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Keeping the Internet Neutral: Net Neutrality and its Role in Protecting Political Expression on the Internet

by

JENNIFER L. NEWMAN*

I. Introduction

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." In particular, throughout history the Supreme Court decided a number of cases granting increased protection to political speech. In Monitor Patriot

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1. U.S. CONST. amend. I.

Co. v. Roy, for example, the Supreme Court held that freedom of speech has it "fullest and most urgent application . . . to the conduct of campaigns for political office." 3 Additionally, in Buckley v. Valeo, the Court found that "discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." 4 Due to this importance, there is profound commitment to the principle that debate on public issues should be "uninhibited, robust, and wide-open." 5

As Internet-use rises and becomes more widely available, it has become an increasingly important medium of political communication, as seen by events such as the CNN/YouTube presidential primary debates, and the explosion of viral videos by both the candidates and supportive (or unsupportive) citizens. 6

Throughout history, as new mediums of communication come about, additional First Amendment protections arise. When other forms of mass media, such as television and radio have been regulated in the past, the regulations were upheld because of the unique and pervasive characteristics of these mediums. 7 Since broadcast audiences (radio and television listeners and viewers, specifically) are constantly tuning in and out, prior warnings cannot protect the listener from unexpected program content, leaving the user with limited control over what he or she hears and sees. 8 As a result of the invasive nature of these mediums, broadcast communication has received more limited First Amendment protection. 9

However, the Supreme Court has long recognized that each medium of expression presents unique challenges and must be regulated differently. 10 For example, a telephone user has significantly more control over the content he or she receives than a television or

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5. Sullivan, 376 U.S. at 270.
8. Pacifica, 438 U.S. at 748.
9. Id.
10. Id.
radio audience member has over what he or she sees and hears. As a result, Congress subjects telephone carriers to less regulation than broadcast networks.

Like telephone users, Internet users maintain a lot of control over the content they receive. The Internet is a medium which is uniquely interactive in that it permits users to specifically choose websites and then allows individuals to personally navigate those websites, thereby giving users a great deal of control over the content they encounter. As a result, Internet users are more readily likened to telephone users than broadcast audiences and the concerns with lack of control (e.g., receiving unwanted content) are not as prevalent. Therefore, thus far, legislative attempts to regulate the Internet in the same manner as broadcast communications have proven unworkable. Rather than effectively and constitutionally control content, such legislative attempts to regulate indecency and obscenity on the Internet violate free speech protections of the First Amendment.

Unlike past legislation and regulation attempts, the current legislation pending in Congress, the Internet Freedom Preservation Act of 2008, limits interference with the free flow of information on the Internet. This legislation has its basis in the concept of network neutrality, which broadly speaking, stands for the proposition that a broadband network should be free of restrictions on the modes of communication allowed and should not restrict or degrade content, sites, or platforms.

This note will suggest that Congress must create a proper legislative avenue to ensure protection of political expression, a critical speech interest that the Supreme Court argues deserves special protection. While the note will discuss competing avenues, it

12. Id. at 70.
13. Jay Krasovec, Cyberspace the Final Frontier, for Regulation, 31 AKRON L. REV. 101, 141 (1997); see also Reno v. ACLU, 521 U.S. 844, 869 (1997) (finding the Internet is not as invasive as the radio or television, and communications over the Internet do not invade an individuals home to such a large degree).
14. See, e.g., Reno v. ACLU, 521 U.S. at 863 (holding that Communications Decency Act, which attempted to regulate pornographic material on the Internet violated the First Amendment's guarantee of freedom of speech because parents were not permitted to decide for themselves what was acceptable for their children).
15. Id.
will ultimately promote legislation that advocates, and hopes to guarantee, a neutral Internet. The note will begin by discussing the history of the Internet and its creation as an open network. It will then focus on current legislation and regulation of the Internet, with special attention drawn to the legislation pending in Congress. It will also compare the competing lobbying campaigns that suggest distinct types of legislation and regulation of the Internet. Finally, the note will highlight the use of the Internet as a tool in political communication and analyze the possible effects of the lobbying campaigns and pending legislation on political communication on the Internet.

