

**STATEMENT OF ANDREW JAY SCHWARTZMAN
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FEDERAL COMMUNICATIONS COMMISSION WORKSHOP
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In the latter half of the Nineteenth Century, the telegraph had a transformative effect on our growing nation. By the 1870's Western Union achieved near-monopoly control of telegraphy services in the United States. Financier Jay Gould, who ultimately obtained control of Western Union, was not beneath using this power for political and economic gain. Among other things, Gould leveraged Western Union's power over this vital technology by striking a deal with the Associated Press in which all AP newspapers would use Western Union and none would support creation of a competitive telegraphy service. Indeed, a number of historians believe Gould actually manipulated the outcome of the 1876 Presidential election in favor of Rutherford B. Hayes.

That was a long time ago, and analogies to the Network Neutrality debate are limited. But there are also some similarities, and some lessons to be learned. One is that the best way to protect against such abuses involves erecting safeguards against them. The creation of common carrier obligations and the passage of the antitrust laws have been important protections for the public and, in particular, for preserving the democratic process.

The problem is not speculative. Here is what I know:

Four years ago, Telus, one of Canada's largest internet service providers ("ISPs"), surreptitiously blocked customer access to a website operated by a union with which it was engaged in a labor-management dispute. Because of the way Telus did this, more than 700 other unrelated websites were also blocked. Telus reversed itself a few weeks after the practice was publicly disclosed, but continued to insist that it had legal authority to do so.

A few months later, a telecommunications carrier named Madison River Communications adopted a practice of blocking voice over internet telephone calls placed by customers using its DSL internet facilities, presumably because they induced customers not to use Madison River's competing phone services. Only after a competitor filed a complaint with the FCC, and without admitting any wrongdoing, did Madison River agree to reopen its network.

Two years ago, Verizon Wireless initially blocked text messages from NARAL Pro-Choice America. Verizon Wireless said that it "does not accept issue-oriented (abortion, war, etc.) programs - only basic general politician-related campaigns (Mitt Romney, Hillary Clinton, etc.)" It said that

For now, [Verizon Wireless] will not accept programs that are issue-oriented from lobbyist[s], PACs, or any organization 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. General informational campaigns about candidates are acceptable to the extent that the content involved is, in Verizon's sole discretion, not issue-oriented or con-

troversial in nature.¹

Verizon Wireless quickly backed down, but for many months it refused to provide written guidelines or other explication of its policies other than that quoted here. In August, 2008 Verizon finally issued comprehensive written content guidelines, including a provision which states that Verizon Wireless will provide text messaging services “to any group that is delivering legal content to customers who affirmatively indicate that they desire to receive such content.” Despite this commendable turnaround, Verizon Wireless maintains that, as a matter of law, it is free to block text messages for any reason.

More recently, the Commission upheld a complaint against Comcast for its undisclosed policy of blocking uploads employing five different peer-to-peer protocols, including BitTorrent. Academics use BitTorrent to transfer datasets; government agencies use BitTorrent to transmit high-definition images to citizens; software developers use BitTorrent to distribute open source software and security patches and other companies use BitTorrent for legal distribution of high-definition streaming video over the Internet.

The complaint demonstrated that, among other content, Comcast blocked transmission of a file containing the text of the King James Bible. As its customers initially started to notice and report problems, Comcast first stated that no applications were blocked, and that no traffic was throttled. After engineers conclusively demonstrated this representation to be untrue, Comcast changed its tune, filing in written comments to the Commission that its blocking only took place at times of congestion. Months after the FCC’s convened public hearings on the complaint, Comcast finally admitted its blocking occurred constantly, not just at times or in places of congestion.

That is what we know. More importantly, here is what we don’t know: how many other instances of blockage or degradation of service there might have been, and how many are taking place right now. After all, Comcast initially denied that it was blocking BitTorrent transmissions. Only after it was confronted with conclusive evidence to the contrary did it ultimately admit that its policy had been in place for more than three years. Indeed, the blockage might have continued indefinitely but for the accident that one of Comcast customers was a highly experienced computer engineer who was puzzled by his inability to upload what he described as “a rare cache of Tin-Pan-Alley-era ‘Wax Cylinder’ recordings and other related musical memorabilia” all of which is in the public domain.

Determining when such misbehavior takes place will only become more difficult. Advancing technologies, including deep packet inspection, are much more sophisticated and much less easily detected than Comcast’s blatant and ham-handed exploits.

The greatest dangers we face in maintaining free expression on the Internet arise because of

¹The quotations are from the declaration of Jed Alpert, submitted in support of a *Petition for Declaratory Ruling Stating that Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules* filed on December 11, 2007 by a number of public interest organizations, including Media Access Project. The *Petition* remains pending before the Commission in Docket WC 08-7.

what we do not know, and because of what new techniques may have been, or may soon be, developed.

It is in this context that I address the question of how to apply the First Amendment to the Network Neutrality debate.

Policies that promote creation of content-neutral, viewpoint-neutral platforms for free expression help fulfil the mandate of the First Amendment that government should seek to promote the public's right to have access to diverse and varied social, political, artistic expression. By creating a better informed electorate such practices advance the operation of democratic self-governance.

As I will discuss, the public is the intended beneficiary of the protections of the First Amendment. Thus, as a preliminary matter, I want to argue that, by contrast, ISPs are entitled to limited, if any, protection under the First Amendment, and it is the right of the public to receive information which is "paramount." Even though the Commission has designated ISPs as "information service" providers under the Communications Act, for the most part the only content they actually create is what is on their own websites. They function as carriers transporting data created by others, and it is those content creators who can claim the rights and responsibilities of being speakers under the First Amendment.

