story is common to every band working today. We've joined with over eight hundred other bands in the Future of Music Coalition's Rock The Net campaign, and each of them – and I'd venture to say pretty much every working musician out there today – will tell you how vital an open an neutral internet is to their business.

Mr. Chairman, let me be very clear here, though: with the big opportunities and big changes that digital technologies have brought to the music world, there are great unknowns for musicians. My peers and I run small businesses, and like all entrepreneurs, we want to ensure that our work is valued, that we can earn livings, and that our good ideas can make us good money. I am no fan of piracy. You will not find a songwriter or musician out there who doesn't want to get paid, but piracy issues must be addressed by innovations that build on an open internet, not shut it down.

We believe people are willing to pay for good music in their lives. That hasn't changed, and the smart folk who build new systems capitalizing on the strengths of the internet will reap big wards. Net neutrality is necessary for the growth of new businesses and business models, and creating a new legitimate digital music business is critical to artists and the music industry. To put it simply, without net neutrality, I would not be sitting here today. If companies think they are going to protect their profits by erecting artificial bottlenecks, artists and their fans will lose. The new system that's emerging in the music world cannot return to a gatekeeper system – a system where the success of our ideas was determined solely by the middlemen who delivered them.

This principle extends beyond the realm of music, it applies to everything on the internet: we cannot allow a system of gatekeepers to be built into the network as a whole. We must protect the basic equality that has made the internet so great, and make sure the few existing broadband providers can't use their market power to erect new bottlenecks for music or any other industry. The failure to enact strong net neutrality legislation would

mean an internet with gatekeepers; an internet that exists for the profit of a few, rather than the good of the many; a society where value comes not from the quality of information, but from the control of access to it.

Creativity and innovation are the lifeblood of any successful endeavor, whether artistic, commercial, or political. There are only two guitar companies who make the majority of guitars sold in America, but luckily they don't control what we play on those guitars. Whether we use Macs or a PC doesn't govern what our minds can bring to life with our computers. The telephone company doesn't get to decide what we discuss over our phone lines. Similarly, the companies who deal with the nuts and bolts of the internet should not determine what we can do, or make, or access, or dream up while we're using it. The Internet has always been a place for freedom of speech, art, and commerce. We should keep it that way.

Until now, the internet has fostered an explosion of creativity, innovation, and progress not in spite of its level playing field – but precisely *because* it is a level playing field. It's as close to a genuine meritocracy as we've ever seen. It's a place where my band's $20 video found a wider audience than the industry's million-dollar productions, because ours was simply better. Legislation to protect this level playing field is essential not just for the music community, but for all of us. The world of tomorrow must be built on our society's best ideas, not just those ideas that align with interests of a few powerful gatekeepers.

We'll do our part. We'll keep making the best songs, the best videos, and the best ideas we can. And on behalf of millions of Americans, musicians and artists, both aspiring and established, I am asking today that the Congress do its part, too. Make sure there is always a fertile place for all of our good ideas to flourish. Do not allow the few existing broadband providers build new bottlenecks. Enshrine the internet's level playing field in law.

Thank you.

Mr. CONYERS. Well, I was for Net Neutrality when we started this hearing. Michele Combs, Christian coalition of America. We welcome you. You started in South Carolina as Executive Director of America 2000, the Educational Service Corporation, a special events company you started in 1992, managed functions for both the Republican National Convention and the Democratic National Convention. Hopefully not at the same time. And you did something for the late Senator Strom Thurmond. We will find out what that—oh, and President George Bush's inauguration. Which one?

Ms. COMBS. 2001.

Mr. CONYERS. All right. We welcome you. And we have your written statement. All statements will be introduced into the record. We are anxious to learn more about your position on this subject. Welcome.

TESTIMONY OF MICHELE COMBS, VICE PRESIDENT OF COMMUNICATIONS, CHRISTIAN COALITION OF AMERICA

Ms. COMBS. Thank you. Thank you, Chairman Conyers and distinguished Members of the Committee on the Judiciary. My name is Michele Combs, and like Chairman Conyers said, I am the Vice President of Communications for the Christian Coalition of America. And thank you for inviting me to testify on this very important issue of Net Neutrality. The Christian Coalition of America is the largest and the most active grassroots political organization in the country. We offer people of faith a vehicle to be involved in shaping their government.

Christian Coalition is a conservative political organization, which is made up of pro-family Americans who care deeply about becoming active citizens for the purpose of guaranteeing that government acts in ways that strengthen rather than threaten families. Use of the Internet has allowed the Christian Coalition to engage Americans in a way that has revolutionized their ability to be heard and to engage in the political process. The Christian Coalition Web site is visited by millions of Americans every year and in addition, we send out e-mail alerts every week to hundreds of thousands of supporters. And have available our voter guides, as many of you know, every election cycle.

Our State chapters also have their own Web sites and many of our supporters would not be able to keep up with legislation and the legislative process if they were not able to access these Web sites on a daily basis. The reason the Christian Coalition is for Net Neutrality is simple. Because we believe in freedom of speech on the Internet. Organizations such as ours should not be—should be able to continue the use of the Internet to communicate with our members and with the worldwide audience without a phone or a cable company snooping into our communications and deciding whether to allow a particular communication to proceed, slow it down, or offer to speed it up only if the author pays extra to be on the fast lane. Free speech should not stop when you turn on your computer or pick up your cell phone.

The Christian Coalition testified some time ago on this issue, and many Members of Congress promised to act if network operators blocked political speech. We are here to say the time has come. Recent actions by the Nation's biggest phone and cable companies

should be of grave concern to all those who care about public participation in our democracy.

Consider these recent examples: Last fall, Verizon Wireless censored text messages sent out by NARAL. When NARAL protested, Verizon Wireless said not to worry, because the company would also block the speech of pro-life advocates such as the Christian Coalition. Now, let me show you—the Christian Coalition and NARAL agree on almost nothing here in Washington, D.C., but we do agree that Verizon censorship of political speech was wrong. Verizon claims it has changed its policy.

I ask you, should the company have the right to make the decision in the first place? In August of 2007, AT&T censored a Web cast of a concert by the rock band Pearl Jam, just as the lead singer started talking about politics. Also in October of 2007, the Associated Press reported that Comcast was blocking consumer's ability to download the King James Bible using a popular file sharing technology. And it is also pointed out that Comcast's discriminatory content just so happens to block access to video distribution applications that compete with Comcast's own programming.

I ask the Committee, if Comcast created a Christian family channel, would Congress allow it to block access to a competing product from the Christian Coalition? If phone companies cannot tell Americans what to say on a phone call, why should they be able to control content or tell us what to say or send a text message or an e-mail?

The Christian Coalition of America does not seek burdensome regulations as we prefer less government to more, and we do not believe that government should censor speech. But right now the telephone and cable companies are invested in the same kind of censorship and content discrimination technologies that are being used today by the Chinese government to block the Christian Coalition from reaching Chinese citizens.

Finally, faith based groups are turning to the Internet to promote their political rights, to engage in what Ronald Reagan called the hard work of freedom. We should not let the phone and cable companies interfere with that work in getting our message out to the millions of Americans who want to make this country a better place for their children and grandchildren.

Mr. CONYERS. Thank you very much.

[The prepared statement of Ms. Combs follows:]

PREPARED STATEMENT OF MICHELE COMBS

WRITTEN STATEMENT OF
MICHELE COMBS, VICE PRESIDENT OF COMMUNICATIONS
THE CHRISTIAN COALITION OF AMERICA

HEARING ON:
NET NEUTRALITY AND FREE SPEECH ON THE INTERNET

BEFORE THE COMMITTEE ON THE JUDICIARY, TASK FORCE ON
COMPETITION POLICY AND ANTITRUST LAWS
UNITED STATES HOUSE OF REPRESENTATIVES
March 11, 2008

Chairman Conyers, Ranking Member Keller, and Distinguished Members of the Committee on the Judiciary Task Force on Competition Policy and Antitrust Laws, my name is Michele Combs, and I am the Vice President of Communications for the Christian Coalition of America. Thank you for inviting our organization to testify on this very important hearing on "Net Neutrality and Free Speech on the Internet."

The Christian Coalition of America ("CCA" or "Christian Coalition") is the largest and most active conservative grassroots political organization in the United States. We offer people of faith a vehicle to be actively involved in shaping their government. Christian Coalition of America is a political organization, which is made up of pro-family Americans who care deeply about becoming active citizens for the purpose of guaranteeing that government acts in ways that strengthen, rather than threaten, families. As such, we work together with Christians of all denominations, as well as with other Americans who agree with our mission and with our ideals.

Our hallmark work lies in voter education. Prior to the last election, the Christian Coalition of America distributed a record 70 million voter guides throughout all 50 states. These non-partisan guides gave voters a clear understanding of where various candidates stood on the issues important to them. With this knowledge, millions of voters went to polls to make their voices heard.

Use of the Internet has allowed the Christian Coalition to amplify the voices of millions of hard-working, pro-family Americans in a way that has revolutionized their ability to be heard and to engage in the political process.

The Internet connects people all over the world in a manner, scope, and ease that would be impossible anywhere but online. It provides a voice for even the most modest members of society to disseminate ideas on a scale traditionally reserved only for the most powerful.

Consequently, the reason the Christian Coalition supports Net Neutrality is simple. We believe that organizations such as the Christian Coalition should be able to continue to use the Internet to communicate with our members and with a worldwide audience without a phone or cable company snooping in on our communications and deciding whether to allow a particular communication to proceed, slow it down, or offer to speed it up if the author pays extra to be on the "fast lane."

Simply put, free speech should not stop when you turn on your computer or pick up your cell phone. The Christian Coalition testified some time ago on this issue and many members of Congress promised to act if network operators blocked political speech. We are here today to say, 'network operators are blocking political speech.'

Recent actions by the nation's biggest phone and cable companies should be of grave concern to all those who care about public participation in our democracy. Consider these recent examples:

1. Verizon Wireless Blocking Political Speech. Last fall, Verizon Wireless censored text messages sent by the pro-choice advocacy group, NARAL, to its own members who had voluntarily signed up to receive them. When NARAL protested, the phone company claimed the right to block any content "that, in its discretion, may be seen as controversial or unsavory." When this did not satisfy the concerned, Verizon Wireless said not to worry, because the company would also block the speech of pro-life advocates such as the Christian Coalition.

   After news of Verizon's censorship hit the front-page of the *New York Times* -- sparking a loud public outcry -- the company quickly backpedaled, issuing an apology and blaming the blocking on a "dusty internal policy," -- while still reserving the right to block text messages in the future in its own discretion.

2. AT&T Blocking Political Speech. In August 2007, AT&T censored a webcast of a concert by the rock band Pearl Jam just as lead singer Eddie Vedder started talking about politics. The company claimed it was a glitch -- as were at least three other instances when AT&T cut off political speech during live concerts.

3. Comcast Blocking Access to Users Ability to Access the Bible. In October 2007, the news organization Associated Press reported that Comcast was blocking consumers' ability to download the King James Bible using a popular file-sharing technology. Comcast at first denied that it was engaging in such discrimination. After independent tests confirmed that Comcast was indeed engaging in this behavior, Comcast claimed that it was simply conducting routine network management. This "routine network management" has launched two petitions at the Federal Communications Commission, a consumer complaint at the FCC, at least two class action

> lawsuits, an investigation by a state attorney general, and countless complaints in the blogosphere. Yet Comcast continues to argue it has the right to discriminate against such applications. And it is my understanding that it argues that the FCC has no legal authority to do anything about it.
>
> It has also been pointed out that Comcast's discriminatory conduct just so happens to block access to video distribution applications that compete with Comcast's own programming. If Comcast were to create a Christian family channel, would Washington allow it to block access to a competing product from the Christian Coalition?

It is our understanding that AT&T, Verizon, Comcast and other Internet access providers in the fine print of their "terms of service" agreements, reserve the right to engage in just this kind of discriminatory behavior.

If phone companies cannot tell Americans what to say on a phone call, why should they be able to control content or tell us what to say or send in a text message, an email, or anywhere else?

Consider what is at stake for an organization like the Christian Coalition. The Internet is a powerful tool for religious speech, and a tool that is increasingly utilized by many Americans for just this purpose. The Pew Internet & American Life project's most recent study showed that nearly two thirds of American Internet users were online for faith-related reasons. Thirty-eight percent of the nation's Internet users sent and received emails with faith based content. Thirty-five percent have sent religious holiday e-cards. Thirty-two percent have sought out faith related news. Seventeen percent have looked for information on attending religious services. Seven percent have made or answered online prayer requests. And 7% have made donations to religious organizations or charities through the Internet.[1]

The Christian Coalition's Web site is visited by millions of Americans every year. In addition, we send out thousands of email alerts on a weekly basis and have available our voter guides to thousands of churches and voters every election. Many Americans use our Web site as a educational tool on a daily basis. Our State Chapters have their own Web sites and use their Web sites to organize and educate voters on a daily basis. Without fast access, many of our supporters would not be able to keep up with legislation and the election process.

Consider some other examples of Web sites and technologies that promote religioius discourse on the Internet:

- GodTube (www.GodTube.com) is a video sharing and social networking website based in Dallas, Texas. In August 2007, GodTube was the fastest growing

[1] www.pewinternet.org/PPF/r/126/report_display.asp

website in the country, at a rate of 1.7 million new users. Believers of all faiths can view over 40,000 videos with religious content.[2]

- MyChurch (www.mychurch.org) is a Christian social network that has combined many user friendly aspects of popular social networking sites. Its site claims to offer the members of over 6900 churches the chance to stay connected to their church, be apprised of community events, listen to sermon podcasts, and contribute to their parish or other religious causes.

- Miro (www.getmiro.com) is a growing, peer-to-peer Internet tv platform that uses BitTorrent and other technologies to provide video content. Over one hundred of its channels are devoted exclusively to topics covering religion and spirituality.

Net Neutrality is more important than ever because technology is converging. The Internet is not just for your computer anymore – it is also on your cell phone, your Blackberry, and even in your car. That is why it makes no sense that the laws that protect your right to engage in lawful speech over the phone do not extend to text messaging, e-mail, or access to web sites.

The Christian Coalition of America does not seek burdensome regulations. We generally believe in the proposition that less government is better than more government. And, we do not believe that governments should censor speech. But let's be clear. Right now, the telephone and cable companies are investing in and using the exact same censorship and content discrimination technologies that are being used by the Chinese government to censor speech.

In fact, the Chinese government is currently using these same technologies to block the Christian Coalition's speech from being received by its citizens. Washington should make it clear that it will not allow cable and phone companies to use these technologies to block the lawful speech rights of the Christian Coalition and others.

Increasingly, faith-based groups are turning to the Internet to promote their political rights, to engage in what Ronald Reagan called "the hard work of freedom." We should not let the phone and cable companies interfere with that work.

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[2] *Christian Science Monitor,* February 6th, 2008

Mr. CONYERS. Songwriters Guild of America, Mr. Rick Carnes. President of Songwriters Guild of America. Twenty-one million records have been produced from songs that he has written. Dean Martin, Trisha Yearwood, Garth Brooks and Reba McEntire. And it goes on and on. Under Mr. Carnes' leadership, the Songwriter's Guild has become a leading advocate on creative and artistic issues. We welcome you to the Committee, sir.

TESTIMONY OF RICK CARNES, PRESIDENT, SONGWRITERS GUILD OF AMERICA

Mr. CARNES. Thank you, Mr. Chairman, and Ranking Member Smith, and Members of the Committee. Thank you for this invitation to discuss the songwriter's perspective on Net Neutrality proposals and antitrust laws. My name is Rick Carnes, and I am President of the Songwriters Guild of America, and this year marks my 30th year as a professional songwriter. No issue is more important to songwriters who have seen their livelihoods and professional futures devastated by Internet piracy. Today, the songwriting profession is like a person drowning in quicksand. Some of us barely have our heads above the surface, but we are up to our armpits, and there is a chance that new technologies to detect and deter illegal file sharing might save us.

