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Washington, D.C. 20554

***En Banc* Hearing on Broadband and the Digital Future**

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COMMENTS

OF

THE AMERICAN CIVIL LIBERTIES UNION ("ACLU"),

THE TECHNOLOGY AND LIBERY PROJECT OF THE ACLU,

AND

THE ACLU OF PENNSYLVANIA

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COMMENTS OF THE ACLU, TECHNOLOGY AND LIBERTY PROJECT OF THE ACLU, AND ACLU OF PENNSYLVANIA

The ACLU, Technology and Liberty Project of the ACLU, and the ACLU of Pennsylvania have been principal participants in many of the important Internet censorship and neutrality cases decided by the United States Supreme Court in the past two decades, including *Reno v. ACLU*,[1] *Ashcroft v. ACLU*,[2] *Ashcroft v. Free Speech Coalition*,[3] and the *Brand X* decision, in which the Court held that cable companies providing broadband Internet access were "information service providers" for purposes of regulation by the FCC under the Communications Act.[4] The ACLU of Pennsylvania was co-counsel in two of the leading Internet decisions, *Reno v. ACLU* and *Ashcroft v. ACLU*. Last year, the ACLU of Pennsylvania obtained relief in the *Ashcroft* litigation that permanently enjoined the Child Online Protection Act ("COPA").[5]

We applaud the Commission for holding today's hearing on broadband and the digital future. We also commend Chairman Martin for encouraging the Commission to take enforcement action against Comcast for violating open access rules by unlawfully blocking file-sharing services such as BitTorrent. We join the Chairman in urging the Commission to impose penalties on Comcast for censoring its own customers. The Commission's proposed action will ensure that the rule of law is followed in keeping the

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[1] 521 U.S. 844 (1997) (striking down the Communications Decency Act and holding that the government cannot engage in blanket censorship in cyberspace).

[2] 542 U.S. 656 (2004) (upholding a preliminary injunction of the Child Online Protection Act, which imposed unconstitutionally overbroad restrictions on adult access to protected speech).

[3] 535 U.S. 234 (2002) (striking down restrictions on so-called "virtual child pornography"). The ACLU's amicus brief is available at 2001 WL 740913 (June 28, 2001).

[4] *See National Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005). The ACLU's amicus brief is available at 2005 WL 470933 (Feb. 22, 2005).

[5] *See ACLU v. Gonzales*, 478 F. Supp.2d 775 (E.D. Pa. 2007).

exchange of lawful content and ideas free of censorship by corporate gatekeepers. In the process, it will reaffirm the Commission's "Four Freedoms" established in its 2005 policy statement, including user "access to the lawful Internet content of their choice" and running "applications and services of their choice."

Today, we are at a crossroads where the fate of broadband and the digital future hangs in the balance. The Internet has grown into one of the most important methods of communication in human history because of neutrality rules. Corporate gatekeepers, such as Comcast, threaten the existence of the Internet as a forum for speech, making it essential to restore neutrality to the Net immediately. At the same time, the Commission must avoid engaging in censorship itself, including the imposition of unconstitutional license conditions such as mandatory and automatic filtering. Likewise, the increasing use of intrusive deep packet inspections, which track and share private information about consumers without their knowledge or consent, chill speech and associational activities. Perhaps most importantly at a basic level, despite the Internet's explosive growth, millions of Americans have been left behind. The Commission must take steps to bridge the digital divide by encouraging applicants to provide low-cost or no-cost Internet services in exchange for licenses to use the dormant bandwidths of the wireless broadband spectrum. The Commission's actions going forward will play a significant role in what the future of broadband will hold.

