

FIRST AMENDMENT-NET NEUTRALITY ISSUES

Randolph J. May /Special to The National Law Journal

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There are many reasons why Congress should not adopt new laws mandating so-called net neutrality for broadband Internet service providers (ISPs). But an often overlooked and underappreciated one is that net-neutrality mandates likely would violate the First Amendment free speech rights of the ISPs, such as Verizon Communications Inc. or Comcast Corp., to which they would apply. This is a case where greater sensitivity paid to constitutional values will lead to sound policy.

While different net-neutrality proposals are pending in the House of Representatives and Senate, all have this in common: One way or another, they propose to restrict ISPs from taking any action to "block, impair or degrade" consumers from reaching any Web site or from "discriminating" against any unaffiliated entity's content. For example, one of the most fulsome expressions of restrictions, a bill drafted by senators Olympia Snowe, R-Maine, and Byron Dorgan, D-N.D., felicitously called the "Internet Freedom Preservation Act," states that ISPs shall not "block, interfere with, discriminate against, impair, or degrade the ability of any person to use a broadband service to access, use, send, post, receive, or offer any lawful content . . . made available over the Internet."

It is generally agreed that except for a few isolated and quickly remedied incidents, neither the cable operators nor the telephone companies providing broadband Internet services have blocked, impaired or otherwise restricted subscriber access to the content of unaffiliated entities. As a matter of policy, Congress should be very hesitant to pass a law in anticipation of conjectured harms that may never materialize. As the Internet continues to evolve, such a law almost certainly would turn out to be overly broad in application, restricting efficient business arrangements that otherwise would allow ISPs to make available services demanded by consumers at lower costs. Moreover, the vague terms of the mandates would be grist for the litigation mills for years to come.

ISPs have free speech rights

But put aside the policy arguments for now. Even if neutrality mandates made good sense, they should not be imposed if they impinge on constitutional rights. The First Amendment's language is plain: "Congress shall make no law . . . abridging the freedom of speech." ISPs like Comcast and Verizon possess free speech rights just like newspapers, magazines, movie and CD producers or the man preaching on a soapbox. They are all speakers for First Amendment purposes, regardless of the medium used. And under traditional First Amendment jurisprudence, it is just as much a free speech infringement to compel a speaker to convey messages that the speaker does not wish to convey as it is to prevent a speaker from conveying messages it wishes to convey. Thus, neutrality laws mandating, for example, that an ISP not block access to any lawful

Web site would mean that it could not choose to restrict access to material that in its view, say, is "indecent" or "homophobic." (I am not suggesting that an ISP should adopt practices restricting access to any content. The examples simply illustrate the free speech interests at stake.)

To be sure, freedom of speech under the First Amendment is not absolute. For example, in 1994 in *Turner Broadcasting System v. FCC*, the U.S. Supreme Court, in a 5-4 decision, rejected the argument that, at least on its face, a law requiring cable operators to carry the signals of local broadcast stations violated the cable operators' First Amendment rights. But the court relied very heavily on Congress' judgment that local stations providing free television deserved special protection. It also assumed that cable operators possessed a bottleneck that allowed them to play a "gatekeeper" role controlling programming that entered subscribers' homes. Net-neutrality mandates have nothing to do with the protection of local stations. Moreover, in today's competitive environment, it cannot be seriously contended that cable operators any longer have control of the video content that enters consumers' homes.

The proposed neutrality nondiscrimination mandates are eerily reminiscent of the Federal Communications Commission's fairness doctrine, which it jettisoned two decades ago in light of the new media proliferating even then. The fairness doctrine required that broadcasters present a balanced view of controversial issues. When the Supreme Court upheld the regulation against First Amendment challenge in 1964 in *Red Lion Broadcasting Co. v. FCC*, it did so on the basis that it considered broadcasters different from other speakers because they use the radio spectrum, which the court characterized as a scarce public resource. Apart from whether the court today would reach the same result regarding broadcasters' free speech rights, it has refused to extend such scarcity-based reasoning to other media. We certainly don't want to import fairness doctrine-type speech restrictions into the world of subscription-based broadband ISPs.

In effect, what the net-neutrality proposals really seek to do, without saying so directly, is to reverse the Supreme Court's 2005 decision in *National Cable & Telecommunications Assoc. v. Brand X Internet Services* by turning ISPs into common carriers required to carry all messages indifferently. In addition to the problematical First Amendment implications, to do so would implicate the Fifth Amendment takings clause, because it is questionable whether compelled access to the ISPs' private property would be found to be a public use.

Important constitutional interests are at stake in the raging net-neutrality debate. Greater appreciation for these constitutional values, especially freedom of speech, is likely to lead to sounder communications policy.

Randolph J. May, an NLJ columnist, is president of The Free State Foundation in Potomac, Md.

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