But I am concerned that pending regulatory and legislative proposals could discourage the development of those technologies and therefore cause my colleagues in my profession to drown. Chairman Conyers and Congressman Smith, over the years there have been no greater advocate for songwriters than you and your colleagues on this Committee. We truly appreciate the responsiveness of this Committee to the copyright and technology challenges we have faced together over the past 15 years. As the Committee considers the competition aspects of the Net Neutrality debate, I wanted to provide you with our perspective on how authors, writers, and composers are affected by potential regulation of the Internet.

As I have testified before this Committee, Internet piracy is damaging the music industry and killing off the songwriting profession. As a matter of fact, my own publisher had 12 songwriters on staff in 1998, and they have one on staff in 2008. The devastation is almost total now. Recent studies indicate that 70 percent of the volume of the traffic on broadband networks is P2P traffic relating to 5 percent of the users, and easily 90 percent of that traffic is unlawful. That is the real bottleneck in the Internet now.

A 2008 U.K. study by the Wiggin Group found that 70 percent of those surveyed said they'd stop illegal file sharing if their ISP notified them in some way that it had detected their practice. In other words, the problem of illegal file sharing is unacceptable and the misconduct committed by a small group of people is causing the problem, many of whom would stop if there were technology to warn them to stop or to make them stop. Some network operators such as AT&T are now considering technological means to identify and filter illegal content over the Internet. Technology has hurt our profession, but at last some more technology might finally save it. As a songwriter, I can tell you that my choice is to have my works distributed by someone who is invested in trying to stop the digital theft of intellectual property.

Indeed, I would believe it would be to the economic advantage of broadband operators to take such steps because the quality of content they distribute would increase and many consumers would prefer their service. In other words, there is evidence that the marketplace might finally be working here to reduce Internet piracy, so it is with great concern that I read the proposals that would prevent ISPs from managing their networks in order to relieve congestion when that congestion is largely caused by illegal file sharing.

Some proposals by the Commerce Committee and the FCC would prevent ISPs from taking necessary management actions, and I believe those proposals are without justification. But so too should this Committee proceed with very great caution on antitrust proposals that would expand the current laws to protect consumers against unfair competition on the Internet. Antitrust legislation in the prior Congress, HR 5417, would have created a presumption that broadband operators were acting unlawfully unless they could show that their network management or antipiracy actions were nondiscriminatory or fit into certain narrow exceptions.

I am confident that this legislation did not intend to discourage the developing technologies that could counteract the digital piracy epidemic, but I am concerned that that might have been the result. The last Congress' antitrust bill could have prevented ISPs from discouraging illegal content practices and would have prohibited the ISPs from encouraging their customers to patronize sites that adopt lawful copyright practices.

I strongly urge the Committee to think this issue through further because that result would be very harmful to songwriters. Here is one final thought on legislation and regulation on Net Neutrality. It strikes me as odd that the problem of broadband network congestion largely caused by illegal file sharing has been addressed by proposing that the ISPs be denied the ability to manage that very congestion. The market appears to be addressing the problem now, but if regulation or legislation is deemed necessary, then I recommend that Congress consider the heart of the problem first, and that is illegal file sharing. Illegal file sharing is the problem, Mr. Chairman. And I encourage you and your colleagues to factor that issue into your further deliberations. Thank you very much for this opportunity to express my views.

Mr. CONYERS. Thanks so much.

[The prepared statement of Mr. Carnes follows:]

PREPARED STATEMENT OF RICK CARNES

www.songwritersguild.com
(201) 867-7603

TESTIMONY OF RICK CARNES
President, Songwriters Guild of America

Before the
HOUSE COMMITTEE ON THE JUDICIARY
Task Force on Competition Policy and Antitrust Laws

March 11, 2008

Hearing on Net Neutrality and Free Speech on the Internet

Chairman Conyers, Congressman Smith, and Members of the Committee Task Force, thank you for this opportunity to testify regarding potential regulation of the Internet and how that might effect the digital copyright piracy that is killing off the American songwriting profession. In summary, I believe the current proposals to regulate the Internet -- whether from the FCC perspective or the antitrust perspective -- are more likely to harm than to help the fight against music piracy, and therefore I suggest you proceed with great caution.

My name is Rick Carnes and I am President of The Songwriters Guild of America (SGA). SGA is the nation's oldest and largest organization run exclusively by and for songwriters. I am a working songwriter and have lived in Nashville since 1978. While I have been fortunate to have had a modicum of success in my career -- including co-writing number one songs for Reba McEntire ("I Can't Even Get the Blues") and Garth Brooks ("Longneck Bottle") along with songs for Steve Wariner, Alabama, Pam Tillis, Conway Twitty, and Dean Martin among others -- I am reminded constantly of the perilous economic existence that all of us who have chosen songwriting as a profession labor under daily.

Let me begin by noting that there has been no greater advocate for songwriters over the years than John Conyers. You have been our champion for as long as I can remember on the many intellectual property challenges that we have faced, and we truly appreciate it. And to Ranking Member Lamar Smith, Former Chairman Sensenbrenner, and other Members of the Committee, we fully appreciate and respect all of the support you have given to songwriters and the copyright community over the years. While we may be starting from different perspectives than some of you on the issue considered today, I am confident that you will give our views full and fair consideration, and I look forward to working with you on it.

Net Neutrality and Copyright Piracy

SGA began focusing on the "Net Neutrality" issue when communications companies started commenting that they were investigating technological solutions to combating piracy on the Internet. At the time of the DMCA debate, ISPs desired to be a "mere conduit" for the material distributed through their networks. In recent months, however, we became aware that some communications companies desire to manage their networks more actively to reduce congestion, which would also have the effect of reducing the significant downloading of pirated content. Additionally, we understand that some companies, including ISPs and content owners, are studying whether pirated content could be identified and stopped before it can be retransmitted for downloading and replication. Others are looking at programs that would encourage or facilitate downloading of legal content. Each of these would be a significant positive development for songwriters and other music copyright owners -- whose livelihoods have been devastated by Internet piracy. Given this prospect, we strongly urge the Committee to fully examine the current situation before placing limits on the ability of broadband companies to manage their networks and implement anti-piracy measures.

The Problem of Internet Piracy for Songwriters

The unfortunate reality of the current situation in the digital world is that online piracy of digital music is rampant. Such piracy has deeply and materially adversely affected the songwriter community. SGA has spoken out frequently and in great detail on the grave harm to the songwriter community that is being caused by the theft of music in cyberspace. For example, we were at the public forefront of the legal battle that lead to the seminal 2005 anti-piracy decision by the U.S. Supreme Court in ***Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*** One of the most startling facts today that shows the devastation caused by the loss of songwriter revenue to piracy is SGA's observation that over half of the staff songwriter positions that existed at music publishing houses across the country as recently as five to ten years ago have disappeared. Some companies appear to have eliminated the practice of hiring staff songwriters altogether. Piracy, in other words, is destroying the American community of songwriters through the elimination of songwriting as a viable livelihood. As a result, an important piece of American culture and global commerce is being decimated.

Given the digital nature of this grave threat to the future of the songwriting profession, I have had to become a lay expert in Internet technology. I therefore read with great interest the opinion of network experts, cited by NBC Universal in its FCC comments, that 70% of the volume of traffic on broadband networks is Peer to Peer, or P2P traffic relating to 5% of the users, and easily 90% of such traffic is unlawful. A 2008 UK study by the Wiggin media group found that 70 % of all people polled said they would stop illegally sharing files if their ISP notified them in some way that it had detected the practice.[1] Mr. Chairman, the current situation is simply unacceptable. If a broadband network operator is considering taking technological steps to stop this occurrence, SGA would say, "more power to you." And, "the sooner, the better." And finally, "how can we help?"

[1] http://arstechnica.com/news.ars/post/20080303, visited March 7, 2008.

Competition in Broadband Networks and Addressing Piracy

As noted, recent events indicate that some network operators, such as AT&T, are investigating whether there might be a technological means to identify and/or filter unlawful content transmitted over the internet. This would make perfect economic sense in my mind, because lawful owners of copyrighted content would rush to make their works available on those networks that incorporated such technology -- given the lower risk of digital theft of their works. If the free market is working the way it should, then these networks might risk alienating some customers because of the filtering, but would also stand to gain significantly from having more robust content to offer to a wider audience. And that is what the free market is all about: creating a distinctive product and challenging competitors with an inferior product. In a market that is free of undue or unwise regulation, the economic winners and losers would be chosen by consumers who have a wide range of choices about what type of Internet service to purchase, and what kind of material might be distributed over those networks. I can tell you as a songwriter and as a copyright owner that my choice would be to have my works distributed by someone that invested in trying to stop digital theft of intellectual property. And I believe that competition would be enhanced if broadband network operators were free to decide to manage their networks in this manner. At the moment, the marketplace can decide which networks made the right choice, and that strikes me as a rational result.

Recent Regulatory and Legislative Proposals.

I think the greatest risk of an anti-competitive result comes from current regulatory and legislative proposals to prohibit or limit responsible ISPs from managing their networks. At the moment, the free market is the best weapon we have for combating Internet piracy. Technology created the illegal file sharing monster, but more technology can detect and deter those practices that are illegal. In other words, we must fight technology with technology. Unfortunately, a number of pending regulatory and legislative proposals would prevent the nascent technological counter-attack against Internet piracy.

The songwriting profession right now is like a person drowning in the quicksand of digital piracy. Of those whose heads remain above the surface, many of us are up to our armpits. There is a chance that some new technology will be the rope thrown to us before it is too late. But companies and entrepreneurs need an economic incentive to develop those anti-piracy technologies. Regulations restricting the ability of ISPs to manage their networks would discourage the development of these necessary technologies and would eliminate the last bit of hope that songwriters have to survive the digital onslaught. We might drown even if these new technologies are deployed -- or we may not. But we will almost certainly slip from sight if they are not developed. And this is an important policy consideration for Congress and the FCC.

Some regulatory proposals before the FCC, and legislation currently in the Commerce Committee, are clearly detrimental to responsible network management, and therefore would harm songwriters. The antitrust legislation introduced in 2006 by Congressmen Conyers and Sensenbrenner recognizes that network operators should be able to protect the security of their networks, and to prevent a violation of Federal or State law. To the extent that this covers copyright enforcement actions, we greatly appreciate your understanding that this is an issue.

Unfortunately, it is our reluctant conclusion that the bill from the prior Congress would still have significant adverse affects on anti-piracy efforts on the Internet -- even though I am confident that is not your intent.

H.R. 5417 from the 109th Congress makes it an antitrust violation to fail to provide broadband network services on reasonable and nondiscriminatory terms and conditions, or to block, impair, or discriminate against, or interfere with the ability of any person to use a broadband network. While an exception exists for measures to manage the functioning of the network, to protect the security of such network, and to prevent violations of law, these measures themselves must be "reasonable and nondiscriminatory." The exception is far from clear, particularly in the area of actions taken to prevent copyright violations. When such an ambiguity exists, the likelihood that companies will spend money to develop technologies to deter broadband piracy falls precipitously. New anti-piracy technology could well be discouraged. While I doubt this result was intended, I am quite concerned that that would be the actual result.

Even if the exceptions in H.R. 5417 were determined to permit ISPs to ***discourage illegal*** copyright practices, the bill clearly would not allow ISPs to ***encourage*** their customers to patronize sites that adopt ***lawful*** copyright practices. I think such flexibility on the part of ISPs is critical to reducing Internet piracy of music, and yet this bill would likely prohibit it.

I am not a lawyer, let alone an antitrust lawyer, but I understand that current antitrust law is quite broad. And I am confident that if the broadband network operators engaged in anti-competitive conduct, DOJ, the FTC, and perhaps this committee as well, would take action against those who are responsible. Given that even the FTC has determined that such conduct has not occurred so far, and given the risks that regulation in this area poses to copyright owners in general -- and to songwriters in particular -- I would strongly encourage the Committee to think twice before further legislative action in the current direction.

My final thoughts on regulating the Internet are as follows. It strikes me as odd that the problem of broadband network congestion caused largely by illegal file sharing has been addressed so far by proposing that ISPs be denied the ability to manage such congestion. If regulation is to be considered, then the heart of the problem should be at the top of the agenda – ***illegal file sharing***. The current proposals seem to have it all backwards. I am comfortable letting the market reward those ISPs who behave responsibly and letting current law apply to those who misbehave. But if regulation or legislation is the course chosen, then the first order of business is to detect and stop illegal file sharing.

Conclusion

Mr. Chairman, Mr. Smith, Mr. Sensenbrenner, and my many other friends on the Committee, SGA truly appreciates your efforts over the years on behalf of the songwriting community. We may not be in agreement on this particular issue at the moment, but I look forward to working with you so that we may resolve this thorny problem, just as we have resolved many other thorny issues in the past. SGA and I stand ready to be a part of that process.

Mr. CONYERS. Caroline Fredrickson, Esquire, American Civil Liberties Union. You have been before the Committee numerous times, you have been General Counsel and Chief Operating Officer for NARAL Pro-Choice America, a Chief of Staff to Senator Maria Cantwell, a deputy chief to former Senate minority leader Tom Daschle, a lawyer from Columbia University, and before that, Yale. We are happy to have you. We have got your statement. And now we will hear from you.

TESTIMONY OF CAROLINE FREDRICKSON, DIRECTOR, WASHINGTON LEGISLATIVE OFFICE, AMERICAN CIVIL LIBERTIES UNION (ACLU)

Ms. FREDRICKSON. Thank you very much, Chairman Conyers, Ranking Member Chabot, Members of the Task Force. It is a pleasure to be here to talk to you about Net Neutrality and free speech on the Internet. The Supreme Court's ruling in Brand X, and FCC inaction in addressing increasing censorship by broadband Internet service providers or ISPs are key factors in today's threat to on line free speech. This hearing marks an important step toward ensuring that the marketplace of ideas for the 21st century, the Internet, remains the bastion of freedom that it has been since its creation. The Internet's marketplace enhances speech through its decentralized, neutral, nondiscriminatory pipe that carries data from origin to destination without interference. Neutrality promotes open discourse; consumers, not gatekeepers, decide what sites to access among millions of choices. The Internet structure facilitates free speech, innovations and competition on a global scale, providing access to a mass audience at little or no cost. No one owns the Internet. Instead the Internet belongs to everyone who uses it.

The Internet has become the leading 21st century marketplace of ideas because of neutrality rules promoting nondiscriminatory speech, association, and content. The Internet was born and flourished under well-established, nondiscrimination protections derived from title 2 of the Communications Act of 1934, which grants the FCC the authority to regulate telephone companies as common carriers. As early as 1966, the FCC required that data transmissions going over the phone lines be provided on a nondiscriminatory basis. The Internet blossomed under that protection.

Today three-quarters of all adults in the United States, 147 million people, use the Internet. And two-thirds of American adults do so daily. Neutrality rules have made this dynamic growth possible. ISPs ignore this history by wrongly suggesting that nondiscrimination would regulate the Internet. The opposite is true. Nondiscrimination ensures that lawful activity on the Internet remains free from regulation by both the government and network providers. And ISP's first amendment rights are not violated by neutrality rules that would bar an ISP from censoring its customers.

Aside from the Internet content that they create, edit and maintain, which would not be restricted under neutrality principles, ISPs are not speakers. They are merely providing the wires through which each of their paying customers accesses the Internet in 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. But ISPs exist to provide customer access to the Internet and the expressive and associational activities found there free of censorship, akin to the role of telephone companies in providing communication services.