1. The Importance of the Internet as a Marketplace of Ideas

The Internet binds its users together in a virtual world that transcends geography. An Internet user in the farthest reaches of the world is just a few keystrokes away from searching the greatest libraries for the wealth of human knowledge. A soldier in

Afghanistan can post a picture of herself online, letting her loved ones back home know that she is safe. Political activists previously confined to passing out a handful of leaflets in a local park can now communicate their messages to millions online. The Internet "enables people to communicate with one another with unprecedented speed and efficiency" in a way that "is rapidly revolutionizing how people share and receive information."[6] These qualities make the Internet a shining example of a modern day marketplace of ideas.[7]

The Internet's marketplace has thrived because of its decentralized, neutral, nondiscriminatory "pipe" that automatically carries data from origin to destination without interference. Neutrality promotes open discourse. Consumers decide what sites to access, among millions of choices, and "pull" information from sites rather than having information chosen by others "pushed" out to them, as with television and other media in which the content is chosen by the broadcaster. The Internet's structure facilitates free speech, innovation, and competition on a global scale. Accessibility to a mass audience at little or no cost makes the Internet a particularly unique forum for speech. "The Internet presents low entry barriers to anyone who wishes to provide or distribute information. Unlike television, cable, radio, newspapers, magazines, or books, the Internet provides an opportunity for those with access to it to communicate with a

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[6] *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 (D.D.C. 1998).

[7] *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting). The marketplace of ideas metaphor aptly applies to an Internet free of corporate or government censors of lawful content. *See generally Reno v. ACLU*, 521 U.S. at 885 (rejecting government censorship of content in "the new marketplace of ideas," the Internet).

worldwide audience at little cost."[8] "Any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[9]

The Internet differs from other forms of mass communication because it "is really more idea than entity. It is an agreement we have made to hook our computers together and communicate by way of binary impulses and digitized signals."[10] No one "owns" the Internet. Instead, the Internet belongs to everyone who uses it. The combination of these distinctive attributes allows the Internet to provide "a vast platform from which to address and hear from a worldwide audience of millions."[11]

> Never before has it been so easy to circulate speech among so many people. John Doe can now communicate with millions of people from the comfort, safety and privacy of his own home. His communication requires minimal investment and minimal time – once the word is written, it is disseminated to a mass audience literally with the touch of a button. Moreover, Internet speakers are not restricted by the ordinary trappings of polite conversation; they tend to speak more freely online.[12]

"It is 'no exaggeration to conclude that the content on the Internet is as diverse as human thought.'"[13] "Such broad access to the public carries with it the potential to influence thought and opinion on a grand scale."[14] The Internet truly has become one of the leading marketplaces of ideas because of neutrality rules that promote nondiscriminatory speech, association, and content.

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[8] *American Library Ass'n v. United States*, 201 F. Supp.2d 401, 416 (E.D. Pa. 2002), *rev'd on other grounds*, 539 U.S. 194 (2003).

[9] *Reno v. ACLU*, 521 U.S. at 870.

[10] *Blumenthal*, 992 F. Supp. at 48 n.7 (quoting Bruce W. Sanford & Michael J. Lorenger, *Teaching An Old Dog New Tricks; The First Amendment In An Online World*, 28 CONN. L. REV. 1137, 1139-43 (1996)).

[11] *Reno v. ACLU*, 521 U.S. at 853.

[12] *Blumenthal*, 992 F. Supp. at 48 n.7 (quoting Sanford & Lorenger, *supra* note 9).

[13] *Reno v. ACLU*, 521 U.S. at 852 (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

[14] *Oja v. United States Army Corps of Eng'rs*, 440 F.3d 1122, 1129 (9th Cir. 2006).

2. Corporate Gatekeepers Threaten the Future of the Internet's Marketplace

Chairman Martin's recommendation that Comcast be sanctioned for its censorship recognizes the growing threat corporate gatekeepers pose to the Internet. Content discrimination is real and it is happening every day. Comcast applied hacking technology to block its own customers from using popular peer-to-peer networks such as BitTorrent, eDonkey, and Gnutella,[15] violating its policy of respecting customer privacy.[16] Similarly, Verizon Wireless suspended NARAL Pro-Choice America's access to a text-messaging program for grassroots lobbying by citing a company policy of terminating service to any group "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."[17] In both cases, the service providers later reversed course after being ravaged by widespread negative publicity and in the face of possible FCC sanctions. The reversal of these intentionally discriminatory policies and the Commission's proposed Comcast ruling are positive developments and bolster the need to restore enforceable neutrality principles immediately.