II. The Internet—What is It and How Does It Really Work?

The Internet is a loose collection of millions of computers throughout the world that share information and files. It is essentially a “decentralized, global medium of communications . . . that links people, institutions, corporations, and governments around the world” and allows tens of millions of people with access to the Internet to exchange information.

To understand the competing lobbying campaigns and how Internet regulation works, it is necessary to have a basic understanding of how the Internet itself functions. “Various computers connect together to create a system.” In turn, numerous systems form a network." Thousands and thousands of local networks then connect, managed by communication software, to form the Internet.

Additionally, “the Internet is not owned or controlled by any one group or person.” In ACLU v. Reno, the courts explained, “No single entity—academic, corporate, governmental, or non-profit—administers the Internet.” There is no centralized storage location, or communications channel for the Internet and due to its vast nature, “it would not be technically feasible for a single entity to control all of

22. Krasovec, supra note 13, at 103.
23. Krasovec, supra note 13, at 103.
24. Krasovec, supra note 13, at 104.
the information conveyed on the Internet."\textsuperscript{26} Instead, "hundreds and thousands of separate operators of computers and computer networks independently . . . exchange communication and information with other computers."\textsuperscript{27}

Individuals can obtain access to these networks from many different sources.\textsuperscript{28} One common way, which this note focuses on, is through one of the major national commercial "online services" such as AT&T and Comcast.\textsuperscript{29} Internet service providers such as these "offer nationwide computer networks."\textsuperscript{30} Their services provide "extensive and well organized content," allowing subscribers to link to the large resources of the Internet.\textsuperscript{31}

Resources available to users include everything from shopping and access to social networks to reading news articles and watching videos, making the Internet a significant tool in communicating and gathering information. In \textit{Reno v. ACLU}, the Supreme Court emphasized the important function of the Internet, stating,

From a publisher’s point of view, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can “publish” information.\textsuperscript{32}

\section*{III. Regulation and Legislation of the Internet}

\textbf{A. Federal Communications Commission Internet Policy Statement}

The Federal Communications Commission ("FCC") has the authority to ensure that providers of telecommunications for Internet access or Internet-enabled services are operated in a neutral manner.\textsuperscript{33}

To encourage, preserve, and promote the open and interconnected nature of the Internet, the FCC adopted some basic

\textsuperscript{26} Id.  
\textsuperscript{27} Id.  
\textsuperscript{28} Reno v. ACLU, 521 U.S. 844, 850 (1997).  
\textsuperscript{30} Id.  
\textsuperscript{31} Id.  
\textsuperscript{32} Reno v. ACLU, 521 U.S. at 853.  
\textsuperscript{33} Federal Communications Commission Policy Statement, FCC 05-151, Sec. II (Aug. 5, 2005).
principles in its 2005 Internet Policy Statement. The statement discussed that consumers are entitled to: (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice; (3) connect their choices of legal devices that do not harm the network; and (4) competition among network providers, application and services providers, and content providers.

The Commission concluded it would incorporate the aforementioned principles into its ongoing policy making activities, but noted the principles adopted are subject to reasonable network management.

B. Federal Telecommunications Act of 1996

The Federal Telecommunications Act of 1996 ("the Act") was the first major overhaul of telecommunications law in almost 62 years, amending the Communications Act of 1934. Embodying the principles of the FCC's 2005 Internet Policy Statement, the Act provides for the promotion of competition and the reduction of regulation in the telecommunications industry.

Section 230 of the Act focuses on the Internet, noting that the Internet represents a forum for "true diversity of racial discourse, unique opportunities for cultural developments, and myriad avenues for intellectual activity." The section adds that the Internet "represents an extraordinary advance in the availability of education and informational resources to our citizens."

Of particular importance, in the Act's preliminary findings, Congress found the following: (1) the Internet offers a forum for "a true diversity of political discourse;" (2) the Internet . . . [has] flourished, to the benefit of all Americans, with a minimum of government regulation;" and (3) Americans increasingly rely on the Internet and interactive media for a variety of political services.