We would not tolerate a telephone company restricting our calls to certain numbers based on the content of the call and we should not tolerate that type of censorship from ISPs. A vibrant marketplace of ideas on the Internet cannot function with corporate censors any more than it can with government censors. Without neutrality rules, ISPs are engaging in more and more online censorship. Ms. Combs has already done a very fine job of outlining the variety of censorship activities that have happened just in the last year or 2. So I won't restate those.

But the ISPs have established, through their very own actions, that Internet censorship is a growing reality and not the speculative hypothetical they claim it to be. Restoration of meaningful neutrality rules would simply return us to where we were before the Brand X decision in 2005 by prohibiting ISPs from picking and choosing which users can access what lawful content through the gateways they provide.

Congress must pass legislation that enforces the four freedoms established by the FCC in its 2005 policy statement, including access to lawful Internet content and running applications and services of one's choice with penalties for violations of those freedoms. Otherwise, the Internet will be transformed from the shining oasis of speech to a desert of discrimination that serves to promote only the ISP's commercial products, and so much would be lost from that change. Thank you very much for your attention.

Mr. CONYERS. Thank you for being on time, which you always are.

[The prepared statement of Ms. Fredrickson follows:]

PREPARED STATEMENT OF CAROLINE FREDERICKSON

Testimony of Caroline Fredrickson

Director, Washington Legislative Office

American Civil Liberties Union
Washington, D.C.

Before the House Committee on the Judiciary

Task Force on Competition Policy and Antitrust Laws

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

March 11, 2008

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/idUSN09182132007080 9?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

[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

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[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.

Mr. CONYERS. I am pleased now to turn to Professor Christopher Yoo, University of Pennsylvania, who teaches telecommunications and intellectual property law, directs the University Center For Technology, and prior to his appointment, taught at Vanderbilt University Law School. He has published prolifically and has a new book coming out this year entitled *Networks in Telecommunications: Economics and Law*. He clerked with Supreme Court Justice Anthony Kennedy, and is a graduate from Harvard Law School, and I am pleased to welcome him at this time.

TESTIMONY OF CHRISTOPHER S. YOO, PROFESSOR OF LAW AND COMMUNICATION AND DIRECTOR, CENTER FOR TECHNOLOGY, INNOVATION, AND COMPETITION, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

Mr. YOO. Thank you, Mr. Chairman, Members of the Committee and the Task Force. I am grateful for the opportunity to be here today. The Internet is, perhaps, the first major technological development of the 21st Century. A network that began as a platform for e-mail and Web browsing now supports a dazzling array of new services. Perhaps the most important of these new services for policymakers is the emergence of Internet video technologies, such as YouTube and Vuze.

These new applications are placing increasingly intense and varied demands on the network and have made network planning considerably more uncertain. For the past 5 years, Internet traffic has grown at a rapid but steady rate of roughly 50 to 60 percent each year. Some experts estimate that Internet video will cause that growth rate to double to 90 percent to 100 percent each year as occurred during the first 6 years of the Internet and is reportedly occurring in Japan. If these estimates are correct, network providers must increase their capital investments by over 100 billion dollars or else the Internet will slow to a crawl by 2010. The key reason that the Internet is—the problems posed by the Internet is that it is subject to congestion.

In other words, the speed you receive depends not only on how many network resources you are using, but also how many other people are on the system at the same time. Internet technologies vary widely in their susceptibility to congestion. For example, cable-based technologies are more vulnerable to congestion at the neighborhood level than are telephone-based technologies. Cable modem service will degrade if as few as 15 of the 300 users in the same neighborhood are running BitTorrent. Wireless broadband technologies are even more vulnerable to congestion.

In some respects, Internet congestion arises in much the same way as congestion arises on our Nation's road system. Like on the Internet, the speeds that you can attain on the roads depend not only on your decisions, but also on how many other drivers choose to hit the road at the same time. In addition, like the Internet, congestion on the road system varies from location to location. Therefore, any solution must be tailored to increases in volume that vary in time and space.

There are typically two solutions to congestion. One solution is to build more lanes to make sure there is always enough capacity to prevent delays when traffic peaks. The problem is that building

excess capacity is expensive. Maintaining extra resources that are only used a few minutes out of every day is typically a bad deal for consumers. The increase in capital costs threatens to slow the buildout of broadband services for all Americans. And the additional cost will raise the number of subscribers that a broadband network will need to break even, which means that the burden would fall especially hard on rural Americans.

In addition, no matter how hard they try, planners' predictions of how much and where to add additional capacity will occasionally be wrong. Adding more lanes takes time. So when planners make mistakes, adding capacity is not always available as an option. Even more importantly, adding lanes often simply stimulates development at the ends of the roads until the new lanes become congested as well. There is a real danger that demand will expand to fill all available capacity no matter how many lanes are added.

The alternative approach to adding capacity is engaging in some type of network management. By limiting access to the interstates during rush hour, reserving lanes for high occupancy vehicles and buses and giving ambulances and other high value traffic priority over other traffic. Each of these approaches involves a degree of nonneutrality, and yet each is regarded as uncontroversial.

I do not mean to push the analogy between the road system and the Internet too far. There are some critical differences between them. For example, Internet traffic is extremely bursty, in that long periods of inactivity are punctuated with extremely brief but intense periods of heavy bandwidth usage. This makes network management considerably more complex and calls for different tools.

Perhaps the most important difference between the road system and the Internet is the presence of bandwidth hogs. In the road system, each driver cause roughly the same amount of congestion. On the Internet, the situation is quite different. Network providers estimate that as few as 5 percent of end users represent between 50 and 80 percent of the networks total usage and many applications are designed to increase the usage as long as capacity is available.

The question in such a world is not whether congestion will occur. The question is whether the cost of that congestion will be borne by all users or only by those responsible for causing it in the first place. Good economics and simple fairness favor placing the lion's share of those costs on those responsible for creating them. Any other system would, in effect, require low bandwidth users to cross-subsidize the network usage of a handful of bandwidth hogs.

It is for this reason that every panelist that testified at the FCC's February 26 hearing on network management agreed that some degree of network management is inevitable. The problem is that the reasonableness of any particular approach to network management varies from technology to technology and within any particular technology varies across time and from location to location. The problem is complicated still further by the fact that technology underlying the Internet is undergoing constant and rapid change. At the same time, the current debate has failed to take into account the proper analog to the Internet is not the one-to-one communica-

tions that characterize the telephone system, but rather the one-to-many communications that characterizes the Internet.

The flood of Internet content—in short, Internet users face an avalanche of content every day and depend on search engines, bloggers and other intermediaries to help sift through it. Consumers also depend on them to protect them from undesirable content such as spam, viruses and pornography. The question is thus not whether there will be an intermediary. The question is who will serve as that intermediary. And, in fact, there are a great deal of problems as the Christian Coalition's position in this—before the FCC makes clear, we do depend on network operators to screen us against pornography, ring tones with racial slurs, and profanity and other forms; and we must be careful that in asking companies to serve as intermediaries that we do not stop their ability to do that.

The precise details of which agency and whether agencies or courts should enforce are less important than the substance of the law. I would urge this Committee not to rule any particular solution off the table. Leaving network providers free to experiment with new solutions is the best way to ensure that consumers enjoy the full range of the Internet's tremendous potential in the future. Thank you.

Mr. CONYERS. Thanks so much.

[The prepared statement of Mr. Yoo follows:]

PREPARED STATEMENT OF CHRISOPHER S. YOO

WRITTEN TESTIMONY OF CHRISTOPHER S. YOO

Professor of Law and Communication
Founding Director, Center for Technology, Innovation, and Competition
University of Pennsylvania

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

Before the Committee on the Judiciary of the United States House of Representatives

March 11, 2008

Mr. Chairman and Members of the Commission, I am grateful for the opportunity to testify here today. As a Professor of Law and Communication and the Founding Director of the Center for Technology, Innovation, and Competition at the University of Pennsylvania, I have been studying these issues for the better part of the past decade. I would like to make two basic points to day.

The first is that the recent surge in Internet traffic caused by new video technologies, such as YouTube, has the potential to overwhelm network providers' ability to add capacity to meet that demand.

The second is that much of the modern Internet is increasingly dominated not by person-to-person communications, but rather by mass media content. There is a long line of Supreme Court precedent acknowledging the important free speech benefits of preserving editorial discretion when media content is involved, both to help sort through the avalanche of content available on the Internet and to screen out bad speech, such as spam and pornography.

The Internet has changed dramatically since its origins as a way for university-based scholars to communicate with one another. Since the Internet backbone was privatized in the mid-1990s, the number of Internet users has exploded. This dramatic increase in the number of users has been accompanied with a similarly dramatic increase in the diversity of ways people

are using the Internet. The relatively simple applications that dominated the early Internet, particularly e-mail and web browsing, are being superseded by a host of more complex and demanding applications, such as Internet telephony, streaming video, online gaming, and virtual worlds. Not only do these new applications demand more bandwidth; many are also much more sensitive to delay than were e-mail and downloading webpages.

The evolution of the Internet has made networks increasingly difficult to manage. The problem is exacerbated still further by the uncertainty about how quickly Internet traffic will likely grow in the future. Between 1996 and 2002, Internet traffic doubled every year. Since that time, the rate of traffic growth has stabilized at roughly 50%-60% per year. Thus, even the most conservative estimates project that network providers will have to undertake massive new investments just to keep pace with traffic growth. Some experts have predicted that the rise of new Internet video technologies like YouTube may once again cause Internet traffic to double each year. If so, Internet video will unleash an "exaflood" that will slow the Internet to a crawl by 2010 unless an additional $137 billion is invested in network capacity.

The reason is that the Internet is subject to congestion. In other words, the speed depends not only on how much capacity any particular user is using, but also on how many other people are on the system at the same time. There are typically two solutions to the problems of congestion. Network providers can build excess capacity to make sure that there is enough bandwidth to ensure against delays when traffic levels peak. The problem is that adding capacity is a solution can be quite expensive, can slow rural deployments, and may ultimately be self defeating. The alternative is to allow network providers to engage in network management. The fact that predictions are never perfect and that capacity cannot be added instantaneously necessarily means that network management will always remain a valuable means for preserving

the value of the Internet. Foreclosing that alternative would place network owners in the impossible position of having to be perfectly prescient in their predictions of exactly how much Internet traffic will grow and exactly where geographically extra capacity will be needed.

The choice between expanding capacity and network management can be illustrated through a more familiar resource that is also subject to congestion, which is our Nation's road system. Like the Internet, traffic on the road system tends to fluctuate. Thus, even though the posted speed limit may be 55 or 75 miles per hour, the speed particular drivers will actually achieve depends not only the total number of miles they drive on the number of other drivers on the road at any particular time. In addition, like the Internet, congestion on the road system is not uniform. Although most portions of the road system will be uncongested, there will be the occasional hot spots.

How do transportation engineers alleviate congestion during times of peak traffic? One solution is to add more lanes. This solution suffers from a number of drawbacks, however. As an initial matter, maintaining excess capacity makes building roads considerably more expensive. In a world in which the network resources are privately provided, the inevitable consequence is to increase the number of customers needed for any network expansion to breakeven, which in turn inevitably limits the ability to expand into less populous areas. Moreover, traffic engineers' predictions of exactly where and how many additional lanes will be needed are never perfect. Absent traffic management, any errors due to underestimation would take years to correct.

Even more importantly, the evidence suggests that expanding capacity may ultimately prove futile. The addition of lanes simply stimulates development at the ends of the road until

the new lanes become congested as well. In short, demand will expand to fill all available capacity no matter how much is added.

The alternative approach to managing peak traffic is engage in some type of traffic management. Classic examples include putting stoplights at Interstate on-ramps that restrict the traffic entering the system, giving ambulances and other traffic with a higher social value priority over other traffic, providing drivers with fast-pass options at toll plazas, and reserving lanes for buses and high occupancy vehicles. Each of these approaches represents a form of nonneutrality. And yet, each is regarded as uncontroversial.

I do not mean to push the analogy between the road system and the Internet too far. There are some critical differences between them. For example, unlike traffic on the road system, in which congestion rises and falls rather slowly and steadily over time, traffic on the Internet is extremely "bursty," in that long periods of inactivity are punctuated with extremely brief but intense periods of heavy bandwidth usage. This makes the network management problem considerably more complex and calls for different tools.

In addition, the Internet is comprised of radically different technologies which vary widely in their susceptibility to congestion. Telephone-based technologies allow telephone companies to give end users dedicated connections all the way to the central facility they maintain in each city known as the central office. As a result, telephone-based technologies are not subject to congestion at the neighborhood level. In contrast, cable-based technologies by their nature do not offer such dedicated connections. Instead, end users share their connection with roughly 300 other users located in the same neighborhood. This makes cable modem systems much more susceptible to neighborhood congestion than telephone-based systems. Unsurprisingly, cable-based systems must take different steps to manage their networks. These

problems are even more acute for wireless broadband. Not only do wireless users share bandwidth in much the same way that cable-modem users do. The bandwidth available to wireless technologies is much more limited than that available to any other technology. As a result, wireless providers frequently give higher priority to telephone calls and other applications that are time sensitive while holding e-mail and other traffic for which delays of a fraction of a second are essentially unnoticeable.

Perhaps the most important difference between the road system and the Internet is the presence of bandwidth hogs. In the road system, each driver causes roughly the same amount of congestion. On the Internet, the situation is quite different. Network providers estimate that as few as 5% of end users represent between 50% and 80% of the network's total usage, and many applications are designed to increase their usage as long as capacity is available. The question in such a world is not whether congestion will occur. The existence of applications that increase their usage to fill all available bandwidth makes that inevitable. The question is whether the costs of those congestion will be borne by all users or only by the handful of users responsible for that congestion. Under these circumstances, requiring those most responsible for congestion to bear a greater percentage of the costs would be both good network management and fair from a consumer standpoint. Any other system would in effect require low bandwidth users to cross subsidize the network usage of a handful of bandwidth hogs. Charging differential rates is thus more properly regarded as a way to keep fees down for end users who simply want to maintain websites.

It is for this reason that every panelist that testified at the FCC's February 26 hearing on network management agreed that some degree of network management is inevitable. The problem is that the reasonableness of any particular approach to network management varies

from technology to technology and even within any particular technology varies depending on the amount of traffic in the network at any particular location or at any particular time of day. The problem is complicated still further by the fact that the technology underlying the Internet is undergoing constant and rapid change. Any categorical solution that might be mandated today would all-too-frequently be overtaken and rendered obsolete by technological change. In the worst case, a mandate might retard new technological solutions from emerging in the first place.

My second larger point is that the nature of the Internet is changing in ways that the current debate does not yet take into account. Proponents of network neutrality repeatedly cite telephone-based precedents, such as the *Computer Inquiries* and *Carterfone*, which were developed to govern person-to-person communications. In so doing, they overlook the fact that the modern Internet is not dominated by person-to-person, but rather has become an important source of mass-media content. As a result, end users have turned to a wide array of intermediaries, such as search engines, bloggers, and update services, to help them sift through the avalanche of desirable Internet content that grows with every passing day. They also depend on intermediaries to protect them from undesirable content, such as spam, viruses, and pornography.

The question is thus not whether some network provider will serve as an intermediary. The flood of Internet content makes that inevitable. Instead, the question is who will play that role. Whoever plays that role must walk a careful line, in that they will be asked to screen out only that content that is truly undesirable while allowing all other content through. Consider, for example, Verizon's statement at the FCC's February 26 hearing. Verizon revealed that it has declined to activate short code campaigns that were designed to distribute wallpaper with nude images or ringtones containing profanity or racial slurs, would be used solely for spam, or would

charge inordinate fees. Any legal intervention must thus be carefully tailored not to prevent exercises of editorial discretion that benefit consumers, keeping in mind the Supreme Court's famous admonition in *Cohen v. California* that "one man's vulgarity is another's lyric."

