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Remarks of Professor Jack M. Balkin at FCC Workshop on Speech, Democratic Engagement, and the Open Internet, December 15, 2009

Good afternoon. My name is Jack M. Balkin and I am the Knight Professor of Constitutional Law and the First Amendment at Yale Law School, and the founder and Director of Yale's Information Society Project, which studies the effects of new information technologies on law and society.

I'm here today in my capacity as a First Amendment scholar to explain why an Open Internet is crucial to freedom of speech and democracy.

The Internet's Greatest Gift: Participation

What do digital networks make possible? First, they allow people to become *active speakers and creators* instead of merely passive consumers of information and entertainment. Second, they *decentralize innovation*, giving people abundant opportunities to create and use new applications for communication and creativity. Third, they allow people to *form new kinds of social relationships, groups and communities*.

In short, digital networks allow people to participate in culture, society, and politics in ever new ways: individually or in groups, locally, nationwide, or around the world. The ability to participate is the Internet's great gift to mankind.

Participation is also central to the First Amendment. Some scholars say that the point of the First Amendment is liberty; others say it is democracy. I combine the two: for me, the point of the First Amendment is to foster a *democratic culture*: a culture in which ordinary people can have a say about the forces that shape them and make them who they are. A culture is democratic not because people vote on it but because they get to participate in making it. A participatory and democratic culture requires more than protecting political speech; it requires a vibrant public sphere that makes self-government possible.

Permission and Media Gatekeepers

But participation means little if we need permission to participate. An Open Internet means that we can speak, organize and innovate without getting anybody's prior permission. This idea, too, has deep roots in the values underlying the First Amendment. One of the earliest conceptions of freedom of speech was freedom from prior government restraints. And I'm sure you remember the saying that the real freedom of the press belongs to the person who owns one.

Until recently, nobody could gain access to mass communications unless they had the permission of a big media company like a newspaper or a television station. Even then, they only got access on the broadcaster's terms, and often were heavily edited. And good luck getting access if you said something a little oddball or unpopular.

An Open Internet changes all this. People can reach audiences that only large media corporations could reach before. The Internet lets us route around traditional media gatekeepers, who often functioned like private censors. People can create new tools and applications for speaking, communicating, and organizing, all without having to get anybody's prior permission.

Just imagine a world in which you had to get permission from Internet service providers before you could create a platform like Typepad or YouTube; or upload content onto Flickr or Facebook. Free speech and democracy thrive precisely because we *don't* have to ask somebody's permission before we speak, engage in politics, upload files, or create a new social media application. An Open Internet is an Internet that is open to new content and new applications, an Internet where your ISP doesn't try to block you or shut you down for daring to compete with its favored content partners.

A Conflict of Interest

The Internet allows us to route around the old gatekeepers. But the challenge we face today comes from the new gatekeepers: the broadband companies who own and operate the conduits through which everyone speaks.

Although broadband providers are private companies, their business is affected with a crucial public interest. Broadband services allow us to communicate, form groups and create new kinds of community. They are the infrastructure of free expression and democracy.

Yet there is a mismatch between the private interests of these new gatekeepers and the public interest. Their private interest, like that of any company in the United States, is maximizing profits and pleasing their shareholders. The public interest, however, is in giving as many people as possible the opportunity to innovate, create, speak, debate, express themselves, spread information, and organize politically. The public interest, in short, is in promoting the values of free expression and democratic participation.

The mismatch between the public interest and companies' private interest would be less troubling if there were many sources of broadband access. But there are not. For most people in the United States, there are only two: the local cable company and the local phone company. This duopoly in Internet access makes broadband companies very powerful. They control the central conduits for speech, innovation, and self-governance in the Information Age. They can slow down Internet traffic and applications to a crawl

or block them entirely, and because they have no obligation to report their decisions, nobody can know what they have done or why they did it.

Broadband companies tell us that they have no interest in censoring unpopular ideas. As a general matter, I believe them. There are a few examples of political censorship on the record, but for the most part this is not the central problem.

What is the problem? It is a conflict of interest between public and private interests: Broadband companies further the public interest when they operate as open, non-discriminatory platforms for other people's innovation and as open, non-discriminatory conduits for other people's speech. But their private interests inevitably lead them to play favorites. A democratic culture requires a level playing field for expression and innovation, but broadband providers don't always have an economic interest in a level playing field.

Broadband providers want end users to consume content and use applications from the companies they own or contract with, because this makes them money. Conversely, they don't want other traffic, other content, or other applications to get in the way of their profits. Broadband companies are not opposed to the Internet's interactivity; they just want the interactivity to be on their own terms. End users or non-favored businesses who want to broadcast their own content, including video content, will have to take the slow lanes. Conversely, broadband owners want to be able to extract payments from applications providers and content owners in exchange for preferred service.

These incentives mean that even if broadband companies have no plans to censor unpopular speech, they won't really want or enforce a level playing field for private speech and innovation. That is why there is a conflict between the public interest and private interests. And that is why regulation is necessary.

Remedying the Conflict of Interest

To preserve the great participatory promise of the Internet, we must confront this conflict of interest head on. When companies act as primary conduits for other people's speech, they may not discriminate in content or applications and they must be transparent about how they maintain and manage their networks to promote efficiency. They can produce and distribute their own content and they can create their own applications. But they may not play favorites between the content of their business partners and the content of everyone else. And they may not move to block or hinder innovations and applications that they didn't invent and don't control.

Seeing that regulation is on the way, broadband companies have begun to argue that they have a constitutional right to block applications and discriminate against content, and that any attempt to keep them from maximizing their profits in this way violates the First Amendment. Nothing could be further from the truth. Under the First Amendment

Congress can make both telephone and cable companies into common carriers who must take on all traffic. Congress can certainly require a much milder non-discrimination requirement like network neutrality.

The First Amendment protects speech, not business models. The FCC's job is to make sure that communications companies serve the public interest as well as their own private interest. This idea has been the basis of telephone and cable regulation for decades. The public interest demands that we secure the benefits of an open and participatory Internet for this century. Network neutrality rules are a good place to start.