Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
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Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

COMMENTS
OF
THE AMERICAN CIVIL LIBERTIES UNION ("ACLU") AND THE TECHNOLOGY AND LIBERY PROJECT OF THE ACLU

Michael Macleod-Ball
Christopher Calabrese
Jay Stanley
American Civil Liberties Union
915 15th Street, NW
Washington, DC 20005

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COMMENTS OF THE ACLU

The ACLU's views are well represented in the comments submitted by the Open Internet Coalition (OIC), of which we are a member. However, in these separate comments we would like to additionally emphasize several issues that are of particular interest and concern to our organization and its over 500,000 members.

A central mission of the ACLU since its founding in 1920 has been the protection of free speech. From its origins amid the repression of the First World War, when an American could receive a 10-year prison sentence for writing a letter to the editor,[1] the ACLU has been instrumental in defending and expanding the protections of the First Amendment, and has survived to witness the creation of a veritable Golden Age of self-expression, democratized publishing and broadcast, and interactive public debate – all made possible, of course, by the Internet. In fact, the Internet has arguably become central to citizens' opportunities for a meaningful and fulfilled life, including participation in self-government and civic affairs.

We continue to serve as zealous guardians of the Internet and take a keen interest in anything that might threaten its freedom and vitality. The ACLU has been a principal participant in nearly all of the Internet censorship and neutrality cases that have been decided by the United States Supreme Court in the past two decades, including *Reno v.*

[1] H.C. Petersen and Gilbert C. fite, *Opponents of War, 1917-1918* (Madison: University of Wisconsin Press, 1957), 185-186; cited in Paul Starr, *The Creation of the Media: Political Origins of Modern Communications* (New York: Basic Books, 2004), 277.

ACLU,[2] *Ashcroft v. ACLU*,[3] *Ashcroft v. Free Speech Coalition*,[4] 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.[5]

The First Amendment, of course, protects speech only from the government, and much of the ACLU's work on free speech has been directed against the government. But access to the Internet is provided by private corporations enabled by government, and protecting the same interests and values that lead us to so fiercely defend the First Amendment requires in this case that the government create good policy that will protect those same interests against incursion by companies that are profit-seeking rather than civic-minded.

The fact is, free speech is not an economic value. That is not to say it is not economically valuable – the openness of American society in general, and free speech in particular, have played a crucial role in supporting the artistic, intellectual, and social vitality of our nation, and therefore its economic vitality as well. But free speech is not a necessary or natural result of competitive markets or other economic activity. The requirements of free speech and the requirements of profit-oriented corporations are too different. Free

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[2] 521 U.S. 844 (1997) (striking down the Communications Decency Act and holding that the government cannot engage in blanket censorship in cyberspace).

[3] 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).

[4] 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).

[5] *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).

speech requires the protection of minority and unpopular – sometimes radically unpopular – viewpoints and expressions. Competitive businesses have little incentive to protect such voices – and indeed tend to cater to what is popular, and shun what is hated or disliked, amplifying rather than challenging popular tastes and understandings. Free speech requires that no voices be permitted to dominate to the exclusion of others. Businesses tend to rush toward proven successes, often shunning smaller, less established voices, not only preventing them from a shot at success, but also reducing the diversity of voices overall (a tendency that has long been observed, for example, in Hollywood and the music industry).

Broadband Internet providers have both the technical means and the financial incentive to interfere with the neutral operation of the Internet as public forum and communications medium. As a result, it is vital that the government protect that neutrality through regulatory policies that are sufficiently robust to withstand the immense pressures involved when large profit-driven companies control our Internet infrastructure. Internet access is not just any business; it involves the sacred role of making available to citizens an arena for speech, self-expression, and association.

The Commission seeks comment on whether the proposed rule will "promote free speech, civic participation, and democratic engagement." Those activities are already taking place to a ferocious degree online. The proposed rule, however, is certainly vital in *protecting* free speech, civic participation, and democratic engagement and allowing it to continue to burgeon online. When communications media are not regarded as reliable,

trustworthy, and private, people seek out other means of communicating. If some users of the Internet are pushed into using other, less efficient means of communicating, the nation loses out.

I. REASONABLE NETWORK MANAGEMENT

We oppose the Commission's inclusion in the definition of "reasonable network management" practices to "prevent the transfer of unlawful content," and to "prevent the unlawful transfer of content." The "filtering" of content by Internet access providers is one of the greatest threats to free speech today. In many countries around the world, governments are seeking to impose their control upon speech by engaging in such filtering, and it is something that the United States must not permit. The FCC should not carve out an exception to its neutrality principles for the purpose of allowing carriers to engage in this practice.