The likely difficulty is illustrated by the positions taken by the Christian Coalition. On the one hand, the Christian Coalition has endorsed network neutrality. On the other hand, it has asked the FCC to preserve network providers' ability to screen out child pornography and obscenity and to refer any instances that they may discover to law enforcement authorities.

The result is that we are asking network providers to strike a careful balance, both in terms of building the Internet of the future and in terms of managing the ever-growing deluge of content that is available online. Prohibiting network owners' ability to play this role would simply shift the emphasis to search engines and other intermediaries, which no doubt would simply cause the debate to shift to "search neutrality." In this sense, the history of Google's success is quite revealing. Google displaced existing search engines like AltaVista by coming up with an algorithm that prioritized search results in a different way. This raises serious questions over whether any particular algorithm can ever be considered truly neutral and suggests how network providers can compete in the way they exercise editorial discretion.

It is for this reason that I have long opposed imposing categorical, before-the-fact prohibitions on any particular conduct. Many forms of network management are beneficial, and categorically precluding any particular form of network management threatens to choke off many of the innovative solutions made possible by new technological developments.

At the same time, the economic literature reveals the existence of limited circumstances in which network owners might use their economic position to disadvantage consumers. Although such circumstances would be relatively rare, such harm remains theoretically possible.

It is for this reason that I have long advocated taking an after-the-fact, case-by-case approach go regulating network neutrality. Such a position would have strong support from Supreme Court precedent. It would also strike the proper balance between protecting consumers and giving dynamic industries like the Internet the breathing room needed to respond to changes in the underlying economics and technology. Although it is conceivable that antitrust courts might play this role, I believe that they are institutionally poorly suited to the type of ongoing supervision that overseeing an access mandate would require. It is for this reason that I have argued that a regulatory agency like the FCC is in a better position to oversee such an analysis. The Supreme Court's *Brand X* and *Trinko* decisions both agree that the FCC has both the authority to oversee such a mandate and is in the best institutional position to do so.

I am heartened by the fact that an ever-growing number of industry participants and scholars have endorsed the approach I first proposed. The vigor with which the FCC has pursued allegations of improper network management suggests that the regulatory structure may already be in place to ensure that consumers are both protected and able to enjoy the Internet's tremendous promise in the future.

Mr. CONYERS. Professor Susan Crawford, Yale Law School. Also has taught at Cardoza School of Law in New York, Georgetown University Law Center, Michigan University, a policy fellow at Center for Democracy and Technology, and sits on the board at the Internet Corporation for Assigned Names and Numbers. We welcome you to the Committee.

TESTIMONY OF SUSAN P. CRAWFORD, VISITING ASSOCIATE PROFESSOR OF LAW, YALE LAW SCHOOL

Ms. CRAWFORD. Thank you so much, Chairman Conyers, Ranking Member Chabot and Members of the Committee. It is an honor for me to be here today and talk to you. I want to leave you with just three key points. First is that the stakes are extraordinarily high for this discussion because the Internet is becoming the general purpose communications network on which all Americans rely for both business and personal reasons. And second, that there are clearly insufficient protections in place for both speech and innovation on line. As the Chairman pointed out, we have an unregulated duopoly in place providing Americans with Internet access at the moment. And they have enormous market power and every incentive to discriminate against speech and new products and new services that they believe are undermining their business plans. Third, congressional action is needed to ensure in advance that we have an open, neutral Internet to which all of us can have nondiscriminatory access. Just a few words about the context here. We make a deal over and over again with the providers of general purpose communications networks. Here is the deal.

In exchange for limiting your liability for the content of the communications that pass over your network, we make them provide nondiscriminatory assistance to all customers who are willing to pay. We have done this for the telegraph, we have done this for the telephone. This is not a new obligation. It has allowed us to put our general communication systems in the hands of private, for-profit companies without worrying about discrimination and censorship.

We are at a constitutive moment in communications history, a real turning point. This is like the moment of the arrival of the telegraph and the telephone. Now it is the Internet. The Internet is the first global, electronic, general purpose communications network. It is triggering economic growth and new ways of making a living all around the world. The Internet is not the same thing as Comcast cables or Verizon's wires or even a wireless connection. These companies are merely providing one set of connections that allow users and businesses to connect to the dynamic interaction that the Internet protocol facilitates.

The stakes for this conversation could not be higher. The difference between a phone, a cable system and television, they are all dissolving. The Internet is taking over the functions of all of these communications networks we used to use. Each of the vertically integrated network access providers in this country sees this change as a threat. Telcos want to offer their own premium television services, music services and premium Web content, cable cos want to offer more channels of cable content. Cable companies

limit their Internet access services to a very small amount of bandwidth.

In fact, the real bandwidth hog here is Comcast in many ways. Internet access is a tiny portion of their overall bandwidth. The rest is devoted to cable content. The open Internet could become the greatest competitor these companies have ever seen. Again, it is not one competitor, but a general purpose vehicle for thousands of entrepreneurs across the country offering innovative new products. Each of these dominant network access providers, as you have heard from Professor Yoo's testimony, wants to act as an editor, an editor or a gatekeeper of Internet access for their own commercial purposes. They want to call these edited services Internet access, but it is not really that. It is much more like more cable content. These guys don't want to be gravel pits. They don't want to provide commodity transport.

We have a choice right now. Should we have a general purpose network available for all Americans to use in a nondiscriminatory fashion, like a road from a rural center to a big city, or should we have a series of special purpose networks that are much more like rides at Disneyland, carefully managed. The whole consumer experience is one that is tailored to the competitive needs of the network access provider. The stakes are very high. This is about the future of communications itself.

Second, there are clearly insufficient protections for speech on line. As the Chairman clearly outlined, we do not have a functioning competitive market for Internet access in this country. Instead we have regional duopolies, offering either DSL service or cable modem service to 96 percent of the country. A third of Americans have, at most, one choice of high-speed Internet access provider. This lack of competition provides the opportunity for discrimination with respect to Internet access services and that discrimination, in turn, serves the goal of these large carriers. It is so easy to come up for explanations for discrimination after the fact. Arbitrariness by itself is enormously threatening to speech, and innovation and has the potential for suppressing particular points of view as the Christian Coalition points out.

So congressional action is needed. That is my final point. All of these Internet access related questions are being dealt with under the SEC's assertion of ancillary jurisdiction. There is simply no express congressional mandate for how to deal with Internet access. We should not allow a key source of America's economic growth to be subjected to such ad hoc authority. Congressional oversight, particularly from this Committee, is needed. Thank you very much.

Mr. CONYERS. Thank you.

[The prepared statement of Ms. Crawford follows:]

PREPARED STATEMENT OF SUSAN P. CRAWFORD

WRITTEN STATEMENT OF
SUSAN CRAWFORD, VISITING ASSOCIATE PROFESSOR, YALE LAW SCHOOL
HEARING ON:
NET NEUTRALITY AND FREE SPEECH ON THE INTERNET
BEFORE THE COMMITTEE ON THE JUDICIARY, TASK FORCE ON
COMPETITION POLICY AND ANTITRUST LAWS
UNITED STATES HOUSE OF REPRESENTATIVES
March 11, 2008

Chairman Conyers, Ranking Member Smith, and Members of the Committee:

Thank you for inviting me to testify. It is an honor for me to be here.

By way of background, I practiced law for 13 years in Los Angeles and Washington D.C., working with Internet-related companies. In January of 2003, I left WilmerHale and began my current job as a professor of law, teaching communications law and Internet law. I am a member of the board of the Internet Corporation for Assigned Names and Numbers. In the fall of 2007 I was a Visiting Professor at the University of Michigan Law School, and I am currently a Visiting Professor at Yale Law School.

I understand that the principal reason you have asked me to come before you today is to discuss the relationship between "network neutrality" and First Amendment values. The question is whether in the current market for Internet access network providers should be allowed to discriminate based on the source or origin of (or content in) particular packets.

I think there are three key points to keep in mind:

• First, that the stakes are very high for this discussion because the Internet is becoming the basic communications network on which all Americans rely for both personal and business reasons;

• Second, that there are insufficient protections in place for speech online, because the current crop of Internet access providers is an unregulated duopoly with enormous market

power that has every incentive to discriminate against speech (and products and services) they believe is undermining their business plans;

• Third, given the legal swamp into which Internet access currently falls, Congressional action is needed to ensure, in advance, that access to the Internet is provided in a non-discriminatory fashion.

At the moment, protections for online speech are murky at best and provide the opportunity for discretionary censorship – harming innovation, speech, and liberty – by extremely powerful private infrastructure actors. The mere existence of the possibility of such censorship is enormously harmful to both speech and economic growth.

I will discuss each of these three points briefly but first want to put the network neutrality debate into context.

The Context for Network Neutrality

The idea of "common carriage" – serving all customers without discrimination – is not new. These principles have been part of the fabric of general-purpose communications and transport networks for a very long time.

Indeed, for centuries common carriage principles have played an important role in the basic infrastructure services of transportation and communications. In exchange for not holding the providers of these services liable for the content of the communications they carry, we have held these services responsible for providing nondiscriminatory assistance to all customers who are willing to pay. Even if infrastructure providers are privately owned, they have been commanded *not* to use their discretion in providing services.

For example, even before the Federal Communications Commission was created, courts and state legislators required telegraph operators to serve all customers, including other telegraph companies, without discrimination. Telephone operators, when they came on

the scene, were required to act as common carriers. This obligation is not new, and it has allowed us to put our general communications systems in the hands of private, for-profit companies without worrying about discrimination and censorship.

The Internet is the first global, electronic, general-purpose communications network.

We used to assume that there was a necessary association between a particular form of infrastructure (like telephone and cable wires) and a particular functional capacity. So we assumed that each wire could do only one thing, and we had to have a separate network for each thing we wanted to do. This led to business models where a network owner was also the provider of whatever particular service—phone, cable, etc.—was carried over that particular kind of wire.

The Internet has completely overturned that assumption. The Internet is best understood as a collective agreement to use a particular language (the Internet Protocol) when connecting computing machines to telephone, fiber, and cable lines that are interconnected around the world. The incredible innovation of this language was to allow computers or other devices connected to the Internet (including telephones, televisions, fax machines, and TiVOs) to send and receive information of any kind via data streams over many different types of physical wires or fibers. The Internet Protocol can run over anything. And any different use (phone calls, television, news) can be communicated over the Internet Protocol. These uses may be provided by the network infrastructure owners, or they may be provided by other people (including any one of us). Phone services can come from Skype—over the Internet. Video on demand can come from Apple's online movie rental store. Television shows can come directly from the servers of users. And so on.

"The Internet" is thus not the same thing as Comcast's, Verizon's, or AT&T's lines and fibers (or wireless connections). Though that infrastructure is important, these actors are merely providing one set of connections that allow users and businesses to connect to the constant, dynamic interaction and communication that the Internet Protocol facilitates.

The Internet is also not the same thing as Web pages with pictures and videos on them. That is the World Wide Web, which is just one particular application that runs on top of the Internet. The Internet, this agreement to use the Internet Protocol, is much more than the World Wide Web – it can be used to send data, email, voice calls in digital form, and more. It is, again, a general-purpose communications network.

It is very different from the other special-purpose networks we have seen, because it allows for so much group interaction and publication to the world of businesses and thoughts – without the permission of the carrier.

The birth of the Internet relied heavily on extensive government intervention requiring that telephone companies provide services on a common carriage basis. The explosive growth and popularity of the Internet took these phone companies by surprise, however, and they became unhappy with requirements to provide flat-rate, open access to online resources.

Today, in this age of deregulation, there are no legal limitations on how Internet access providers may provide access. They are free to discriminate, and we have already seen this happen with Comcast's handicap of certain applications. This is just the tip of the iceberg.

You may be thinking, "Common carriage – how old-fashioned! This is the new world, not the old one." My purpose in being here today is to say that we need neutral access to the Internet for the new world – not just for application providers but also for users. The "people formerly known as the audience" in America need jobs, and they will be finding them online through the interactive Internet. They'll also be creating their own communications content. We cannot even imagine what they will be doing, and we must not let a few private actors act as gatekeepers that stand in their way. Common carriage is actually very Web 2.0.

• The stakes are very high.

As the difference between a "phone," a "television," and a "cable system" vanishes, the Internet is taking over the functions of all of the communications networks we used to have. *Each of the vertically-integrated network access providers in this country sees this change as a threat.* Telcos want to offer their own television services, music services, and "premium web content." The open Internet could become the greatest competitor they have ever seen—precisely because it is not one competitor, but a general-purpose vehicle for thousands of entrepreneurs across the country to offer innovative new products.

Put very simply, each of these dominant network access providers wants to have the freedom to act as an editor or gatekeeper for its own commercial purposes. They want to call their edited services "Internet Access" – but it really is not that. It is more like "more cable programming"—an edited and constricted communications offering.

It is useful to remember that there were minimal vertically-integrated services in the telephone/telegraph world. But our current network providers want to avoid being treated as communications providers -- telcos and cablecos today see the potential for nearly unlimited vertically-integrated services (that they control singlehandedly) in the high speed internet-access market.[1]

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[1] The AT&T/Yahoo! terms of service: http://edit.client.yahoo.com/cspcommon/static?page=tos

"AT&T Yahoo! High Speed Internet and AT&T Yahoo! High Speed Internet U-verse Enabled are information services. These Services combine Internet access and applications from AT&T with customized content, services and applications from Yahoo! to provide Members with high-speed broadband access to the World Wide Web."

"The Service includes a rich collection of resources provided by AT&T Yahoo!, including various communications tools, forums, shopping services, search services, personalized content and branded programming that Yahoo! provides through its network of properties which may be accessed through various media or devices now known or hereafter developed, and AT&T's broadband and narrowband Internet access service for retail consumers. Included with your basic membership fee, you receive certain services and content. Unless explicitly stated otherwise, any new features that augment or enhance the current Service, including the release of new Yahoo! properties, shall be subject to these TOS."

We are, right now, deciding what the future of the Internet will be for all Americans. We should not take this lightly. We are confronted with a choice: should we have a general-purpose network that is nondiscriminatory and available to all (like a highway linking a rural area to a big city) or should we have a few special-purpose networks that are "managed" for the commercial purposes of the carriers (like a ride in Disneyland). The stakes are very high indeed – this is not just about Comcast's throttling of BitTorrent or Verizon's treatment of "unsavory" short codes. This is about the future of communication itself.

• There are insufficient protections in place for speech online.

You might be thinking that the market will ensure that a non-discriminatory provider of Internet access will arrive on the scene if that is what users want. But we do not have a functioning competitive market for Internet access. Instead, we have regional duopolies (usually one cable provider and one telco) providing Internet access to 98% of the country. Prices are not going down and nondiscriminatory Internet access services are not available. In fact, a JP Morgan analyst named Jonathan Chaplin recently made clear that cable and telephone companies are doing their best to avoid a price war:

> "The broadband market is a duopoly," he said. "That should be a stable pricing environment. It's in their interests to compete rationally and preserve the economics of the market."

This is the "orderly marketplace" beloved of the early 20th-Century trusts and combinations.

The breakup of Ma Bell has effectively been reversed. There are only three Baby Bells left: Verizon, AT&T, and the much smaller Qwest. The two largest cell phone companies, Verizon and AT&T, command more than half the market. On the wireline side, Verizon and AT&T have carved up the country into exclusive territories, each one

covering half the country. Two cable companies, Comcast and Time Warner, control half the cable television market. In nearly every town there is only one cable company.