I want to focus for a moment on the "responsibilities" part of what I just said. Under Section 230 of the Communications Act provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This important and highly beneficial provision affords immunity to websites and carriers for libel and other torts committed by others. Similarly, Section 512(a) of the Digital Millennium Copyright Act affords ISPs an exemption from secondary copyright infringement liability when they retransmit protected content so long as they remove it promptly when asked.

ISPs cannot have it both ways. They do not materially contribute to the content they retransmit, and they receive important protections based on the presumption that they do not function as speak. To the extent that they claim to be speakers, they would have to forfeit those protections.

More fundamentally, however, I want to stress that it is the living, breathing citizens of this country who are the intended beneficiaries of protection under the First Amendment. As the Supreme said in its unanimous *Red Lion* decision,

[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv.L.Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and

experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

Policies promoting more, and more varied, speech thereby advance the governmental objective embodied in the First Amendment. As Professor Meiklejohn said,

[C]ongress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it. The freedom of mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security, by bringing them together in activities of communication and mutual understanding. And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, in that positive field the Congress of the United States has a heavy and basic responsibility to promote the freedom of speech.

Alexander Meiklejohn, *Free Speech and Its Relation to Self-Governance* at 16-17 (1948).

Incorporating pro-speech policies in the interpretation of law is hardly a novel proposition. Indeed, it has been clear for some 60 years that antitrust principles overlap with First Amendment doctrine. The seminal case in this regard is *United States v. Associated Press*, 326 US 1 (1945), where the Supreme Court applied the Sherman Act to newspapers. Writing for the majority, Justice Black held that the First Amendment provided powerful support for applying the Sherman Act because it “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public....” *Id.*, 326 U.S. at 20. Justice Frankfurter emphasized in his concurring opinion that the case was about a commodity more important than peanuts or potatoes, that it was about who we are as a nation. “A free press,” he said, “is indispensable to the workings of our democratic society.” *Id.*, 326 U.S. at 28. For that reason, he wrote, “the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.” *Id.*

A notable example of how this concept has been applied in practice can be found in Judge Greene’s treatment of the AT&T consent decree. In imposing restrictions on what was then described as “electronic publishing,” he held that both competitive and First Amendment considerations separately supported his action.

Judge Greene made clear that application of these objectives is not delimited to Title III of the Communications Act. “Certainly,” he said, “the Court does not here sit to decide on the allocation of broadcast licenses. Yet, like the FCC, it is called upon to make a judgment with respect to the public interest and, like the FCC, it must make that decision with respect to a regulated industry and a regulated company.” *U.S. v. AT&T*, 551 F.Supp. 131, 184 (D.D.C. 1982). Thus, he

said, it was necessary for him to “take into account the decree’s effect on other public policies, such as the First Amendment principle of diversity in dissemination of information to the American public. Consideration of this policy is especially appropriate because, as the Supreme Court has recognized, in promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws.” *Id.*

These principles were applied even more forcefully in the context of the Communications Act. In *Red Lion*, the Court unanimously embraced a robust view of the affirmative duty of government to facilitate speech, pointing to the public’s “collective right to have the medium function consistently with the ends and purposes of the First Amendment.” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Elaborating on that, Justice White said that “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” *Id.*

The Court relied on similar principles in upholding the FCC’s broadcast ownership rules in *FCC v. NCCB*, 436 U.S. 775 (1978). Quoting the Court of Appeals, the unanimous decision held that “far from seeking to limit the flow of information, the Commission has acted... ‘to enhance the diversity of information heard by the public without on-going surveillance of the content of speech.’” *Id.*, 436 U.S. at 801 (citation omitted).

The role of the First Amendment in application of the Communications Act was dramatically restated in the Supreme Court’s *Turner* cases. Echoing the issues as framed in *Associated Press*, the majority in *Turner* held that considerations of both competition and diversity justified enactment of cable must carry rules. In *Turner I*, the majority held that “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.” *Turner Broadcasting System v. FCC*, 512 U.S. 622, 663 (1994). After a remand for fact finding, it reaffirmed that holding in *Turner II*. *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1978). Interestingly, Justice Breyer concurred in *Turner II*. Based on the record which had been developed, he disagreed that the must carry regime was justified by competitive considerations. However, he did agree with the majority’s finding about the impact of the must carry rules on the marketplace of ideas. He wrote separately to express the view that diversity was, by itself, a sufficient basis to sustain those rules. The “basic noneconomic purpose” of the 1992 amendments to the Communications Act, he said, “is to prevent too precipitous a decline in the quality and quantity of programming choice....” *Id.*, 520 U.S. at 227. Quoting *U.S. v. Midwest Video* and *Associated Press*, he said that “This purpose reflects ‘what has long been a basic tenet of national communications policy,’ namely that ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. That policy, in turn, seeks to facilitate the public discussion and informed deliberation which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve.’” *Id.* (citations omitted.).

CONCLUSION

As the Supreme Court has said, “It ‘is no exaggeration to conclude that the content on the Internet is as diverse as human thought.’” *Reno v. ACLU*, 521 U.S. 844, 852 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)). Strong government action can help insure that the Internet will serve to distribute that information as freely as possible.