Based on these findings, Congress stated that effective in 1998, it was the policy of the United States to, among other things, "preserve the vibrant and competitive free market that presently exists on the

34. Id. at Sec. I.
35. Id. at Sec. II.
36. Id. at 4 n.15.
Internet . . . unfettered by Federal or State regulation” and “encourage the development of technologies which maximize user control over what information is received by individuals . . . who use the Internet.”

C. Internet Freedom Preservation Act of 2008

On February 13, 2008, Representatives Ed Markey and Chip Pickering introduced legislation to explicitly make the Internet “neutral.” The purpose of the proposed legislation, entitled the Internet Freedom Preservation Act, is “to assess and promote Internet freedom for consumers and content providers.” Additionally, the Act wants to “establish broadband policy and direct the Federal Communications Commission to conduct a proceeding and public broadband summits to assess competition, consumer protection, and consumer choice issues relating to broadband Internet access services . . . .” Essentially, proponents of the bill hope to encourage “openness, competition, innovation, and affordable, ubiquitous broadband service” for everyone in the country.

Basing the legislation on the policy and history of the Internet, the new broadband policy contained in the bill expands on the FCC’s Internet Policy Statement and amends Title I of the Communications Act of 1934. If passed, the following would become the policy of the United States: (1) “maintain the freedom to use . . . the Internet without unreasonable interference from or discrimination by network operators;” (2) “preserve and promote open and interconnected nature of . . . networks [and] enable consumers to reach lawful content, applications and services of their [choice];” and (3) “safeguard the open marketplace of ideas on the Internet by adopting

42. 47 U.S.C. § 230(b)(2),(3).
43. See The Internet Freedom Preservation Act Summary, http://markey.house.gov/docs/telecomm/hr5353_summary.pdf (last viewed on Mar. 21, 2008). A summary of the bill on Rep. Markey’s website defines Internet freedom as the notion that “consumers and content providers should be free to send, receive, access, and use the lawful applications, content, and services of their choice on broadband networks; possess the effective right to attach and use non-harmful devices to use in conjunction with their broadband services; and that content providers not be subjected to new, discriminatory charges by broadband network providers.” Id. It adds that these general principles have been referred to as “network neutrality” principles as well. Section IV below will discuss the idea of Internet freedom and neutrality in further detail.
44. H.R. 5353.
45. H.R. 5353 § 2.
46. H.R. 5353 § 3.
and enforcing . . . protections to guard against unreasonable discriminatory favoritism for, or degradation of, content by network operators based on its source, ownership, or destination on the Internet.\footnote{H.R. 5353 § 12 (1), (3), (4).}

Specifically, the Commission will examine whether broadband network providers adhere to the Commission’s Internet Policy Statement and (1) refrain from “blocking, thwarting, or unreasonably interfering with the ability of consumers” to “access, use, send, receive, or offer lawful content, applications, or services over . . . the Internet” and (2) “use lawful applications and services of their choice.”\footnote{H.R. 5353 § 12(2)(A).}

The bill will also require the FCC to assess “whether broadband network providers add charges . . . to certain Internet applications . . . and whether such pricing conflicts with the policies of the United States.”\footnote{H.R. 5353 § 12(2)(B).} The FCC will also have to examine “the practices by which network providers manage or prioritize network traffic . . . [and determine] in what instances these practices [are] consistent with the policies of the United States.”\footnote{H.R. 5353 § 12(2)(D).}

IV. Lobbying Campaigns: Network Neutrality vs. Network Competition

A. Network Neutrality

The proposed legislation discussed above, designed to essentially mandate the neutrality of the Internet, promotes the concept of Internet freedom, which is often referred to as network neutrality (“net neutrality”). While definitions of the term vary, the principle has been widely supported by large Internet corporations such as Amazon, Google, Yahoo, and eBay, as well as organizations such as MoveOn.org, the American Civil Liberties Union, and FreePress.\footnote{Wikipedia.com, Network Neutrality, http://en.wikipedia.org/wiki/Network_neutrality (last visited Mar. 21, 2008).}

Savetheinternet.com Coalition,\footnote{See Savetheinternet.com, About the Coalition, http://www.savetheinternet.com/=coalitionSavetheinternet.com (last visited Mar. 21, 2008). The coalition is composed of over one million members, including university professors, Craigslist founder, Craig Newmark, and organizations such as the MoveOn.org, Free Press, ACLU, Christian...} a lobbying campaign that supports a neutral Internet, defines net neutrality as the basic...
principle that preserves free Internet, leaving the Internet free from discrimination.33 Simply put, those who support net neutrality believe that all “Internet content must be treated alike and move at the same speed” over the Internet.