This lack of competition provides the opportunity for discrimination. The few large carriers providing Internet access have both the market power and every incentive to effectively turn the Internet (as viewed by Americans) into a managed, proprietary network – monetizing every transaction and optimizing the network on billing. We have already seen Comcast doing its best to avoid competition from a more-efficient mode of video distribution using its network, by secretly acting to terminate communication sessions. We would have even more evidence of this kind of sporadic abuse of power by a gatekeepers/censors like Comcast if we were able to have researchers watching what was going on. As it is, we already know that Comcast (and others) are capable of using techniques that the Chinese government also uses to "purify" the Internet.

After-the-fact rationalizations for "management" of Internet access ("discrimination" using a more neutral name) are so easy to craft. The real danger to speech and innovation is the pervasive threat inherent in the ability to "manage." A speaker cannot know if her speech will be disapproved of. An application developer cannot attract investment, because the network provider may degrade the functionality of the application at any time – imagine a highway designed to favor only particular kinds of cars at particular moments, and then imagine the frustration of an auto entrepreneur with a new kind of design ready for funding. Arbitrariness, by itself, is enormously threatening to speech and innovation, and has the potential for suppressing particular points of view.

You may say, well, if the market isn't functioning let antitrust authorities deal with the problem. But antitrust regulators will, right now, defer to the decisions of the special-purpose regulator. (Even if they did get involved, they have a mixed record in highly technical environments.) At the moment, our special-purpose regulator – the FCC – is in turn generally deferring to the decisions of the potentially arbitrary gatekeepers. These gatekeepers, in turn, are probably not state actors, so it is unclear whether they are

constrained by the First Amendment. No one is protecting the speech that should flow over general purpose communications networks.

• **Congressional action is needed.**

We have a Telecommunications Act that does not fit reality. All of these Internet-related questions are being dealt with under the FCC's assertion of "ancillary jurisdiction" – in other words, the FCC says that because the Act puts them in charge of wires and radios, and the Internet is accessed through wires and radios, they have implicit authority from Congress to regulate the Internet. But we are in a featureless swamp – Congress said little expressly about the Internet in the 1996 Act and has given the Commission zero guidance as to how to proceed when deciding whether nondiscrimination rules should apply to Internet access providers. There simply is no specific Congressional mandate on this issue. We should not allow a key source of America's economic growth to be subject to such accidental, ad hoc authority.

In 2005, in response to great concerns about net neutrality, the Commission issued a policy statement saying that consumers were allowed to access content and run applications of their choice. The statement is fine as far as it goes, and I am personally hopeful that the Commission will use it effectively in responding to the current crisis with Comcast. But carriers like Comcast, AT&T, Verizon, and the others claim it is subject to an apparently enormous, principle-swallowing exception: that anything the network provider does can be justified if it is for "reasonable network management." As I have explained, the risk is that almost anything – including discrimination for commercial reasons as well as viewpoint-related reasons – can fit within "reasonable network management." Indeed, the network operators take this position, and also claim the FCC lacks the jurisdiction to enforce the Policy Statement.

So now I want to return to where we began, with First Amendment values. The First Amendment is a special instance of a general American concern for liberty, speech, and innovation. Liberty, speech, and innovation are connected. When we build general-

purpose communications systems, we build liberty into them. We did it with the postal service, the telegraph, and the telephone. We did it with highways. The architects of the Internet built liberty into the Internet Protocol, which is designed not to discriminate against any applications that use it, and to operate using any form of transport. E-mail, instant messaging, the World Wide Web, and now Internet video have become important facilitators of speech and interaction, and none of these world-changing uses of the Internet was developed by the enterprises that now control Internet access. The innovation at stake here is innovation in our ability to communicate with one another.

For certain kinds of basic inputs to communication and transport, our American First Amendment values require that we all have the opportunity to speak (and invent) without being censored by public or private gatekeepers. We are now moving our communications online, to a new general-purpose communications network, and our common concern for liberty, speech, and innovation requires that we keep access to the Internet neutral.

Communications policy has always been part of our national industrial policy, and is now more important than ever. Congress now has the opportunity to adopt a coherent approach to Internet access that takes proper account of the importance of the diversity of the communications these dominant network operators are carrying. Congress can help by acting decisively to separate control over transport infrastructure from control over provision of communications – the overall goal of net neutrality. This will promote free speech, foster innovation, and will drive broad economic growth.

There are many paths available towards this goal. The recently-introduced Internet Freedom Preservation Act, could be a useful step. We will need eventually to re-write the Communications Act to take account of the convergence of communications platforms and to ensure that the companies that are providing basic, general-purpose communications services such as Internet access do not discriminate or leverage their control over this general-purpose service into other markets. I urge this Committee to

play a role in crafting legislation that will support the long-term interests of all Americans.

Thank you.

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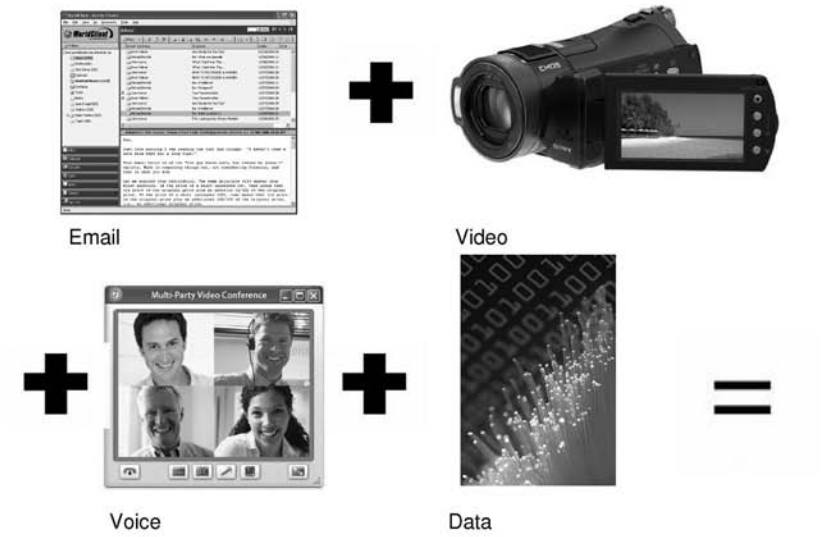
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Video
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Mr. CONYERS. Professor Yoo, you are in a tough place here. Because you are between two female lawyers. Steve Chabot and I are wondering what would happen if we left you, you know, to your own devices and see what would happen. Now, over here, we have got two songwriters. And is this new school versus old school on this situation?

Mr. KULASH. No, it is not, sir.

Mr. CONYERS. Oh, it isn't?

Mr. CARNES. He is the Future of Music Coalition. I guess that makes me the past.

Mr. CONYERS. And then Attorney Fredrickson and Ms. Combs have rarely agreed on anything, and they come together in harmony this afternoon. Isn't that amazing? So your Chairman wonders what would you say, Mr. Kulash, to Mr. Carnes and what would our two lawyers say to Professor Yoo?

Mr. KULASH. I will take the Kulash question. There is no reason that the law shouldn't apply on the Internet. What we are looking for is a vibrant, realistic digital market place for music and I think that can only happen if we let the innovators come up with the system instead of deciding right now that one of the two companies existing can make that system happen.

Mr. CARNES. To which I would reply, when you say Net Neutrality, the Internet is not neutral now. It is set up for the benefit of the 5 percent of bandwidth hogs that are using 70 percent of the bandwidth, 90 percent of which is illegal content. In terms of freedom of speech, I would like to remind you that this copyrighted—it is all copyrighted material that is being stolen and the Supreme Court has said that copyright is the engine of freedom of free expression.

Mr. CONYERS. Well, you know, this Committee has just put out a pro IP bill with all kinds of additional protection.

Mr. CARNES. And we appreciate that. But they also removed the civil enforcement from the bill by the FBI, which is in the Senate version but it is not in the House version, which is really critical for us.

Mr. CONYERS. Are you a lawyer, as well?

Mr. CARNES. You know, I am not——

Mr. CONYERS. I am just inquiring. Now, Professor Yoo, do you have any last comments before we leave you to the people on your immediate right and left?

Mr. YOO. Thank you for allowing me that, Mr. Chairman.

Mr. CONYERS. It is like making your last statement before you are executed.

Mr. YOO. I guess if I were to leave—make one point at this point is that I do believe that the competitive market can work here in ways that are unappreciated. The Chairman—you mentioned that there is a duopoly. There is actually tremendous opportunity for a much more competitive environment. From having zero subscribers in 2004, wireless broadband by the end of 2006 signed up 21 million subscribers. And by the end of 2007, they estimate it will have doubled again to 45 million subscribers. What we find from the record in the FCC proceedings is things like network management, which we regard as nonneutrality, are critical for wireless sub-

scribers to survive to introduce the very competition that the antitrust task force recognizes as essential for a long-term solution.

And, in fact, one of the points made by a very small rural wireless carrier named LARIAT run by a gentleman named Brent Glass says that he has got such limited bandwidth and his cost margins are so tight that the only way he can survive is by cutting down on a handful of BitTorrent users on the moments that the volume peaks. And the reality for him is if we do not allow him to manage the network in that way, the kind of competition which we are saying is the goal will not occur.

Mr. CONYERS. Well, what do you say, ladies?

Ms. FREDRICKSON. Well, I think from our perspective, the essential factor here is free speech and the ability to communicate. And whether or not the ISPs need to engage in some kind of network management I think is a question for technologists more than it is for those of us on this panel, except to the extent that it is nondiscriminatory that should be the major focus of this Committee and of legislation to ensure that whatever network management, as Professor Crawford has noted, not be used as an after-the-fact justification for discrimination.

So that is why I think it is critical that the Committee consider legislation that would set up neutral rules from the beginning to ensure that no discrimination takes place and network management not be used as cover to eliminate certain types of content.

Ms. CRAWFORD. And just a follow-up on Ms. Fredrickson's remarks. We did this successfully in the '60's. We kept the phone business out of the business of data processing. They were quarantined out of that business. And that was a very successful way of not having to get engineers into writing legislation but just keeping an old industry from controlling a new one. And that is the risk we are facing here. Now, a lot of this is talking about money. I understand that for about a dollar per subscriber per month, a cable system could roll a neutral network. It saves them, I understand, Comcast something like 10 cents per subscriber per month to do the kind of traffic shaving they are doing. This is not about that. This is about, from their perspective, the risk of a precedence that they be treated like a general communications carrier when it comes to Internet access. They should upgrade their networks.

Ms. LOFGREN. [Presiding.] Ms. Combs, are all of the ladies on this panel in agreement this afternoon?

Ms. COMBS. Yes, we are.

Ms. LOFGREN. I thought so. Well, on that note, we will take a brief recess for a vote, and we will be right back and recognize Steve Chabot.

[Recess.]

Ms. LOFGREN. The hearing may resume. We are now at the part of our agenda where we will ask Mr. Chabot to begin his questions.

Mr. CHABOT. Thank you very much, Madam Chair.

This question is to any or to all of the witnesses, whoever would like to respond.

The relationship between the Internet Service Providers and content providers, isn't it mutually beneficial—and practically speaking, consumers cannot access content without a network, and a network serves no purpose without content to distribute and consumer

demand. How does government involvement help this already quite successful relationship? How would the consumer be impacted by changes in that dynamic at this time? Yes, Professor.

Ms. CRAWFORD. It is an interesting question. You would think that the two would be mutually helpful to each other. Actually, there is economic evidence by our colleagues Barbara Van Shelich and Brett Frischmann, a joint paper, making clear that network access providers have every incentive actually to discriminate against content, not their own, in order to further their own business plans. Again, the idea is you have got an incumbent with an existing powerful business that it wants to protect at almost any cost even if it might be better for the network as a whole if they collaborated with content providers.

A second point is that the Internet is not just content being passively sent to subscribers. The greatness of the Internet is that this is an interactive, often user-generated network that allows for a lot of other communications that cannot be described as content.

Mr. CHABOT. Okay. Thank you. Professor Yoo.

Mr. YOO. They are mutually beneficial for the most part. It is one of these things that is actually reflected in Supreme Court precedent going back to the vertical integration between networks and content providers, all the way back. The Supreme Court used to be extremely hostile toward the idea and were thinking, oh, this would be big—having the network own the content could lead to all of these harms. Well, what is happening in the Supreme Court doctrine with regard to vertical integration and vertical restraints is it has become much more permissive. Why? Because this is often extremely efficient behavior. Particularly with the Internet, sometimes a very tight integration between the content and the network can actually increase the functionality of the network.

The best example I know of is the wireless industry. One of the things—if I were walking across this room, I would pass through hot spots and cold spots as I walk through depending on the bandwidth I get. What the wireless industry will often do is to give me my voice communications constantly all the way through as I walk through the room. If I am at a cold spot, it will hold my e-mail. Why? I cannot stand my voice traffic being interrupted for even a third or a quarter of a second, or else I will not use it. Now, when I get to a hot spot, they will dump me all of my e-mail at once. Is that neutral? No. Does it require a very tight integration between the content, the device, and the application of the network? Absolutely. It is a way to yield real benefits to consumers in ways that are very concrete.

You see this in an empirical study that is fascinating. They have done two large studies by the FTC staff as to when that kind of tight integration yields benefits. One looked at 17 full studies that always increased consumer welfare. In the other study, 16 out of 17 times it increased consumer welfare. If you look over the last 2½ years, the FCC has examined it and has said this is not a problem despite the filings in every single case in five major regulatory matters. Is there a small theoretical possibility of some harm? Yes. It depends on very specific empirical conditions, which is why I think a case by—I have always supported a case-by-case analysis instead of saying this is not a problem and it should go away, but

we should make sure that the circumstances for that anticompetitive conduct exists before we stop these kinds of practices which can yield real benefits to consumers.

Mr. CHABOT. Thank you.

Does anybody else want to touch on it or should I go to another question? I will go to another question.

How do networks deal with innovation? How would technology be impacted by additional government involvement? Would consumers benefit from more regulation? Anybody is welcome to it.

Ms. Fredrickson.

Ms. FREDRICKSON. Well, I think our perspective is that Net Neutrality rules are less regulation. They allow the Internet to flourish in a very free fashion, but you have to set some basic, nondiscriminatory policy to so that those ISPs cannot control and limit the content.

I think Ms. Combs, as I said earlier, has already laid out numerous examples of where there has already been discrimination undertaken by ISPs. So I would differ with Professor Yoo and say that it is not theoretical. It is not hypothetical. It actually exists. Therefore, we need to ensure that the Internet remains unconstrained and free and foments innovation and competitiveness rather than limits it by allowing ISPs to shut down competing services and content that they might disfavor.

Mr. CHABOT. Thank you.

Professor Yoo and Professor Crawford, if you could, answer very quickly because my time is over.

Ms. CRAWFORD. Just very quickly, we are talking about telco incumbents. One of their last great innovations was call waiting. We have not seen a lot of innovation coming from the network providers. What has been happening is an explosion of innovation at the edge, and it is that innovation that Net Neutrality furthers.

Mr. CHABOT. Thank you. Professor Yoo.

Mr. YOO. As to the story that Ms. Fredrickson told about the early days of the Internet, I assume you are talking about the Computer Inquiries and the first generation of regulation. What is fascinating is we did have nondiscrimination rules, but the telcos, when they had a new development, constantly had to come asking for waivers. For example, in shifting from analog transmission to digital transmission, you had to change the network, and all of a sudden the things that were digital did not communicate with the things that were analog anymore. When we had a restrictive rule in place that defined nondiscrimination in a very particular way, any time a network needed to innovate they had to come get a waiver and get a special dispensation. Call waiting was retarded by the fact that they had to get a special waiver because call waiting is provided by the computer processing in the switch. That is the cheapest way to do it. Well, that was nonneutral because the telephone company had an advantage, but it was a natural advantage in the technology. We had these battles under that rule where they were constantly fighting over what was permitted under the rules until finally we shifted the regime to saying the FCC said we should get out of this. The real solution here is competition.