That conclusion is inescapable in light of the growing list of other examples of corporate censorship in the aftermath of *Brand X*. In 2006, Time Warner/AOL blocked a grassroots e-mail campaign by the DearAOL.com Coalition to inform and mobilize customers against AOL's pay-to-send e-mail tax scheme.[18] In 2007, AT&T censored a

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[15] Peer-to-peer technology allows customers to share files on their personal computers with other Internet users.

[16] Comcast, http://www.comcast.com/customers/faq/FaqDetails.ashx?ID=4391.

[17] Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, http://www.nytimes.com/2007/09/27/us/27verizon.html?_r=1&oref=login.

[18] Rob Malda, *Pay-per-e-mail and the "Market Myth,"* Slashdot, March 29, 2006, *available at* http://it.slashdot.org/article.pl?sid=06/03/29/1411221.

portion of Eddie Vedder's musical critique of President Bush[19] and threatened to use its terms of service contract to terminate a customer's DSL service for any activity that it considered "damaging" to its reputation.[20] In 2006, BellSouth blocked its customers in Florida and Tennessee from using MySpace and YouTube.[21] Cingular Wireless has blocked the ability of its customers to use PayPal, a popular billing service used to pay for many online purchases, such as those from eBay.[22] Every major service provider has engaged in censorship since 2005. The list of examples of corporate censorship doubtless would be much longer if the Commission had not required many service providers to temporarily comply with neutrality rules in the recent wave of mergers.

Comcast's censorship of BitTorrent is just the tip of the iceberg. The recent agreement between Comcast and BitTorrent that ended Comcast's content-based restrictions on BitTorrent's peer-to-peer file sharing provides no guarantee that other application developers, innovators, and speakers will be able to reach an accommodation with their providers. It certainly does not ensure that innovators will be able to communicate with Internet users on a fair and equal basis with other, potentially more powerful, competitors. If and when some innovators create an improved alternative to BitTorrent – in a garage, perhaps – will they be able to compete with BitTorrent based on

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[19] Reuters, *AT&T Calls Censorship of Pearl Jam Lyrics an Error*, Aug. 9, 2007, http://www.reuters.com/article/technologyNews/idUSN0918213200708O9?feedType=RSS&rpc=22&sp=true

[20] Ken Fisher, *AT&T Relents on Controversial Terms of Service, Announces Changes,* ArsTechnica, Oct. 10, 2007, http://arstechnica.com/news.ars/post/20071010-att-relents-on-controversial-terms-of-service-announces-changes.html?rel

[21] Steve Rosenbush, *The MySpace Ecosystem,* BUSINESS WEEK, July 25, 2006, http://www.businessweek.com/technology/content/jul2006/tc20060721_833338.htm.

[22] Scott Smith, *Cingular Playing Tough on Content Payments*, The Mobile Weblog, July 7, 2006, http://www.mobile-weblog.com/50226711/cingular_playing_tough_on_content_payment.php.

the value of their product alone, or will they be hamstrung unless and until they can swing their own deal with Comcast? In such negotiations, what leverage would they possess to overcome what might be a tight corporate relationship between their ISP and a powerful incumbent whom they are trying to challenge? What if their main product is speech, advancing a point of view that the provider or a key corporate or political ally despises? Might the next Comcast-BitTorrent deal require Comcast to keep such innovators offline?

