

April 25, 2006

The Honorable Joe Barton
Chairman, House Energy and Commerce Committee
2109 Rayburn House Office Building
Washington, DC 20510

The Honorable John Dingell
Ranking Member, House Energy and Commerce Committee
2328 Rayburn House Office Building
Washington, DC 20510

Dear Chairman Barton and Ranking Member Dingell:

On behalf of the ACLU, a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nation-wide, we urge you to support the Markey network neutrality amendment which we understand will be offered during the markup of the Committee Print of the Communications Opportunity, Promotion and Enhancement (COPE) Act of 2006. While the COPE Act contains provisions allowing the FCC to monitor the policies and practices of Internet Service Providers (ISPs) that may affect network neutrality, it does not allow for enforcement of network neutrality principles. Without specific recognition and enforcement of network neutrality principles, the democratic nature of the Internet as we know it could change, to the detriment of the First Amendment.

In contrast, the Markey amendment specifically provides that broadband network providers have a duty not to discriminate against content, applications, or services provided over the broadband network. It additionally provides for an expedited complaint process through the Federal Communications Commission. The amendment thus provides specific recognition of network neutrality principles and allows for enforcement of those principles, thereby preserving the Internet as a vibrant medium for free speech.

The Internet Promotes Free Speech

The Internet is the closest thing ever invented to a true free marketplace of ideas. “[A]ny person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”[1] “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.”[2] The Internet is without doubt the most vital and active forum where freedom of speech rights are exercised today.

Courts have been emphatic that the Internet is entitled to the highest level of protection and that attempts to censor its content or silence its speakers are to be viewed with extreme disfavor.[3]

Courts have also recognized 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.[4] Indeed, the “widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” [5]

Internet access permits the public “to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers” without any editorial restriction.[6] Because the Internet is a powerful means for the public to have meaningful access to diverse sources of ideas and experiences courts have protected the public’s right to uncensored Internet access on First Amendment grounds.[7]

The Internet’s Architecture Enhances the Internet’s Ability to Promote Free Speech

The speech-enhancing quality of today’s Internet is the result of its decentralized, nondiscriminatory design. The Internet serves as a neutral, nondiscriminatory “pipe” that automatically carries data from origin to destination without prejudice or interference. No company, individual or institution has the power to decide what applications are allowed to run, what kinds of data can be moved through the network, or whose data moves faster. This neutrality promotes open discourse. The Internet is open and easily accessible to the public, allowing it to freely communicate on a global scale. Consumers decide what sites to access, among millions of choices, and “pull” information from these sites, rather than having information chosen by others “pushed” out to them, as with television and other major media. The Internet structure of network neutrality therefore currently facilitates both free speech and commercial innovation and competition.

Cable networks lack the open and nondiscriminatory design of the Internet. As a result of cable systems’ historical use to distribute paid and unpaid television content, cable customers are wired directly into the cable provider system as part of one big local area network, all under the control of a centralized administrator, the cable provider. Cable company Internet service providers (ISP) wield almost complete control over the content their customers are able to see and disseminate on the Internet. A cable company has many opportunities for interfering with online activities, often in ways that are invisible to its customers.

The cable ISP may limit the number of computers a customer can connect to his or her modem. It can control the overall speed and reliability of the customer’s service. It can set prices for various levels of high-speed Internet access. Cable ISPs have the ability to discriminate in a very fine level, by the kind of packets being sent (e.g., streaming video), by the addressee or addressor, or by the kind of user (e.g., private individual versus corporation). The cable ISP can thus easily block customers from using specific Internet applications, including those that compete with the cable company. For example, AT&T could choose to prevent its cable ISP customers from using Internet telephony or videoconferencing, because these services compete with AT&T’s long-distance telephone and video conference services. Moreover, ISPs can control what the customer

can and cannot view online. For example, an ISP that was ideologically opposed to anti-abortion web sites could block her customers from viewing them. As a result, network neutrality could soon become a thing of the past, to the detriment of First Amendment values.

**Changing the Internet Architecture from One of Network Neutrality to ISP Control
Will Harm First Amendment Values**

If the Internet is to remain a robust and open forum for free speech, Congress must act to enforce the network neutrality that has allowed free speech to flourish. The Markey amendment will preserve this global soapbox for future generations. We therefore urge you to support the Markey amendment.

Sincerely,

Caroline Fredrickson
Director

Marvin J. Johnson