Mr. CHABOT. Thank you very much.

My time has expired, and I yield back the balance of my time.

Ms. LOFGREN. The gentleman yields back.

I have, really, a question. I was interested—I am sorry. I ran over to vote, and I did not get to hear your testimony, but I did read the testimony, Professor Crawford. I have a concern with Comcast's recent issues with BitTorrent. I was just thinking. Where does this lead if you regulate uploads or charge for uploads? You know, what does that do to the innovation that we are finding on the Internet? Does that pose, in your judgment, pretty severe first amendment issues?

Ms. CRAWFORD. Thank you, Congresswoman. It is a wonderful question because the great value add of the Internet comes from the ability to upload, not just to be passive consumers of content for all of us without asking permission to create our own movies, our own new applications, our own new ways of making a living. Having an asymmetric network like the one that Comcast has intentionally built is very destructive to that kind of innovation. I will note that in Japan and in France and all over the world they are building symmetric networks that are moving for uploads at 100 times the speed we have available in the United States. So, just as a matter of national pride as well as innovation, we should care about our ability to upload.

Ms. LOFGREN. All right. Professor Yoo, do you disagree?

Mr. YOO. Well, I do think it is important, but what is fascinating about the Comcast example is that it is not just about uploads. I mean consider OK Go's success on YouTube. YouTube is not a peer-to-peer technology. It is a classic server technology where it is all hosted in one place. So, in a way, what Comcast is not trying to do is to go against user-generated content. What they created was a very nicely crafted world in which they did not block it across any application across the whole network. They found a handful of nodes at certain times where they were bogging down with congestion and found a way to slow down the uploads when there was no human being on the other end. The beauty of BitTorrent is that it probably did not even hurt the people who were attempting to download at the same time because the genius of BitTorrent is it will go get those bits someplace else. So it was actually potentially a very finely crafted idea.

I agree with Professor Crawford that the user-generated content world is very exciting, but in many ways, things like what Comcast did to BitTorrent is essential to preserving the YouTube style of file server user-generated content and in making sure that the peer-to-peer style does not congest the entire Internet.

Ms. LOFGREN. You know, this Net Neutrality debate is not a new one for the Congress. Last year, we went through this. As a matter of fact, I was telling my staff that I sort of toyed with the idea of playing the "Ask a Ninja: Net Neutrality video" rather than actually asking the questions, but I was discouraged from doing so.

I do have a concern that if you start allowing the pipes to really decide who gets to see what, you end up sort of cablizing the Internet in a way that is not the way we have had the Internet. I met with Vint Cerf last week out at Google. You know, the Internet is to be free. It has always been that way, and it has only been threatened recently.

Do you think the concern about turning the Internet into cable is overblown, Professor?

Ms. CRAWFORD. No, I do not, Congresswoman. As I said, I think we really stand at a turning point. A visual picture I often use is that it is as if the sidewalk has gotten tired of being a sidewalk and wants to rise up and take a little "ca-ching" and monetize the conversations we are having, if they are particularly valuable or if they think they can price discriminate with respect to that sidewalk.

As a society, we need basic infrastructure. We need to invest in it. We need to move forward as a country with this basic infrastructure. Communications policy should be part of our industrial policy and move us forward as a country. Net Neutrality is a central part. This is a Sputnik moment for us, and I think Vint Cerf would agree that. Just as the fear of what was going on with the Russians drove us to create the Internet, we have now got an internal Sputnik development which is our own market, powerful ISPs controlling innovation on the Internet.

Ms. LOFGREN. I will just close by thanking all of the witnesses. It was fun to talk to Mr. Kulash.

I did not get a chance to talk to you, Mr. Carnes. I appreciate your coming all this way.

I also wanted to say something, Ms. Combs, to you because I respect that a conservative person such as yourself would say that you agree with somebody with whom you completely disagree on the issues to stand up for free speech. Doubtless, there are many things on which we do not agree, but I really do respect that you are here standing up for the first amendment here today. It is a very honorable thing that you are doing. Thank you very much.

Mr. Keller.

Mr. KELLER. Thank you, Madam Chairwoman. Let's see.

Professor Crawford, you made the analogy about having one road rather than the many-tiered system like at Disneyland, and you caught my attention there since I represent Disney World in Orlando. So let me ask you a pretty basic question.

One of the concerns that has been raised is that ISPs want to provide tiered service to consumers that utilize higher amounts of bandwidth, and the DOJ in its comments to the FCC said—and I will just quote it—mandating a single uniform level of service for all content could limit the quality and variety of services that are available to consumers and discourage investment and new facilities, close quote.

Are you in favor of a tiered service or do you feel that a single tier is always the best for consumers?

Ms. CRAWFORD. Let's be clear about our terms here, Congressman. I think that no one would disagree on the Net Neutrality side that it makes sense to charge consumers for use of bandwidth and that discriminating against consumers in that way seems appropriate. If you are using more, charge more. It is that business model that our current ISPs do not want to move towards. What I am against is the idea of discriminating against particular applications because of what they do or particular sources or the content of packets. I am also personally concerned about trying to draw categories of applications and say, you know, with your video, you go

at X speed; all video goes at that speed. Here is the problem with drawing those categories.

The ISP is in the position of being the line drawer and will have all kinds of new things that will appear in the world. We do not want to give these very consolidated entities the power to decide who falls in what category.

Mr. KELLER. All right. Professor Yoo, let me follow up with you. You were at Vanderbilt at the same time I was at Vanderbilt, I see, and you gave me a "C" in antitrust, and now I have some questions for you. No. Just kidding. I did not take your classes when I was there. They were too hard of classes. Let me begin with you, Professor Yoo.

If a broadband provider chooses to degrade certain content, do consumers have other options to turn to for their broadband service?

Mr. YOO. I think the wireless option tells us yes. We have a world in which that is a real possibility for the first time, and there is wonderful data coming out of Europe and OECD that is looking at the impact that nondiscrimination and access requirements have on building out new networks, which is the real goal. We discovered that it is retarding it actually. If you look, it is correlated when you have those sorts of access requirements. You get less new broadband extended to new areas, and that is an enormous problem.

If I may, the one reaction I had to what Professor Crawford said is that it is often said that the bloggers will be hurt by the fast lane and the slow lane. What is fascinating to me is I actually think that has it backwards. Creating a fast lane and a slow lane is a way to protect the bloggers. Why? People who are just sending text do not need the fast lane. It is the video that needs the fast lane. If right now we are charging all a certain price, if we are going to upgrade the network at all, we can either charge everyone a higher price for the upgrade or we can create a tiered service where the bloggers can still keep the price they are getting and only charge the people who need the faster service for video for what they are getting because this is a way to keep people like the bloggers online, not to hurt them.

Mr. KELLER. Let me get back with you, but let me touch on the piracy issue just a little bit, and then we will give both of our artists a chance.

Mr. Carnes, what is the relationship between online piracy and network congestion?

Mr. CARNES. Well, I said previously that 5 percent of the users on the Internet are using up 70 percent of the broadband network, and 90 percent of that is illegal P2P, so congestion is actually piracy. You know, piracy is the disease, and network congestion is just a symptom of that disease.

Mr. KELLER. All right. Mr. Kulash, I know that you got your big break from the video that you showed, from the famous treadmill video. Let me ask you:

Did you get that video on the first take or did that take a while?

Mr. KULASH. Take 13, sir.

Mr. KELLER. Take 13. All right.

Tell me, since you are an artist who—obviously, I know you get your revenue from at least some performance royalties. Do you have concerns about preventing online piracy?

Mr. KULASH. Absolutely. You know, I believe, as every songwriter believes and as, I think, everyone believes, that musicians should be paid for their work. I am certainly not advocating anything that I think will lead to piracy. The question is who is going to build that new system for music distribution, for how we listen to music, for how we get to make music. It seems to me that the telcos are not the people I want building that system.

Mr. KELLER. Okay. Professor Crawford, you wanted to respond.

Ms. CRAWFORD. Just very briefly with a couple of empirical points.

When we talk about competition from the wireless sector in this country, we should remember that those companies are owned by the same companies that control DSL access. Then we have a very highly concentrated market when it comes to Internet access as a whole. The same actors.

Also, on the video point, we need a larger principle moving forward for this entire discussion. We cannot focus ourselves on what is going on with Internet video right now. We have got 100 years ahead of us for Internet history, and we have to set the terms now.

Also, finally on the filtering point here, I think it will be, as Mr. Kulash has said, inappropriate for the ISP to be the level where filtering takes place. The content application providers can do this. They will have some knowledge of who they are having license arrangements with, and they can respond to notices and take-down procedures under the DMCA. We have set up this structure, and it can work.

Thanks.

Ms. LOFGREN. The gentlelady from Florida.

Ms. WASSERMAN SCHULTZ. Thank you, Madam Chair. I want to thank all of you for being here today and for helping us to tackle this very thorny issue.

Obviously, everybody is concerned about the Internet and its ever evolving status, and we want to continue to see it be a source of innovation and a strength for our economy, which is a little bit shaky right now. I supported network neutrality in the 109th Congress because I was really concerned that there was not enough competition in the marketplace to start cornering off sections of the Internet and adding a premium to the price of that section. I mean, to me it made sense to do that, to prevent that from happening through network neutrality so that you do not have ISPs striking up deals in favor of one set of providers over another and limiting the competition and making choices for consumers, because that is counterintuitive to what the Internet is supposed to be.

You know, we are Members of this Antitrust Task Force, but we are also Members of the Judiciary Committee, and we deal with legislation related to crime as well. The concern that I have about network neutrality is that you would never want to force ISPs to actively ignore conduct that is unlawful or speech that they know is unprotected. What I mean by that is piracy or child pornography.

I mean, I sponsored legislation that some of you may be familiar with that would address the 500,000 known individuals in the

United States who are trading and trafficking in child pornography on the Internet. We are talking about images of young children being raped and victimized. These are crime scene photos. Those are being shared through peer-to-peer file sharing all over the country every single day, and law enforcement knows who they are, knows where they could find them, but they are just overwhelmed and outnumbered.

The legislation that I sponsored and that was adopted unanimously out of this Committee—excuse me, out of the Congress, not unanimously. It was with two "no" votes. Let me be accurate. It was designed to make sure that we could get those resources into the system and go after people who are breaking the law and who are going well beyond the bounds of speech. So the question that I have—you know, we want to include socially responsible behavior from Internet Service Providers, but we want to make sure that they manage their networks in such a way that they can eliminate piracy and the spread of child pornography over peer-to-peer networks.

So that is a long preface to my question, and I would like any of you to answer it.

How do we fashion principles that will continue Internet innovation but also will not prohibit corporations from addressing this kind of unlawful activity or unprotected speech? Because I want ISPs to be able to corner off access to that kind of peer-to-peer file sharing. When they identify where these people are and can shut off their access, I do not want network neutrality to prevent them from being able to do that.

Ms. CRAWFORD. Congresswoman, if I could respond briefly, the creation of child pornography is the most heinous behavior we know of around the world. It is incredibly destructive. The closest thing we have, actually, to a global norm is an abhorrence of child pornography. We need to remember, though, that we are addressing two different things—behavior on the one hand and technology on the other. The behavior of child porn creators we always prosecute, and we make sure we go after them. Fashioning technology in advance to look for a particular flesh tone or for a particular action in a packet crossing an ISP network is going to be both incredibly difficult and probably destructive to some sense of innovation. So here is my response to you.

The ISPs cooperate quite closely with law enforcement all the time, and it is in facilitating that cooperation that we go after the behavior without punishing the technology that makes so much else that is good and positive in the world——

Ms. WASSERMAN SCHULTZ. I can understand pursuing the behavior. We cannot just leave it to punishing the behavior here. We have to make sure that you limit the market. If you limit access to the market, the market will shrink, and the reduction in the competitive exchange will cause less need for the market to be fed by more crime.

Ms. CRAWFORD. I agree with you. I think it is just a question of timing. I am saying that ISPs cooperate with law enforcement, hear about what is going on and then act and then act to either take off subscribers——

Ms. WASSERMAN SCHULTZ. But a child has already been victimized when you do it that way. We are talking about children who are being raped——

Ms. CRAWFORD. Right.

Ms. WASSERMAN SCHULTZ [continuing]. Children who are being victimized. So waiting until after that has happened hurts children.

Ms. CRAWFORD. How could we do it before? How would you know where the file was before this happened?

Ms. WASSERMAN SCHULTZ. Well, they already have the technology to know where the file is, to know the servers that are on there. I mean, if we have the resources, they can go and find—I do not know—the digital fingerprints. From what I understand, they have the technology to lift those now and find them, and it is only due to the lack of resources. Like I said, I am a proponent of network neutrality, but I certainly am not a proponent of network neutrality's benefiting the promotion of illegal activity, and after the fact is not okay when it comes to harming children.

Mr. CARNES. Congresswoman, basically—I mean I am certainly in total agreement that the illegal activity that is going on on the Internet needs to have some cap, some control in some way. In terms of Net Neutrality, they are talking about like having a level playing field. That sounds really nice, but what we have got now is not a level playing field. We have got a playing field that is tilted just like you are saying. These people are overwhelmed. They cannot begin to control 500,000 different cases. The network is set up right now tilted in favor of——

Ms. LOFGREN. The gentlelady's time has expired. I will turn now to the former Chairman of the Judiciary Committee, Mr. Sensenbrenner, for 5 minutes.

Mr. SENSENBRENNER. Thank you very much.

Ms. Combs, I was interested in your comments about the blocking of a political message during a performance that was streamed over the Internet and the analogy to the same type of blocking of religious messages by the thought police in the People's Republic of China.

Could you amplify a little bit more about how these actions were similar?

Ms. COMBS. Do you mean the Pearl Jam concert?

Mr. SENSENBRENNER. Yes. Please turn your mike on or bring it a little closer.

Ms. COMBS. Oh, sorry.

I just think they are both examples of discriminatory behavior on the Internet because even though we as an organization do not agree probably with what Pearl Jam was saying in their concert——

Mr. SENSENBRENNER. Neither do I.

Ms. COMBS. No, but it is just an example of discriminatory behavior in that they did try to stop the concert, and we believe it is the exact same discriminatory behavior that is being used by the Chinese Government to block our message to getting to the Chinese citizens who would like to see and hear some of our messages that we are trying to put out. We just do not want that to happen. We are constantly sending out e-mail blasts. We are constantly getting our message out to our thousands of supporters across the

country, and we do not want Comcast or Verizon or one of the large companies to do that to our organization.

Mr. SENSENBRENNER. Well, as you know from my opening remarks, my interest in Internet neutrality has been more focused on the antitrust and on the monopolistic aspects of nonneutrality than the content that has been intercepted, jammed, blocked or whatever, because a free market economy, in my opinion, is based upon healthy competition. America was the first country in the world to pass antitrust laws, largely aimed at busting up the Standard Oil trust. Those antitrust laws, I think, have worked fairly well to protect consumers in the United States, contrasted to antitrust laws in Europe and elsewhere that are designed to protect competition.

That said, what do you think Congress should do to protect consumers such as those who wish to receive your message, whether they be in the People's Republic of China or elsewhere, or somebody who wishes to get a brief political message from Pearl Jam?

Ms. COMBS. We just believe that every organization out there, whether they be NARAL or the Christian Coalition or the ACLU—we do not believe that Comcast and Verizon and these companies should have the ability to block our message.