A situation in which content and applications developers – speakers making use of their First Amendment rights – are forced to negotiate with and strike deals with network operators is precisely the situation that the FCC should seek to avoid, and that a genuine network neutrality policy would avert. In addition, providers have strong business incentives to interfere with content and the technical ability to do so. Internet access is not just any business; it involves the sacred role of providing a First Amendment forum for speech and self-expression and access to the speech and self-expression of others. It is a forum that is perhaps the most valuable new civic institution to appear in the United States in the past century. There is a vital public interest in assuring that Internet access remains free and unencumbered by the censorship of corporate gatekeepers.

Restoration of meaningful rules protecting Internet users from corporate censorship is essential to the future of free speech on the Internet. Neutrality rules would simply restore the status quo in effect before the *Brand X* decision in 2005, when ISPs were prohibited from picking and choosing which users could access what lawful content through the gateways they provided to their paying customers. With a single order, the

Commission could restore net neutrality to all Americans who use broadband services, as the Supreme Court made clear in *Brand X*. Such an action would merely be a formal codification of the "Four Freedoms" established by the FCC in its 2005 policy statement, which assured users "access to the lawful Internet content of their choice" and running "applications and services of their choice."[23] In the process, FCC's action would afford consumers the peace of mind to know that they, not corporate gatekeepers, hold the power to decide the lawful content that they could access and exchange. It would provide greater certainty by applying a uniform set of rules to all providers, under the Commission's oversight. And equally important, it would do so while still allowing service providers to engage in reasonable network management, as long as they did not cross the line into unlawful censorship of online activities and speech.

The future of the Internet as we know it is at stake. Now is the time for the Commission to act by restoring net neutrality rules to all providers.

3. Mandatory Online Filters are Unconstitutional and Censor Lawful Speech

Recently, the Commission proposed rules that for the first time would impose a requirement that licensees use mandatory filters to block certain websites and content. Under the proposed rules for broadband wireless licenses in certain bandwidths,[24] any content deemed to be pornographic or harmful to adolescents or minors would have to be automatically blocked by the licensee. Adult users could unblock the filter, but only after affirmatively opting-out by identifying themselves and providing corroborating personal

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[23] *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf.

[24] The broadband wireless bandwidths affected by the proposed rules are in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz, 2155-2175 MHz, and 2175 MHz-2180 MHz bands.

information demonstrating they are eighteen years or older.[25] The Commission's proposed rules are ill-conceived efforts to impose unconstitutional conditions on licensees. The rules would censor the exchange of lawful content and violate the privacy rights of users seeking to disable the filter to access that content.

The Supreme Court struck down similar content-based restrictions in COPA[26] and the Communications Decency Act of 1996 ("CDA").[27] In *ACLU v. Reno*, the Court made it clear that the Internet is subject to the same constitutional standards that apply to content-based restrictions through other modes of communications.[28] "Sexual expression which is indecent but not obscene is protected by the First Amendment." [29] Therefore, strict scrutiny applies to the proposed content-based regulation of speech, requiring the Commission to establish that it is the least restrictive means of furthering a compelling governmental interest.[30] We can assume, without further comment, that the government has a compelling interest in protecting minors. But "even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."[31] And even if the speech is merely burdened, the restrictions nevertheless are subject to strict scrutiny

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25 *See* Notices of Proposed Rulemaking in WT Dkt. Nos. 04-356 & 07-195.

26 Pub. L. No. 105-277, 112 Stat. 2681.

27 Pub. L. No. 104-104, 110 Stat. 103

28 *See* 521 U.S. at 870 ("our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet).