When Congress has constitutionally made some content or some transfers of content illegal, such laws would not be affected by the Commission's rulemaking. And when illegal content somehow legitimately comes to the attention of a carrier, it is of course not compelled to transfer that content, let alone to do so within the strictures of FCC rules. However, a hunt for needles of illegal data transfers within the haystack of Internet traffic must not be used by carriers as a reason to scan and filter all of the communications that pass over their wires, any more than the occasional use of the telephone in the commission of a wide range of crimes (from contract murders to anti-trust violations) has ever been used as a rationale for the telephone company to listen in to all telephone calls.

Such filtering would constitute an enormous invasion of privacy that would chill expressive activities and diminish the usefulness of the Internet and the efficiencies it provides in American life and commerce. When law enforcement has particularized suspicion of wrongdoing, including commercial content piracy or trafficking in child pornography, it has plentiful powers to secure the cooperation of carriers in investigating such wrongdoing. But our society has never permitted sweeping invasions of privacy in attempts to discover wrongdoing hidden within legitimate activities, and should not do so now.

Such filtering would inevitably sweep up a large volume of legitimate material, and be ineffective at stopping more than a tiny fraction of illegitimate material. Copyright laws are consistent with the First Amendment only because "Fair Use" exceptions to copyright permit the reproduction of copyrighted material for such purposes as parody, criticism, commentary, news reporting, research, scholarship and teaching. Fair use is not some narrow exception or technicality in intellectual property law, but a vital limit on copyright that permits it to coexist with the First Amendment. Fair use cannot be severed from our copyright regime – yet that is exactly the effect that allowing computerized filtering of Internet traffic would have, since computers are in no position to make judgments as to which uses of copyrighted material count as fair use (under the law such judgments are based on factors that include but are not limited to the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion copied, and the effect upon the market value of the work).

Such filtering would also fail to identify most transfers of copyrighted material that are transmitted over the Internet. Under the law, all material is presumptively copyrighted upon its creation. At best, such filtering would likely identify only works copyrighted by a limited number of major corporations, failing to protect the far larger number of independent content creators who are deserving of equal degrees of copyright protection.

Finally, such filtering would also violate the federal Wiretap Act as amended by the Electronic Communications Privacy Act.[6]

The FCC must not encourage or put its imprimatur upon such filtering practices by Internet providers by granting a sweeping and unnecessary exception to network neutrality principles for those practices.

The Commission also proposes defining "reasonable network management" as practices to "address traffic that is unwanted by users or harmful." We understand that the Commission intends to allow providers to filter spam and malware and act against denial of service attacks, and allow carriers to provide services requested by particular individual customers such as attempting to block pornographic material. Such goals are reasonable. However, we are concerned that the term "harmful" is overbroad. Anyone who disagrees strongly with a particular point of view, or believes that it is false, almost by definition believes that such material is "harmful." In past decades, most Americans

[6] 18 U.S.C. §§ 2510-2522.

would have agreed that any information at all about homosexuality was harmful. In the early decades of the 20th century, "immoral" material (including, for example, any information whatsoever about birth control) as well as speech deemed as obstructing military recruitment (which was used to punish a broad spectrum of anti-war speech during the First World War) were widely viewed as "harmful" and were banned. However, all such speech is protected by the First Amendment. Companies should not be given discretion to interfere with any traffic on such a broad basis; only traffic that is *technologically harmful to the operation of the network* should fall under the definition of "reasonable network management."

II. FIRST AMENDMENT RIGHTS OF CARRIERS

The Commission seeks comment on whether the proposed rule will "impose any burdens on access providers' speech that would be cognizable for purposes of the First Amendment."

Arguments by Internet providers that the First Amendment would protect their right to violate network neutrality principles is a gross distortion of free speech principles. The First Amendment is good because it guarantees that everyone, including the powerless and those with deeply unpopular views, can speak up. It guarantees that a diversity of voices will be heard, which helps society. It provides certainty to speakers, denies to the government the role of deciding what speech is acceptable and what is not, and permits citizens to speak truth to power.

Allowing carriers the freedom to interfere with transmissions over the Internet wires they control would accomplish none of these goals, but merely allow one already powerful speaker within the marketplace of ideas to interfere with others.