Essentially, proponents of net neutrality hope to prevent Internet providers such as Comcast and AT&T (which have shown a propensity to engage in, or actually have engaged in, non-neutral activity) from providing different costs and/or rates of service and delivery based on the particular content item’s “source, ownership or destination.”54

B. Providing Preferential Treatment Based on Source

There is evidence that CEOs of large telecom companies like Verizon, AT&T, and Comcast would like to build Internet with faster service for companies willing or able to pay high tolls.55

For example, in 2005, a senior telecommunications executive stated that Internet service providers, such as Bell South Corp., should be allowed to strike deals to give certain companies like Yahoo the opportunity to have its search site load faster than Google’s.56 By identifying the source and destination of content moving through their network infrastructure, network operators have the ability to block some content, or put other content near the front of the line.57 Additionally, in an interview in 2005, AT&T's chief executive Edward E. Whiteacre told Business Week,

Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to

Coalition of America, Democracy for America and the Media Alliance Project. It works to preserve net neutrality and application of the First Amendment on the Internet, and tries to ensure Congress passes no telecommunications legislation without net neutrality protections.

55. Id.
57. Id.
be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes?  

C. Providing Preferential Treatment Based on Content

While most of the debate around the issue centers on the tentative plans of large Internet carriers to offer preferential treatment of traffic from certain content providers for a fee, these plans have now been postponed, and recently the debate moved to stifle attempts by service providers prioritizing traffic based on its type.

In October 2007, the SaveTheInternet.com coalition and several academics filed a complaint with the FCC to stop Comcast from violating customer rights following a report by the Associated Press that the ISP was cutting off service to file-sharing services. The Associated Press confirmed, through nationwide tests, that “Comcast actively interfere[d] with attempts by some of its high-speed Internet subscribers to share files online.”

While Comcast repeatedly denied suffocating peer-to-peer networks like BitTorrent, tests by the Associated Press in late 2007 revealed that Comcast was jamming traffic in a way that made it inconvenient and extremely slow for users in ways that were designed to go undetected. According to the complaint, Associated Press

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59. See Peter Svensson, Comcast Blocks Some Internet Traffic, MSNBC, Oct. 19, 2007, http://www.msnbc.msn.com/id/21376597/. AT&T Inc. suggested in 2005 it would like to charge some Web companies more for treatment of their traffic, but consumer advocate groups like Google and Amazon said it violated the principle that all traffic be treated equally. To get its acquisition of BellSouth Corp. approved by the Federal Communications Commission, AT&T agreed in late 2006 not to implement such plans or prioritize traffic based on its origin for two and a half years. However, it did not make any commitments not to prioritize traffic based on its type, which is what Comcast is doing.


61. Svensson, supra note 59.

tests showed Comcast was jamming peer-to-peer traffic sites such as BitTorrent, Gnutella and Lotus Notes in a way that made it inconvenient and extremely slow for users.

In the case of BitTorrent, the jamming prevents Comcast subscribers from publishing or republishing material using BitTorrent. The jamming additionally "prevents a user's ability to find other Gnutella users and either upload or download material over the network." The Complaint claims Comcast violates the FCC's 2005 Internet Policy statement by acting as an Internet gatekeeper and telling users which Internet services they can and cannot use. Specifically, Comcast violates three of the four principles discussed in the FCC's Internet Policy Statement by blocking consumers' access to certain applications and content and limiting competition.

D. The Case for Net Neutrality

Tim Wu, the man responsible for coining the term "net neutrality" says a public information network will be most useful if it "aspires to treat all content, sites, and platforms equally." In the past twenty years, the Internet has had a profound impact on the evolution of communication and cultural discourse. Some proponents argue that its very neutrality is the reason for its success and growing importance. They contend Internet users should be in control of the content they view and applications they use on the Internet.