Mr. SENSENBRENNER. Now, do you think that a better way to police that principle is through having the FCC or another Federal agency regulate content on the Internet or by giving you or other aggrieved parties the right to sue the ISP for treble damages if they are engaging in monopolistic practices that prevent the people who wish to receive your message from getting it?

Ms. COMBS. We just believe that there should be a free and open Internet to all consumers and that they should have the right to receive any e-mails coming from any organization.

Mr. SENSENBRENNER. My question, with all due respect, Ms. Combs, is what is the best way to do it, because that is what the debate is here in the Congress, whether we should be utilizing the antitrust laws, which will get you some money if you end up being aggrieved upon or having to go to the Federal Communications Commission or to another agency to try to get them to say that somebody broke the regulations.

Ms. COMBS. Right. I am not familiar with all of those laws. Is it okay if Professor Crawford answers this question?

Mr. SENSENBRENNER. Okay. This is now a 50-yard punt.

Ms. Fredrickson.

Ms. FREDRICKSON. I think, with all due respect, Mr. Sensenbrenner—well, first off, I would also like to say that Ms. Combs and I—the ACLU and the Christian Coalition—have worked together on many issues, not simply on Net Neutrality, so I wanted to set the record straight on that. I think the issue here is—the concern is that with all the many small players on the Internet, the variety of content producers who are filming videos in their backyard or who are putting up their own Web sites or who are doing things that are very small in scale but that can reach a very wide audience, I think that the burden of trying to sue is a heavy one to bear and that there should be—whatever the framework is, there should be some neutrality principles that govern from the beginning, from the outset, that ensure that there is some level playing field.

Mr. SENSENBRENNER. Okay. Thank you. My time has expired.

Ms. LOFGREN. The gentleman yields back.

The gentlelady from Texas is recognized for 5 minutes.

Mr. JACKSON LEE. I thank you very much, and I thank the presiding Chair, and I thank Mr. Conyers as well for this ongoing series of important discussions and debates about the utilization of this technology and this question that is before us. Let me start.

First of all, I find it fascinating—and I think you are absolutely right, Ms. Fredrickson—that I have seen the Christian Coalition and the ACLU work together, and I think it is important to note that the ACLU is known for finding the most prickly of adversaries and for working with them. You are to be commended for it, seriously, that you circle the wagons around issues and not around the views of others.

Ms. Combs, I am not suggesting in any way that you are prickly. I do not want the record to reflect that, and it should not, because I appreciate the advocacy for which you stand.

I am going to probe Professor Yoo to give him a fighting chance to try to understand because the one thing I like about this task force is that we try to strike a reasoned balance. I am moved, however, by the words of Professor Crawford in that the perspective that she might take would foster more competition. You are arguing that you could promote competition by, in essence, having this managed care system on the Internet. Help me understand that.

Mr. YOO. There are new technologies out there that do not operate like the old Internet technologies. We are used to thinking of the Internet's growing up in a telephone world. A person I had mentioned earlier in this hearing, who was here during the vote, is here. He is doing wireless broadband. His name is Brett Glass. He represents a company called LARIAT from Laramie, Wyoming. He is not one of the big existing players. Even among the big existing players, there are four wireless players. They depend on being really smart about how they route their traffic so that, one, they can provide the kind of services that consumers——

Mr. JACKSON LEE. Let me stop you for a moment.

What you are suggesting is that a jammed-up system means nobody can get on to a certain extent?

Mr. YOO. Correct.

Ms. JACKSON LEE. So competition goes down because those who you voice cannot manage access or content. It is overloaded?

Mr. YOO. It is a system that is overloaded. No one will use it, and you will go out of business. You will lose your subscribers, and you will go out of business. Being able to provide a quality service that people will actually pay for instead of buying from one of the existing options is what they need to survive.

Part of the way that wireless players are doing it is by figuring out which applications are extremely time sensitive and by giving them priority over the stuff where, if it waits for a second or two, it will not be——

Mr. JACKSON LEE. Give me an example which is time sensitive. What would that be?

Mr. YOO. Voice or streaming video. If there is a hiccup in the video, you will stop watching it. If your voice service has a delay of a third of a second, the studies show you will stop using it.

Mr. JACKSON LEE. That means a telephone by cable.

Mr. YOO. Yes, an Internet telephone, the IP telephony. There are other examples. Virtual worlds like Second Life. Video online games.

Mr. JACKSON LEE. So, Mr. Kulash, you consider him as having the ability to wait?

Mr. YOO. It is interesting. What he is doing is a streaming technology that is actually—you can buffer it, and it is less sensitive than realtime applications. In other words, when you launch YouTube to download Mr. Kulash's video, it is running ahead of where you are watching, and it is actually storing it, and it tends not to be extremely sensitive. The things that are very sensitive are games where you make a move or if you are talking——

Mr. JACKSON LEE. And you need a response. That is what I am saying. Mr. Kulash, in your view, could function and have a success if he waited?

Mr. YOO. No. I am saying that the network is smart enough to make sure that download applications like YouTube do not have to wait in general. In fact, there are certain applications which can use other situations to get around the waiting problem whether by storing it locally or by giving it different means, but the networks really——

Mr. JACKSON LEE. I think I have got you. I see my time going. Let me get right to the first amendment.

Is Professor Yoo pulling the wool over our eyes by what he is suggesting? Because I think we should entertain the question of competitiveness. How does Professor Yoo's reasonable perspective interfere with the first amendment?

Professor Crawford and then Ms. Fredrickson and Mr. Kulash.

Ms. CRAWFORD. Just very briefly, Congresswoman, given the highly concentrated market we have right now for high-speed Internet access, these gatekeepers are in the position of choosing speech, of choosing winners and losers and of backing up. That is the principle that we are worried about.

Ms. LOFGREN. Very quickly. The time has expired.

Ms. FREDRICKSON. Yes. In some ways, I was going to say that there is a little bit of apples and oranges because I think, as Professor Crawford has already suggested, limiting access based on bandwidth or on other nondiscriminatory means could be considered as a way of managing a network, but what really cannot be allowed is doing so based on content.

Ms. LOFGREN. The gentlelady's time has expired.

The gentleman from Utah is recognized for 5 minutes.

Mr. CANNON. Thank you, Madam Chair.

Mr. Carnes, you said earlier that 5 percent of the users are using 70 percent of the bandwidth and are downloading peer-to-peer material. My sense is—and I do not know this, but I do a lot of YouTube. I mean there is just some really interesting stuff on there. We put up YouTube in my office. My sense is that those numbers have changed. I ask that question because what I am really going at is that it seems to me that the Internet and the nature of what we are doing on the Internet has been changing very rapidly and that the rate of change is going to increase.

So when were those numbers validated that you gave us, and are they current or are they a couple of years old?

Mr. CARNES. Those are the most recent numbers I have.

Mr. CANNON. Was it like a couple of years ago or a year ago, do you know?

Mr. CARNES. You know, I could not tell you exactly.

Mr. CANNON. Does anybody know? My sense is that there has been a huge transformation as to how bandwidth is used.

Mr. Yoo.

Mr. YOO. Those numbers have been validated within the last 6 months from at least 5 sources. They vary, obviously. I have seen 50 to 80 percent. The most extreme number is 5 percent in 70 or 80, maybe as much as 1 percent in 50. If you take an even smaller slice of it, it might be even more intense.

Mr. CANNON. Great. Is that all peer to peer and mostly pirating or is the mix changing?

Mr. YOO. That number that we are talking about, 5 percent and 80, is peer to peer. The mix of peer to peer is 90 percent piracy. So the vast majority—you can do the math. 70-ish percent is piracy.

Mr. CANNON. Yes. Ms. Crawford, please.

Ms. CRAWFORD. Those uses are also changing, Congressman. We are seeing a lot of use of BitTorrent for sending around security patches for laptops. A lot of use of BitTorrent is for making sure that developers stay in sync. It is a very efficient way of using the network so that you are not depending on central servers and on one piece of bandwidth. Everybody is sharing the bandwidth in the storage.

Mr. CARNES. But you know, in the Grokster case—I think it was in 2005—the figure is almost exactly the same. It was still 90 percent illegal. So they may be doing more, but apparently the illegal is growing, too. The ratio is still the same.

Mr. YOO. If I may, it brings up a wonderful question, though, which is what is the future going to be? For the last 4 years until the last year, peer to peer was outstripping downloads every year, and it looked like that was the shape of things to come. Last year, because of YouTube, downloads made a comeback, and they have now passed peer to peer. The entire industry is staring at this. Should we design our entire networks because peer to peer is the answer or is YouTube the new thing? Even if we redesign it today, what is the next thing coming down? It is important to understand that it is extremely uncertain what you have to do right now. There is more than $100 billion at stake. They are going to have to make a gamble, and that is what they are paid to do.

Mr. CANNON. Just following up, when you say that they need to make a gamble, you have got very different architectures out there, and the gamble is gambling future investments in architectures that are dissimilar. What is the effect of a mandate from government on those decisions about what architecture to choose?

Mr. YOO. In a free market economy you let business people take chances. Some of them will work guaranteed; some of them will not. Our normal system is to allow individual consumers through their individual buying decisions to determine the winners and the

losers and not to have a centralized authority, whether government or private business, decide what that architecture is going to be.

Mr. CANNON. Yes, Ms. Crawford.

Ms. CRAWFORD. Just very briefly, the follow-up to that is that it would be good if we had a functioning free market in Internet access, but we really do not in this country.

Mr. CANNON. Yes. One of the things I would like to see happen is that we stimulate the possibilities of what that infrastructure will be rather than our limiting the possibilities, because we have seen an increase in the availability of bandwidth.

Yes, Mr. Carnes.

Mr. CARNES. From the songwriter's perspective, we have had 10 years of dumb pipes as the Internet, and it has hurt us. We are just hoping that an intelligent network can help us.

Mr. CANNON. One of the things I am hoping is that we can prosecute people who steal and then bring down the price enough so that people are incented to do other things. *Time Magazine* had an editorial on its last page about Rob Reid's doing an experiment with Rhapsody where he charges 25 cents per song. Instead of getting four songs, in other words, being equal, he got six songs sold for the same. So the 25 cents per song resulted in a 50 percent increase in revenues, and I am hoping that people who have content will sort of look at that model and will realize that by bringing the price down two things happen. One is you get more revenue. Two is why would you steal if you can pay a reasonably low price?

Along the lines of how we have a system that actually accommodates more movement, we have what I call the Super Bowl syndrome. If everybody downloads the Super Bowl over the same pipes—and in a neighborhood, you have got 300 households sucking the Super Bowl independently through the same pipe—you are going to have a problem with speed. If you use a model like Comcast and distribute that locally, then the backbone is not totally wiped out. In that environment, how we use the radio frequency, another spectrum, seems to be very important to me.

Are any of you familiar with the M2Z project? Does that give us an opportunity to see how we can use bandwidth a little more effectively?

Mr. YOO. There are a number of fascinating projects underway, and we have no idea which are going to work. There is a P4P project that is going on. All of these different solutions are brewing out there, and technology is going so fast that we do not ultimately know which one is going to win. I would love to see a wonderful battle between these different technologies unfold. The only way we can allow that is if we give them breathing room to experiment with new ways of doing business.

Mr. CANNON. Madam Chair, I recognize that my time has passed, but I actually intended that question for Ms. Crawford. I thought that she would have an answer. If she could have the time to answer——

Ms. LOFGREN. With unanimous consent, the gentleman is given another minute so Ms. Crawford may respond.

Ms. CRAWFORD. Here is the point. Here is the point. We need a playing field for innovation. That is the point of Network Neutrality. Keeping the conduit players as conduits does not limit our

opportunities as a Nation for the future. All it is going to do is to make sure that developers can attract investment because they can predict the kind of Internet on which they will be able to run their new applications. Right now we have uncertainty, which is clouding innovation, making it difficult to invest. Yes, we have to weigh benefits and burdens to different populations. As a society, social welfare will be served by a neutral Internet in a way that it will not be served by making sure that these very few private companies are able to monetize the Internet in the way they would like.

Ms. LOFGREN. The gentleman's time has expired.

As you have noticed, we have been called for a vote on the floor of the House, and we are out of questions for Members. So we will be adjourning this hearing, with terrific thanks to each one of you. A lot of people do not realize that our witnesses are volunteers and that you are here just to help us do the right thing and to make sure that our country's future is protected. So we do very much appreciate your participation in this hearing.

This hearing is now adjourned.

[Whereupon, at 4:04 p.m., the task force was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, TASK FORCE ON COMPETITION POLICY AND ANTITRUST LAWS

Thank you, Mr. Chairman, for your leadership in convening today's very important hearing on net neutrality and free speech on the internet. I would also like to thank the ranking member, the Honorable Steve Chabot, and welcome our panelists. I look forward to their testimony.

This hearing could not be more timely, Mr. Chairman. Over the past few years, the internet has become a dominant venue for the expression of ideas and public discourse. The internet provides a powerful medium for its users to use their First Amendment rights. From social networking to get-out-the vote drives, the internet is a powerful tool for speech. Technological innovation on the internet has made it among the most powerful outlets for creativity and free speech.

The internet's importance in promoting free speech has caused proponents of net neutrality to raise concerns that a lack of competition among broadband access provides allows providers to stifle and censor speech. In this hearing, the Judiciary Committee's Task Force on Competition Policy and Antitrust Laws will explore how network neutrality principles, government enforcement of policies, and private business practices currently protect and inhibit the freedom of speech.

The term "network neutrality" is the term used to describe the concept of keeping the internet open to all lawful content, information, applications, and equipment. It refers to the fundamental architecture of the internet that allows for user-to-user communications that are uninhibited and are not regulated based upon content. All network content is to be treated equally under "network neutrality."

The debate over net neutrality has arisen as broadband network providers became increasingly vertically integrated. For example, cable companies began to expand in the areas of television services, land-line phone lines, wire-less phone services, and high-speed internet services. Questions arose over how the stratified communications legal regime would apply to new, conglomerated companies offering services that traversed the regulatory law spectrum.

The concept of net neutrality has been supported by entertainment companies, providers of internet-based applications, software companies, content providers, and device manufacturers. These groups advocate argue that net neutrality fosters technology and innovation. These groups also argue that network providers have a clear incentive to discriminate.

On the other hand, network service providers, i.e., the cable or telephone companies, claim that statutory mandated net neutrality undermines their ability to effectively manage their networks. Net neutrality has arisen as an issue for this Congress to address for several reasons.

First, there have been instances of broadband access providers blocking certain content.

Second, Subcommittee Chairman Markey has introduced a net neutrality bill, H.R. 5353, the "Internet Freedom Preservation Act of 2008," which would require the FCC conduct proceedings to assess whether broadband providers violate net neutrality principles. H.R. 5353, also requires the FCC to hold eight public broadband summits to assess competition, consumer protection, and choice related to broadband.

Third, the FCC has begun considering complaints from entities claiming that the broadband service providers have been violating the FCC net neutrality principles. The FCC held its first public hearing on the issue in Boston on February 25, 2008. The FCC indicated that it was "ready, willing, and able" to take action against "improper practices."

The internet has also allowed its users to have access to billions of people. The internet can be used for communication or commerce. It is available to anyone with access to the internet.

The internet has been used to get people to vote and as a means of communication between organizations and their supporters. The internet is increasingly used for the proliferation of mass media content to millions of people. As the internet becomes increasingly more accessible and important in the global marketplace, questions arise regarding the role the communication carriers and the internet service providers should play in shaping the content they deliver to consumers.

Increasingly, there have been reports that internet service providers are limiting various groups from accessing the internet based upon the content of the communication. One such example of abuse occurred with Verizon Wireless.

