

NETWORK NEUTRALITY: PROTECTING THE FLOW OF INFORMATION CRITICAL TO DEMOCRACY AND COMMERCE



In 1971, the Federal Communications Commission (FCC) ruled that incumbent telephone providers must allow anyone, whether a residential subscriber or a commercial rival, to use the telephone network to provide information services without interference. For more than 30 years, the FCC's "network neutrality" rule set a basic framework that protected speech and innovation. Those that provided the wires over which information flowed could not interfere with that information flow. Wireline companies, such as cable and telephone incumbents, were free to offer competing services, but the FCC prevented them from leveraging their control over the physical network into a competitive advantage.

The FCC's "network neutrality" regulations created, in the words of the Supreme Court, a medium "as diverse as human thought," one where any individual could become a pamphleteer, a publisher, an independent radio or movie producer. *Reno v. ACLU*, 521 U.S. 844 (1997). Using the Internet, can enjoy the give and take of participating in political debate, rather than passively watching "talking heads" on television. They can easily research candidates and issues and explore dozens of diverse views and perspectives. And, perhaps most importantly, it enables millions of ordinary people to keep in touch with family and friends in real time.

This exciting world of unfettered communication arose *only* because the FCC imposed network neutrality on the network from the very beginning. As the U.S. District Court for the District of Columbia observed in 1985 when upholding the application of the FCC's network neutrality rules to the newly created "Baby Bells," any network operator that controls the wires over which the information flows has both the ability and the incentive to interfere with that content for its own benefit. Absent strict rules to protect First Amendment expression by subscribers and business rivals, the newly created Baby Bells would inevitably try to profit from degrading rival content and services while enhancing delivery of their own. *United States v. Western Electric Co., Inc.*, 673 F. Supp. 525 (D.D.C. 1987).

According to studies from the PEW Internet and American Life Project, Americans have embraced the opportunity to create their own content and seek alternative views. In one study, researchers found that Americans with Internet access routinely used the internet to seek out information on political candidates and issues, to research major life decisions, and avail themselves of educational opportunities. Jeffrey Boase, John Horrigan, Barry Wellman and Lee Rainie, "The Strength of Internet Ties," (2006). Nor do most users merely passively download information created by others. To the contrary, another recent PEW study of broadband users showed that the majority of broadband users post content to the Internet. John Horrigan, "Home Broadband Adoption," (2006). The phenomenal growth of "user generated content sites" like youtube.com, of "social networking sites" such as myspace.com, and political bloggers from across the political and social spectrum demonstrates more than an "untapped market" for commercial exploitation. Rather, these phenomena demonstrate the eagerness with which speakers everywhere have embraced a neutral, stable platform to communicate with one another.

The FCC's August, 2005 decision to deregulate the networks that carry the information, after more than thirty years of innovation and growth, threatens what has become an explosion of First Amendment expression. Average users and subscribers cannot expect to pay the cost for "premium tier" that commercial providers will willingly pay. As a result, users trying to use the Internet as they do now, to speak to one another, will experience frustrations and barriers while commercial products will flow quickly and easily. Without Network Neutrality, the Internet will change from a medium that levels barriers to speech to one that replicates television, radio, and cable. Those that can afford to pay premium prices will still speak to the world, but the vast majority of people and businesses will muddle along in the "slow lane."

If that happens, it will be our democracy that is poorer for it.