63. Free Press Complaint, supra note 62, at 5. BitTorrent is used for a wide range of valuable and legal uses, including transmitting large files and content in downloads, and streaming media or podcasts cheaply and efficiently.
65. Free Press Complaint, supra note 62, at 7. Lotus Notes is a suite of software that many businesses use to share email, calendars, and file sharing.
68. Id. at i.
69. Id. at 13.
70. See http://timwu.org/network_neutrality.html (last visited Mar. 21, 2008). Wu suggests that information networks are more valuable when they are less specialized. For example, an electric grid is neutral in that it does not care if you plug in a toaster, iron, or computer and therefore has survived and supported a great deal of innovation in the appliance market.
Internet to ensure the Internet's increasing success. For example, Eric Schmidt, co-CEO of Google, says the "Internet has operated according to this neutrality principle since its earliest days," and "it is this neutrality that has allowed many companies, including Google, to launch, grow, and innovate." He adds, "Just as telephone companies are not permitted to tell consumers who they can call or what they can say, broadband carriers should not be allowed to use their market power to control activity online."

Tim Wu makes the following argument analogizing the preference based on source on the Internet to a preference for certain cars on an interstate highway. If a highway announced "an exclusive deal with General Motors to provide a special rush hour lane for GM cars only," it seems wrong. One "might buy a Pontiac instead of a Toyota to get the rush-hour lane, not because the Pontiac is actually a good car." "As a result, the nature of competition among car-makers would change. Rather than try to make the best product, they would battle to make deals with highways."

Broadband policy should be about what is best for the people and gives them the opportunity to "speak, create, and engage" with one another online. Proponents argue these opportunities can only be maintained with a neutral Internet. When companies like Comcast slow down certain un-pirated content, including files containing text of the King James Bible and video that BitTorrent distributes on behalf of its clients Fox and Viacom, Internet users are prevented from speaking and engaging with one another.

72. Id.
73. Id.
75. Id.
76. Id.
77. Id.
E. Net Competition

Proponents of a contrasting principle known as net competition advocate a free market view of the Internet and promote competitive Internet choices for consumers.80 These proponents believe that legitimate management of the Internet is necessary and that net neutrality prevents this management. In addition, they say net neutrality is “about government permanently mandating one 30-year old network design over all other competing network designs.”81

One key proponent of the concept of net competition is the Hands Off the Internet coalition.82 Hands Off the Internet is a Washington D.C.-based coalition of Internet users, manufacturers, and network operators including AT&T, Qwest, 3M, the National Association of Manufacturers, Cinergy Communications, the American Conservative Union and other companies and organizations.83 In an FCC filing, the coalition argues against government regulation of a market it believes is “otherwise working to give consumers the choices, freedom, and prices . . . they desire.”84 The coalition adds that net neutrality will slow down broadband deployment and stop progress that makes Internet widespread and affordable.85

Another major tenet of the net competition argument is that interference is almost necessary.86 Since people use the Internet for vastly different things, including downloading videos and music, applications have diverse requirements for bandwidth, latency, and quality of service.87 Because the multiple tasks must be prioritized,
managing these scarce resources is not only not discrimination, it is essential to the everyday functioning of the Internet.88

Finally, proponents argue that current practices are consistent with the FCC's 2005 Internet Policy Statement. Since they believe there is no current or anticipated content discrimination or service degradation (and current harms are greatly exaggerated by those advocating net neutrality) new regulations are not justified, especially concerning the potential harmful economic consequences.89

While proponents of net competition have a valid argument that they may know best how to design, organize, and maintain their network services, they also have some degree of self interest and a clear bias in promoting activities that make them more money. Arguably, absent neutrality protections, rationing bandwidth will be the preferred option, which will ensure increased revenue for the service providers.90