On September 27, 2007, the Associated Press broke the story that Verizon Wireless rejected requests from NARAL Pro-Choice America to use Verizon's mobile network for text-messaging. Verizon temporarily barred NARAL from using a service known as "short code." Consumers generally receive text-messages on cellular telephones with traditional ten-digit phone numbers. When organizations transmit messages to their users' ten-digit numbers, they rent shorter five and six digit numbers, called "short codes," from which to send and receive messages. Verizon denied NARAL access to a short code that would have enable NARAL to contact its supporters with Verizon phones.

In its denial to NARAL, Verizon asserted that it did not accept text-messages from any group seeking "to promote an agenda or distribute content that, in its discretion may be seen as controversial or unsavory to any of our users." Amid mounting pressure against censorship from activist groups, Verizon discontinued its activities within days of the initial news report. This was not the first time that Verizon has engaged in such conduct; there are other instances of content based blockages.

An abuse such as this would ordinarily correct itself in a typical, competitive marketplace because users dissatisfied with their service would switch providers. However, in a non-competitive marketplace, there are few options for change. Broadband controls 96 percent of the U.S. residential market for high-speed internet access. Most consumers have very limited choice in which company provides service. Net neutrality advocate that without competition, providers will have both the power and the influence to determine whether speech will happen.

The providers argue that net neutrality regulations would limit innovation and technological advances because the presence of emerging technologies thwart discriminatory behavior. The providers argue that where censorship has occurred, like that between Verizon and NARAL, those instances of censorship are quickly resolved without government intervention.

The providers also assert that the FCC already has jurisdiction to regulate the internet and that the FCC has not intervened. The network providers argue that net neutrality statutes would impede efficient network management strategies because the regulations will further complicate how the companies distribute their limited amounts of bandwith among their different customers. The network providers argue that new regulation would negate the advancement and development of new technologies and consumer technologies.

I welcome the panelists' insight on this very time subject. Thank you, Mr. Chairman; I yield the remainder of my time.

RESPONSE BY RICK CARNES, PRESIDENT, SONGWRITERS GUILD OF AMERICA, TO QUESTION FROM CONGRESSMAN BOB GOODLATTE

The Songwriters Guild certainly welcomes your concern about the theft of billions of copies of songwriter creations on the Internet each year. For the past six years, I have come to Congress on numerous occasions to testify and meet with Members on that very issue, and on the financial devastation that has occurred in the songwriting community due to music piracy. It is the sad truth, however, that, despite widespread recognition of the problem, the piracy situation has only gotten worse. In fact, we have now lost over half of the professional songwriters in America; Internet theft has simply made it impossible for many of us to earn a living practicing our craft.

It is against this backdrop that SGA has been speaking out against enshrining the often lawless structure that currently exists on the Internet. The Internet now is in no way "neutral," at least insofar as songwriters are concerned. In many cases it has become no more than a playground for intellectual property thieves. In my

view it will remain so if no one is allowed to manage the networks in a way that identifies and filters pirated content.

With respect to Mr. Kulash's concerns, I would emphasize that SGA is far more concerned at the moment with *illegal content* on the Internet and in encouraging efforts and technological advances to alleviate that. If any ISP wants to filter *illegal* files from its network in order to make that network safe for *legal* music, obviously we strongly support that. However, we also do not object to sensible regulation that would prevent discrimination between types of *legal content,* to the extent that such discrimination is not already barred by current law.

RESPONSE TO POST-HEARING QUESTIONS FROM CHRISTOPHER S. YOO, PROFESSOR OF LAW AND COMMUNICATION AND DIRECTOR, CENTER FOR TECHNOLOGY, INNOVATION, AND COMPETITION, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

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Christopher S. Yoo
Professor of Law and Communication
Founding Director, Center for Technology, Innovation, and Competition

May 5, 2008

House Committee on the Judiciary
Attention: Benjamin Staub
2138 Rayburn House Office Building
Washington, DC 20515

To the Members of the House Committee on the Judiciary:

Thank you again for inviting me to testify at the hearing on "Net Neutrality and Free Speech on the Internet" on March 11, 2008, and for the chance to respond to the additional questions for the record submitted by Representative Goodlatte. My answers appear below:

* * *

1. I believe that our nation's antitrust laws provide a pretty good framework to ensure fair competition in most industries. However, antitrust cases often last years, which could be many generations in Internet time, at which point any ruling is likely to be moot. Do you have suggestions on how we can tweak the antitrust laws to make sure that they are effective in dynamic industries, like the Internet access industry, that evolve so quickly?

Commentators and policymakers have made extensive investigations into whether the rapid pace of technological change requires revisions to the antitrust laws. The Antitrust Modernization Commissioner concluded that new legislation was unnecessary, although it did recommend that the antitrust enforcement agencies clarify the standards they apply in deciding whether to bring enforcement actions. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS (Apr. 2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. Richard Posner shares the concerns raised by this question, but largely agrees that no substantive revisions are needed and instead suggests that greater use of neural experts and the expansion of the technical staffs of the enforcement agencies. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 936-40 (2001).

These studies represent large-scale efforts by distinguished scholars whose work commands respect. All I would add is that we should recognize that in some ways the increasing speed of technological change simplifies the problems faced by antitrust by making it less likely that any market power made possible by technological advantages will prove durable. For example, twenty-five years ago, the dominant players in the technology space were IBM and AT&T. Although both continue to exist in some form today, neither exerts the degree of influence that they did in the 1980s. Moving forward, roughly ten years ago, the dominant technology players

were Microsoft and America Online. The fact that neither seems poised to dominate the next generation of technology shows just how rapid technological change can render any dominant market positions ephemeral. Thus, antitrust law must also take into account the possibility that aggressive antitrust intervention will deter innovative activity that will provide the basis for shaking up the industrial structure.

2. If Mr. Carnes is correct, then most of the traffic on the Internet is illegal content. Can we attack this problem by allowing access providers to block illegal content on the Internet, such as illegal copies of movies, music, and software, while ensuring that providers do not engage in anti-competitive practices with regard to legal content?

Congress could clearly enhance access providers' ability to block illegal content. In fact, the evidence suggests that the vast majority of congestion n the Internet is the direct result of downloading illegal content.

Because illegal content inevitably travels in the same channels as legal content, any increase in enforcement necessarily requires allowing the access providers to employ deep packet inspection or some other means from distinguishing between the two. In addition, any such enforcement regime requires some means for decrypting encrypted traffic if those transmitting illegal content are not to be allowed to evade these restrictions relatively easily. Providing access providers with information about customers raises competitive risks of its own. Finally, every attempt to stay ahead of piracy will prompt purveyors of illegal content to undertake countermeasures to evade detection, which in turn will lead to further reactions and counter-reactions in response.

The solution, I believe, is to ensure that access providers retain the flexibility to respond to these challenges on a dynamic basis. As I have argued at some length elsewhere, it may make sense for access providers to employ proxies that, while perfectly tailored to the scope of illegal activity, represent useful, quick-and-dirty approximations of illegal conduct. For example, many access providers block entire ports, as they do for Port 25, which one of the primary sources of spam. Similar solutions may arise with respect to downloading of illegal content.

* * *

I am honored to have been of service to the Committee. Please do not hesitate to contact me again if there is any other way I can be of assistance.

Sincerely,

Christopher S. Yoo
Professor of Law and Communication
Co-Director, Center for Technology, Innovation, and Competition

UNIVERSITY *of* PENNSYLVANIA

RESPONSE TO POST-HEARING QUESTIONS FROM SUSAN P. CRAWFORD, VISITING ASSOCIATE PROFESSOR OF LAW, YALE LAW SCHOOL

April 4, 2008

Professor Susan P. Crawford
Visiting Associate Professor of Law
Yale Law School
P.O. Box 208215
New Haven, CT 06520

Dear Professor Crawford:

On behalf of the House Committee on the Judiciary, I want to thank you again for appearing before the Committee on March 11, 2008. Your testimony was informative and will assist us in future deliberations on the important issues addressed during the hearing.

Please find enclosed the follow-up questions for the record submitted on behalf of members of the Committee. I would ask that you please respond to the questions by May 2, 2008. Please address your response to the House Committee on the Judiciary, 2138 Rayburn House Office Building, Washington, DC 20515 to the attention of Benjamin Staub. Your assistance in this matter is greatly appreciated.

Sincerely,

John Conyers, Jr.
Chairman

JC/bs

Enclosure

Professor Susan P. Crawford
April 4, 2008

From the Honorable Bob Goodlatte:

1. *I believe that our nation's antitrust laws provide a pretty good framework to ensure fair competition in most industries. However, antitrust cases often last years, which could be many generations in Internet time, at which point any ruling is likely to be moot. Do you have suggestions on how we can tweak the antitrust laws to make sure that they are effective in dynamic industries, like the Internet access industry, that evolve so quickly?*

I am not confident that antitrust laws can do the job of evaluating and correcting anticompetitive network neutrality issues, for three reasons. First, these laws are inherently backward-looking. The issues raised by the specter of non-neutral network management are inherently forward-looking, as the risk of a network manager "managing" a new business out of existence is real, as are the effects of that risk on potential investment. Second, an antitrust case requires either enormous resources or the ability to persuade a prosecutor to act – something the many small companies online will never have. Third, the kind of discrimination we are discussing here focuses on the dropping of packets by routers and other tiny technical actions; antitrust law is a blunt instrument that will not function well in this context.

One revision to the antitrust laws that would help this situation (but would not supplant the need for general-purpose neutrality/structural-separation legislation) would be to make clear that the *Trinko* decision does not preclude the judicial imposition of an obligation on the part of network access providers to provide interconnection or access to others. The judicial branch, as well as the legislature and the FCC, needs to have its say in connection with these issues. This kind of inter-branch dynamism will do much to disrupt the current situation, in which courts will defer to the Commission because it has the potential regulatory authority to require network access providers to act – but does not act.

2. *I understand the unique problems facing access providers as more and more content appears and travels over the Internet. They must deal with the general increasing volume of Internet traffic, as well as temporary surges in Internet traffic that occur, such as when a popular live concert is viewed by, say, thousands of users at the same time.*

   Professor Crawford, how do you respond to Mr. Yoo's statistics about the amount of content on the Internet and the fact that the online video revolution will put great stresses on the capacity of many providers of Internet access? Should access providers be able to structure their pipes to provide maximum speed to all their consumers and also to avoid temporary slowdowns in Internet connections that result when the pipes are clogged?

Professor Yoo's claims in this regard are overstated. As Andrew Odlyzko of the University of Minnesota Internet Traffic Studies (MINTS) project has shown, Internet traffic growth is slowing. (http://www.dtc.umn.edu/mints/home.html) By contrast to 1995-1996, when Internet

traffic was doubling every hundred days, the growth rate for traffic is now at about 50% per year. Internet backbone managers are certainly capable of managing to that growth rate. It is high but not unmanageable.

It is true that there is a bottleneck in the last mile. That is the place where network operators are apparently unwilling to expand their pipes to meet user demand. (In a competitive environment, this would be viewed as an opportunity rather than a problem; it is very odd to have the network operators complaining about this.)

Actually, the story is more nuanced. Both cable and telephone companies would like to maintain an atmosphere of scarcity, just like all industries that want to avoid commoditization. So they are moving from saying "we need to constrain the movement of packets through our pipes to avoid congestion" to saying "highspeed Internet access will be expensive, so we need to make sure it is not neutral – we need to price-discriminate." So, VZ is indeed rolling out its highspeed FiOS service, which will certainly deal with Professor Yoo's congestion claims, but VZ will not agree to run it in a neutral fashion. VZ's plan is to overlay FiOS and all of its networks with something called IMS, the Interactive Multimedia Subsystem, which allows for cellphone-like monetization of Internet use. (Also, arguably we citizens have already paid for the FiOS work through billions of dollars in higher rates and taxes designed to support the installation of highspeed networks.)

Another example: cable companies have the choice of allocating more bandwidth to Internet access (removing it from the hundreds of channels no one watches), but are instead moving to DOCSIS 3.0, a standard that will increase download/upload speeds over existing Internet access channels. This standard won't have any effect on the cable companies' ability to discriminate using deep-packet inspection. Bottom line: the congestion story isn't persuasive at this point given the plans of the network access providers and the reality of backbone capacity.

At the same time, network providers want to be perceived as offering highspeed access, so they oversubscribe their networks dramatically -- at least by 10:1 in the case of cable modem access, which means each user has been sold the Brooklyn Bridge but will have access only to the bridge's pedestrian walkway at particular times of day. The power and information asymmetries from a consumer's perspective are profound: we have very little idea, each of us, what these network providers are up to.

All of these efforts to continue to discriminate and yet get the advantage of advertising high "up to" speeds are somewhat baffling. Why not simply buy more pipes, open them up, offer capped plans for lower-usage users, and let everyone know precisely what you're selling? The PR benefits of such a move would be dramatic. It is my strong sense that the network access providers are using every argument they can think of to avoid the precedent of any common-carriage-like requirement of non-discrimination being applied to them. As I said at the March 11 hearing, I think we need to examine carefully the gatekeeping role of private actors in giving Americans access to what has become the key 21st century general purpose network: the Internet.

LETTER FROM LESLEE J. UNRUH, FOUNDER AND PRESIDENT, ABSTINENCE CLEARINGHOUSE, ET AL. TO MEMBERS OF CONGRESS, DATED MARCH 10, 2008

March 10, 2008

Dear Member of Congress,

We write to you to warn of the dangers of "net neutrality." Legislation has been introduced in both houses of Congress that will stifle future innovation and may limit our ability to protect families and children from harmful content found on the web. Recent efforts to impose burdensome regulations on the Internet have failed, and we ask that you continue to resist any such proposals.

Experience has shown that competitive markets work to the benefit of all Internet users. It is competition, not regulation, which has led to significant investment in improving and upgrading broadband networks by our nation's Internet service providers. Thanks to these investments, more Americans have access to high-speed Internet than ever before which has been vital to our ability to spread our message. Network neutrality mandates would directly harm future innovation and broadband deployment, and as a result, would hinder our efforts.

The Internet has unquestionably changed the way we communicate for the better. However, as you know, the Internet has also made obscenity, child pornography, and other objectionable content readily accessible. Thankfully, research, innovation, and competition have given Internet users tools to block unwanted content from entering their homes. It is critically important for parents and broadband service providers to continue to have these tools available to them because despite what network neutrality proponents may say, all content on the web is not equal and should not be treated equally. Network management is not some insidious method of stifling voices on the Internet; network management is critical to stop pornographers and pedophiles from having unfettered access to consumers' Internet connections.

We appreciate your willingness up to this point to allow the market to function properly, and ask that you continue to do so by resisting the call for network neutrality. Please inform Chairman Martin that although the Commission may be "ready, willing, and able to step in if necessary," absent market failure now is certainly not an appropriate time for the FCC to act.

Sincerely,

Leslee J. Unruh
Founder & President
Abstinence Clearinghouse

Dr. Carl Herbster
President
AdvanceUSA

David A. Keene
Chairman
American Conservative Union

Grover Norquist
President
Americans for Tax Reform

Gary L. Bauer
President
American Values

Austin Ruse
President
Catholic Family & Human Rights Institute

Larry Cirignano
Founder
CatholicVote.org

Hance Haney
Director
Technology & Democracy Project, Discovery Institute

Brian Burch
President
Fidelis

Steve Elliot
President
Grassfire.org Alliance

Joseph K. Grieboski
Founder & President
Institute on Religion & Public Policy

Derek Hunter
Executive Director
Media Freedom Project

C. Preston Noell III
President
Tradition, Family, Property, Inc.

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