That does not mean that carriers receive no protection from the First Amendment. Internet providers actually play two different roles: as speakers, and access providers.

As speakers, carriers often provide information and services. They deliver video feeds and web pages and other content of their own, which constitutes online speech entitled to at least some protection under the First Amendment. The level of protection that speech receives depends upon whether it is noncommercial or commercial in nature.[7] The best example is the content of a network provider's home pages.

The proposed rule would have no impact on an ISP's right to post whatever lawful content it wants on its own pages. Indeed, by their very nature, neutrality rules say exactly the opposite: like any online user, ISPs would be protected to say whatever they want on their pages free from censorship or interference by, for example, other carriers in the "network of networks" that comprises the Internet.

But ISPs also play another role: they perform the public function of controlling the wires across which everyone's speech flows. They are merely providing the conduit through

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[7] *See generally* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (defining commercial speech, which is less protected than non-commercial speech, as speech that merely proposes "a commercial transaction").

which each of its paying customers accesses the Internet, in much the same manner as telephone companies do for our phone lines. That is why the FCC was allowed to regulate ISPs as common carriers until 2005, when the Supreme Court ruled in *Brand X* that they instead may be regulated as "information services."[8] Just as telephone companies (which also have First Amendment rights) are not allowed to choose who can use their phone services, censor their phone calls, and disconnect calls when something is said that they dislike, so too can Internet providers be prohibited from doing those same things on the Internet.

Companies can deploy their web site and other tools to participate in the marketplace of ideas and advance their own particular viewpoints and interests. What they cannot be permitted to do – though their desire will be strong – is advance those viewpoints and interests by using their sensitive, socially critical role of delivering speech and information over the Internet to suppress speech they do not like or promote speech that they favor. It is vital that they be barred from doing so.

III. MINORITY AND ECONOMICALLY DISADVANTAGED USERS

The Internet has in some respects become a tremendous democratizing force. It used to be said, in the words of A.J. Liebling, that "freedom of the press belongs to those who own one." Today, anyone can easily and inexpensively publish content online that has the potential, based on its own merits, to reach an audience of millions.

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[8] *See* 545 U.S. at 995-1001.

For residents of minority communities, the Internet holds great promise as an equalizer. Currently, minorities and low-income individuals are among the least-connected segments of the U.S. population. In 2009, 63% of adult Americans had broadband at home, but only 46% of African Americans and only 35% of households with incomes under $20,000.[9] That means that minorities and low-income individuals are disproportionately losing out on the benefits of connectivity, including participating in civil life, accessing information that can help them as consumers, patients, and citizens, honing online skills, obtaining jobs, organizing, and representing themselves and their stories and their communities within the national and global online conversation.

However, the Internet offers the potential for leveling the playing field for minorities and the economically disadvantaged – now and in the future as access levels increase. If providers are permitted to discriminate against some content or speakers or applications, then many in the minority community suspect they know who will be most affected by such actions. It is the nature of profit-oriented businesses to respond most strongly to the tastes, interests and concerns of the largest groups, and sometimes to deprioritize (or outright shun) the concerns and interests of smaller groups. If that is allowed to occur, the effect could be to amplify existing disparities rather than level them as the Internet promises to do. Allowing ISPs to discriminate against users as they see fit will pose yet another barrier to success for individuals and communities that can least afford it.

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[9] *Home Broadband Adoption 2009*, Pew Internet & American Life Project, June 17 2009.

In addition, African Americans and Latinos access the Internet over mobile devices more than other segments of the population.[10] For the same reasons that network neutrality is especially needed by those communities in the wireline context, it is even more needed in the wireless context. This is another reason why the FCC should extend net neutrality rules to wireless.

CONCLUSION

The American Civil Liberties Union supports the proposed rule and hopes that the Commission will adopt it with the modifications suggested by the ACLU and the Open Internet Coalition. The Internet has become not only a crucial engine of economic innovation and activity in the United States, but our primary forum for speech, self-expression, and civic participation – activities that are central to having a chance at living a fulfilled life in a democratic republic. The commission should not be waylaid by false concerns over the First Amendment rights of broadband Internet providers *qua* providers, and should be cognizant of the special impact that Internet policy will have on minorities and the economically disadvantaged. We also recommend that the Commission narrow the definition of "reasonable network management."

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[10] *Mobile Access to Data and Information,* Pew Internet and American Life Project study, March 5 2008; http://www.pewinternet.org/Reports/2008/Mobile-Access-to-Data-and-Information.aspx