29 *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

30 *Id.*

31 *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 814 (2000).

review.[32] The proposed mandatory filters fail strict scrutiny because they are not the least restrictive means and are unconstitutionally overbroad and vague.[33]

The proposed rules offer no guidance regarding the content being censored, as required by *Miller v. California*.[34] They likewise do not identify who will make the determination of what must be censored, or how that will be accomplished consistent with the neutrality principles the Commission embraced in 2005.[35] Contrary to *Miller*'s mandate, the Commission has not identified the contemporary community standards that are to be applied. The Supreme Court found that a similarly overbroad restriction in the CDA made it impossible to apply *Miller* in any meaningful way.[36] Even if it were possible to resolve the problems with the proposed rules under *Miller*, the Commission has failed to explain how users could continue to access all material protected by the First Amendment. Of course, no explanation exists – it is impossible to craft a mandatory filter that would not block some constitutionally protected material and speech. In the process, the automatic mandatory filter would chill protected speech in violation of the First Amendment. The application of the proposed rules is unworkable and as such, is facially unconstitutional.[37]

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[32] *See id.* at 812 ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

[33] *See id.* at 818 ("When First Amendment compliance is the point to be proved, the risk of non-persuasion – operative in all trials – must rest with the Government, not with the citizen.").

[34] 413 U.S. 15, 24 (1973).

[35] The Commission established "Four Freedoms" in its 2005 policy statement, including user "access to the lawful Internet content of their choice" and running "applications and services of their choice." *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf.

[36] *Reno v. ACLU*, 521 U.S. at 877-78.

[37] *See id.* at 874; *see also Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967-68 (1984) ("Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and

Furthermore, requiring users to prove "that they are of the age of the majority" does not cure unconstitutional restrictions imposed on adults. In *Reno*, the Court rejected a similar requirement in the CDA, which provided for age verification by requiring a user to provide a credit card number, and found that '[t]hese limitations must inevitably curtail a significant amount of adult communication on the Internet."[38] *Reno* concluded that "there is no effective way to determine the identity or the age of a user who is accessing material" online.[39] In *Ashcroft*, the Court upheld a preliminary injunction prohibiting enforcement of COPA,[40] in part because the adult identification requirements it included – like those in the CDA – did not "constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision."[41] Moreover, requiring credit card or age-verification screening for access to the filter to disable it severely burdens the expression of users and content providers who wish to maintain their privacy.[42] It also would violate the rights of those users to engage in constitutionally protected anonymous

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where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates and unnecessary risk of chilling free speech, the statute is properly subject to a facial attack.").

38 *Reno v. ACLU*, 521 U.S. at 877.

39 *Id.* at 855.

40 *See* 542 U.S. at 656.

41 *Reno v. ACLU*, 521 U.S. at 882.

42 *See ACLU v. Reno*, 31 F. Supp.2d 473, 487, 491 (E.D. Pa. 1999); *see also id.* at 487 ("in general, users of the Web are reluctant to provide personal information to Web sites unless the are at the end of an online shopping experience and prepared to make a purchase.").

speech.[43] Federal courts have struck down similarly flawed identity requirements for other communications media regulated by the Commission.[44]

Finally, the proposed mandatory filters are unconstitutional because there are less restrictive means available for parents to block their children's access to protected Internet content. Specifically, *voluntary* "[b]locking and filtering software is an alternative that is less restrictive… and in addition, likely more effective as a means of restricting children's access to materials harmful to them."[45] The Court recognized that the government may encourage voluntary filtering by "enacting programs to promote the use of filtering software… [that] could give *parents* that ability without subjecting protected speech to severe penalties," but the government may not make a filter mandatory.[46] That is where the power to impose a filter on the content that children view rightfully belongs: with the parents, not the Commission, a licensee, or service provider.

We strongly urge the Commission to abandon its proposed rules to censor lawful content and activity on the Internet. We respectfully submit that the Commission should focus on enforcing neutrality rules to stop censorship by service providers, instead of pursuing its own unconstitutional course of policing morality on the Internet.

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[43] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (recognizing that anonymous political speech is protected under the First Amendment and striking down a requirement that the speaker identify themselves).

[44] *Denver Area Educ.Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996); *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 785-86 (3d Cir. 1990); *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).

[45] *Ashcroft v. ACLU*, 542 U.S. at 666-67.

[46] *Id.* at 670 (emphasis added).