V. Political Communication and the Internet

A. Protection of Political Expression

Though the Founding Fathers could not envision the Internet, they did promote the expression of ideas in an open public forum without government restrictions.91 This was especially true in the area of political expression.92 The First Amendment affords the broadest protection of political expression to assure unfettered interchange of ideas to bring about better political discourse,93 reflecting a commitment to the principle that "debate on public issues should be uninhibited, robust, and wide-open."94 Additionally, there is widespread agreement that a major purpose of the First Amendment is to protect the free discussion of candidates.95 In McIntyre v. Ohio

88. Id.; see also Karmack, supra note 86, discussing that we live in a world where video is becoming increasingly popular online and "video takes up a lot of space, a lot more than text, and the increased use of video means that the Internet is fast filling up. The result is that if we don't invest soon, we could be seeing, in the near future, the Internet equivalent of an early evening traffic jam on Interstate 93. It could take forever for your photos or video to download or for your e-mail to arrive."
89. Hands Off Comment, supra note 82, at 4.
91. Id.
Elections Commission, for example, the Court found that “discussion[s] of public issues and debate on the qualifications of the candidates are integral to the operation” of the U.S. government.96

Since Internet-based activities have strong potential to enable various modes of political communication among citizens through listservs, political blogs, or online media sites, it is vital to ensure uninhibited and wide-open discussion on the Internet.97

B. Political Communication and Expression on the Internet

According to a Pew Internet study, 71% of American adults use the Internet at least occasionally from any location.98 Broadband use is the highest among Americans age 18-49 (63%), those with annual household incomes over $75,000 (76%), and college graduates (70%).99 To these individuals, “the Internet provides the greatest and quickest dissemination of information ever imagined,”100 and is becoming an important part of everyday life for a majority of Americans.

Specifically, over the past decade, the Internet has become an increasingly important source of political communication and expression. This importance is illustrated by recent high participation in events such as the CNN/YouTube Presidential Debates101 and the popularity of viral videos such as “Giuliani Girl” and “I Got a Crush . . . on Obama,” the latter of which received over 100,000 views within the first five hours of its posting and sparked numerous copycats.102

99. Id. at 4.
100. Krasovec, supra note 13, at 125.
While the Internet’s important role in disseminating political communication reached new levels in this presidential primary, its role has been steadily growing. A study in July 2000 “estimated that about 30 million adult Americans spend 83.2 hours a year looking for political information on the Internet, [combining] for a total of . . . 250 million hours.”

In 2006, the number of Americans citing the Internet as the source of most of their political news and information doubled totaling nearly 60 million people. Additionally, 15% of all American adults say the Internet was the primary source for campaign news during the 2006 mid-term election. Though the greatest number of campaign Internet users cite traditional news organizations’ online services as their main sources of news and information (such as CNN or the New York Times), 53% of campaign Internet users went to web sources beyond those fed by traditional news media in the U.S. In total, 24% of users received political information from issue oriented websites and 20% received their information from blogs.

A recent survey conducted by the Pew Research Center illustrates the Internet’s even broader role in the 2008 campaign. Almost a quarter of Americans regularly learn something about the campaign from the Internet, almost double the percentage in 2004 (13%). While people who rely on the Internet for campaign news and information rely more frequently on large commercial websites like MSNBC (26%), CNN (23%), and Yahoo News (21%), other non-traditional outlets such as MySpace and YouTube were mentioned (each with 3% and 2% respectively).

Additionally people, particularly younger voters (voters under 30), go online to watch videos of campaign debates, speeches, and

103. See infra, Part V.B. for further discussion on the role of the Internet in the 2008 Presidential Primary.
106. Id.
107. Id.
108. Id.
110. Id. at 1.
111. Id. at 2.
commercials. Approximately 40% of younger voters watched at least one form of campaign video online, and 24% of Americans say they have seen something about the campaign in a video online.112

Importantly, while the Internet is an increasingly important source of political news, an increasing number of people are not only using the Internet for information, but are becoming “online political activists.”113 According to a report published in January 2007, 23% of campaign Internet users were political activists in 2006.114 Among these campaign Internet users: 8% posted their own political commentary to a newsgroup website or blog; 13% forwarded or posted someone else’s political commentary; 1% created political audio or video recordings; and 8% of them forwarded or posted someone else’s political audio or video.115 In total, as of 2006, 11% of Internet users and 7% of the entire U.S. population engaged in some form of online political activism.116

C. Net Neutrality and Political Expression on the Internet

As demonstrated above, the Internet plays an important role in the dissemination of political news and provides an open forum for political discourse between citizens.