4. Deep Packet Inspections (DPI) Violate Privacy and Chill Speech

We also urge the Commission to scrutinize the growing practice of intrusive Deep Packet Inspections (DPI), which service providers use to scrutinize data packets as they traverse the Internet. Under the agreements and standards that established the Internet and by which it continues to operate and thrive, network participants forward data according to the "envelope" of each packet. Each envelope contains a destination and return address and a few other basic pieces of information, which are separate from the actual content of the packet. DPI involves scrutinizing the content itself. DPI is intrinsically a highly suspect activity, because it threatens privacy and threatens the neutrality of the Internet as a forum for speech. It has already been implicated in numerous abusive online practices.

As a mechanism for examining the content of Internet traffic, DPI opens up a vast realm of potential for privacy invasion. Americans expect that when they use an ISP or broadband provider, their communications will be processed neutrally and privately just as when they use a telephone or mail or package delivery service. They do not expect their service provider to scrutinize the contents of their transmission, whether to collect information about them, improve marketing efficiency, serve ads, or make technical decisions over how the communication is delivered. Indeed, that is precisely why so many Internet users install spyware applications on their computers. Unfortunately, those applications do nothing to stop DPI, giving many Internet users a false sense of security and privacy that no longer exists.

Services such as NebuAd and Phorm that scrutinize or alter the Internet traffic of ISP customers represent merely the extreme of predictable attempts to exploit this

technology. Ultimately, this kind of behavior threatens to leave Americans' online lives, including their Web surfing, online reading, blog posting, Web searches, e-mails, and all other activities vulnerable to snooping and manipulation. There is no end to the "innovation" that could follow in using and abusing personal information. It could lead to embarrassment and annoyance through "targeted marketing," to adverse decisions from insurance companies and financial institutions – and to a general chilling of the Internet's potential as a communications medium and forum for free speech.

Moreover, DPI undermines the neutrality principles in the Commission's "Four Freedoms" statement. Under the guise of applying differential pricing based on the speed, volume, application preferences, or even the substance of content, service providers would snoop on every facet of user activity. Such flagrant flouting of open Internet rules on the pretext of monitoring the level of user activity is precisely what led to Comcast's unlawful actions against BitTorrent. DPI is incompatible with user freedom and choice that are the foundation of the Internet as we know it.

DPI also threatens to blur the boundary between the forum in which speech and communication takes place, and the content of that speech and communication. Some examples illustrate this point. We do not allow the postal service to route mail according to the content of letters. We do not allow the telephone companies to provide better connections to those whose conversations the companies deem to be more important. We do not allow governments to grant parade permits only to those protesters it thinks are reasonable. We do not allow the chair of a hearing to alter Robert's Rules of Order according to the sagacity and eloquence of the speaker. Once the operator of a forum begins to scrutinize the content of the communications that take place within it, it opens

up the potential for abuse, especially where there is money to be made. The Commission must ask some very sharp questions about the reasons for that scrutiny, or, better yet, put an end to it.

DPI has already been associated with a great deal of abuse. The presence of DPI equipment (a Narus STA 6400) is part of what alerted whistleblower Mark Klein to the existence of an apparent NSA warrantless wiretapping facility in a San Francisco AT&T facility.[47] DPI is what broadband provider Comcast used in its program of interfering with peer-to-peer application traffic. DPI is what NebuAd and Phorm are using to eavesdrop upon Internet users' Web surfing for the purpose of serving ads. Additional government surveillance will certainly follow the adoption of widespread DPI usage.

Defenders of DPI argue that restricting its use will curb innovation, but much of the "innovation" that is taking place appears to be intrusive and dangerous to the health of the Internet as a free and neutral forum for the exchange of information, speech and expression. We do not allow the telephone company to "innovate" in how it can make use of transcripts of our telephone calls – something that is now completely feasible – because the benefits of such innovation would be far outweighed by its disadvantages. In addition, credible network experts have argued that continuing growth in bandwidth is a far better solution to any network congestion than interfering with the foundational agreements that have brought the Internet to where it is today. We urge the Commission to examine the increasing danger DPI poses, and to take appropriate action to ensure that consumers are informed of the practice and their privacy is protected.

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[47] Wired, "Whistle-Blower's Evidence, Uncut, May 22, 2006, *available at* http://www.wired.com/science/discoveries/news/2006/05/70944.

5. Unused Portions of the Broadband Spectrum must be developed to make the Internet More Accessible

The Commission is charged to "make available, so far as possible, to all the people of the United States" a communications system "with adequate facilities at reasonable charges."[48] Changes in communications technology now provide the Commission with an excellent opportunity to expand the availability of broadband access to the American public, and promote the maximum possible range of content available to the public.

Only a relatively small portion of the vast radio spectrum has been opened up for unlicensed public use. On these tiny slices there has been an explosion of innovation, from WiFi to cordless telephones to baby monitors to many other wireless devices, which all share those small swaths of spectrum. As vacant frequencies become available due to the evolution of technology, including the so-called white space between television channels, the Commission should take advantage of the opportunities that technology offers. The use of this public spectrum has tremendous implications for freedom of speech because it makes the Internet more accessible and affordable for everyone. As greater equality of access to the Internet is provided, our nation will benefit from the vibrant marketplace of ideas that the online world has become. We urge the Commission to facilitate the development of the untapped portions of the radio spectrum to the maximum extent possible.

There are many options to expand spectrum use. New technologies such as "spectrum sensing" as well as alternatives proposed by Google, Motorola and other

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[48] 47 U.S.C. 151 § 1.

companies maximize spectrum use, without the risk of interference to existing television channels. In any case, the Internet has been an astonishing engine for economic, technological, political, and cultural innovation in recent years; the dramatic expansion of affordable Internet access (as well as the potential explosion of innovation in devices) that proper use of this unlicensed spectrum could generate far dwarfs the risk to the public of interference on one or two television channels. In evaluating the technological possibilities of such proposals, we ask the Commission to keep in perspective its larger mission. The small risks of occasional interference and the pecuniary interests of incumbent occupants of portions of the public airwaves must not be permitted to stand in the way of this dramatic advance in the public interest. More broadly, we urge the Commission, within the limits of its discretion provided by Congress, to take a greater leadership role by embracing technologies that promise to eliminate or reduce the technological scarcity of the airwaves.

We also urge the Commission to take greater steps to help bridge the digital divide that leaves millions of socio-economically disadvantaged and geographically isolated Americans without access to the Internet. Increasing use of new technologies to expand the use of the broadband wireless spectrum will help narrow that divide. Other proposals that would expand opportunities for service providers offering low cost or no-cost Internet access also are encouraging. But as the M2Z proposal illustrates, the Commission must actively avoid unconstitutional conditions such as mandatory and automatic filtering that would deny lawful content to economically disadvantaged users. Online free speech must not be available only to those who can pay a fee.

CONCLUSION

The ACLU, Technology and Liberty Project of the ACLU, and ACLU of Pennsylvania applaud the FCC's public hearings on the Internet. But the Commission must do more. Today, the status of broadband and the digital future and the role of the online marketplace of ideas are uncertain. The Commission can eliminate much of that uncertainty immediately by reinstating neutrality principles, supported by the Commission's existing "Four Freedoms" policy. The future of the Internet must remain robust, open, and free of censorship by both corporate gatekeepers and the Commission itself. The regulatory framework should establish an accessible, non-discriminatory, and content-neutral regimen, provide for meaningful enforcement available to all users of text messaging, short code, and broadband services, and uphold the concepts of neutrality, non-discrimination, equality of access, and non-exclusivity in the provision of those services. We urge the Commission to act consistently with these principles to ensure that speech and association on the Internet has a future.