Essentially, because the Internet allows more people to get involved in the political process, political scientists are saying that everyday citizens are taking on more important, and influential, roles in elections.117 Mark McKinnon, vice chairman of Public Strategies, president of Maverick Media, and an adviser to Senator John McCain’s presidential campaign, said “the ‘YouTube phenomenon,’ the idea that political advertisements posted on YouTube for free can have just as much more impact on an election than paid advertisements run on TV, has had a significant impact on this election cycle.”118

112. Id.
113. Rainie and Horrigan, supra note 105, at ii. Online political activists are people that take an active role, such as submitting videos, creating blogs, or posting on websites.
114. Id.
115. Id.
116. Id. Although numbers are not yet available for this primary election cycle, based on the increase in Internet use in other areas, it can be hypothesized that the number of online political activists increased as well.
118. Id.
Arguably, the Internet has managed to become such an effective and important tool in political discourse due to its neutral nature. Since according to the FCC's 2005 Internet Policy Statement, service providers are not permitted to limit access to the lawful Internet content of their choice, individuals who use the Internet to obtain political news should be able to continue to obtain information from the website of their choosing with no interference. This allows Internet users to experience a wide range of views.

However, attempts by service providers such as AT&T to charge some companies more for better “traffic” might inhibit Internet users' ability to do so. If the network service providers charge content providers for better treatment of traffic, larger companies can afford to purchase more of these “lanes,” making connections to their sites quicker, and slowing down access to websites run by smaller companies and individuals. It will not only be more expensive (if not unaffordable) for citizen journalists and bloggers to post articles on the Internet, but power will be put in the hands of a few corporate-owned media outlets. Because connecting to certain sources will be more difficult, Internet users are prevented from accessing the content of their choice without interference.

Additionally, since network service providers are not permitted to prevent users from running applications and using services of their choice, viewing and sharing large files, such as online videos, should be done with ease. This gives Internet users the opportunity to watch and exchange videos and promotes online political activism. An Internet policy that authorizes service providers to jam peer-to-peer traffic sites like BitTorrent will make it difficult to share large files and view videos from companies such as Viacom and Fox. The service provider can make certain applications so unreliable that users, frustrated by the delays and terminations, stop trying to use the specific applications and try others. Therefore, when slowing down certain content such as campaign speeches or viral videos like “I got a crush… on Obama,” network service providers will be

120. Svensson, supra note 59. It should be noted that At&T only agreed not to implement such plans in late 2006 for two and a half years. Therefore, by mid 2009, they are not obligated by contract to continue to refrain from this practice.
121. See, e.g., Savetheinternet.com, What is Net Neutrality (likening the Internet without neutrality to cable television—“network owners will decide which channels, content, and applications are available; consumers will have to choose from their menu.”)
122. See Free Press Complaint, supra note 62 at 21.
preventing users from running applications and using services of their choice.

VI. Conclusion

Contrary to the beliefs of proponents of net competition, there are threats to the Internet's openness, and as discussed above. These threats can affect, and limit, the political expression on the Internet, altering the current path of citizens taking a larger role in elections. As contended by Sir Tim Berners-Lee, creator of the World Wide Web, in an interview, "Democracy depends on freedom of speech. Freedom of connection, with any application, to any party, is the fundamental social basis of the Internet, and, now, the society based on it."  

The Internet Freedom Preservation Act of 2008, which builds upon the principles established by the FCC 2005 Internet Policy Statement (which network service providers are required to follow) and supports the concept furthered by Sir Berners-Lee, encourages an open and affordable Internet for all citizens. By mandating the freedom to use the Internet without unreasonable interference from, or discrimination by, network operators, and calling on the FCC to examine the legality of certain questionable practices, the proposed Act has the ability to ensure the continued growth of online political activism.

123. See supra Section IV(E) above, discussing the principle of Net Competition which argues the threats are overblown and exaggerated.


126. Id.