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Net Neutrality, Freedom, and First Principles

by

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The prospect of even more regulation of Internet access providers under the rubric of net neutrality regulation is back in the news again. For example, Senators Olympia Snowe and Byron Dorgan are renewing their call for passage of net neutrality mandates, which, in effect, impose common carrier regulation on all broadband Internet service providers.

There are other legislative and administrative net neutrality proposals as well. The [complaint](#) filed at the Federal Communications Commission by Free Press, Moveon.org, Consumer Federation of America, Media Access Projects, and other like-minded organizations garnered much attention. The organizations claim that Comcast's delaying of file downloads from the BitTorrent website violates the FCC's [net neutrality principles](#) which prohibit broadband ISPs from discriminating among Internet traffic bytes. They want the FCC's principles enforced, according to their own lights, and Comcast fined. In return, Comcast says it is engaging in reasonable network management practices that are necessary to prevent the degradation of the Internet experience for all of its subscribers.

I don't want to rehash at the moment all of the policy arguments I have made previously as to why net neutrality regulation (née common carriage) constitutes unsound public policy. You may find plenty of those arguments in the papers on the [Publications page of the FSF website](#). What I want to do instead is to suggest that the battle over net neutrality regulation involves some fundamental principles that are worth fighting for by a broad array of freedom-loving citizens and groups. This is true even though the broadband ISPs themselves often find it

easier or more palatable, for whatever their reasons, not to argue against net neutrality on the basis of first principles.

Take the recent examples said to be adding fuel to the renewed net neutrality fire. In what seem to be two isolated incidents, AT&T and Verizon quickly apologized for blocking access to some content on their wireless services. They said the blocking in each instance was a mistake that was corrected when brought to their attention. And Comcast, defending its action delaying downloads from BitTorrent, largely does so on the perfectly reasonable basis that it is acting consistently with net neutrality principles, not in contravention of them.

In the heat of the moment, when complicated matters of network economics and network management are routinely reduced to sound bites, it is easy to understand why broadband ISPs react somewhat defensively to claims of “censorship” or “degrading” Internet access. Especially when market forces alone generally dictate that the ISPs must align their practices with consumer desires.

But there are first principles at stake in the net neutrality debate, and they demand that this be said: It is more than a little ironic that the Snowe-Dorgan bill is named the “Internet Freedom Preservation Act” and that a group called “Free Press” is asking the FCC to enforce its net neutrality policy by fining Comcast. The truth is that the Snowe-Dorgan bill does not preserve freedom, but erodes it. And the truth is the Free Press petition does not protect press freedom, but denigrates free speech.

In my view, net neutrality mandates are inconsistent with free speech rights protected under the First Amendment. As I have explained [here](#), [here](#), and [here](#), broadband ISPs are speakers entitled to First Amendment protection. While I appreciate that as a matter of business policy the ISPs may not presently —or ever— want to block (or degrade) access to particular websites, in my view they have a right under the First Amendment to do so if they wish.

I understand that the Free Press and its allied organizations, and Senators Dorgan and Snowe, and perhaps many other lawmakers and policymakers, believe that it is the ISP subscribers whose First Amendment rights are at stake. For the reasons explained in my essays on net neutrality mandates and the First Amendment, this is, in my view, a fundamental misconception of the First Amendment. And one that, if accepted, is dangerous to all those who may wish to claim the protection of the free speech guarantee going forward.

And then there is the matter of property rights. I understand that if broadband ISPs are declared common carriers by Congress or the FCC that the ISPs’ claims to be protected by the Fifth Amendment’s Taking Clause against the imposition of net neutrality mandates would be substantially diminished (but not necessarily entirely extinguished). Common carriers are required to carry all traffic “indiscriminately” and at rates the government determines to be “reasonable”. While I do not think it makes any sense as a matter of policy, upon a proper

record and for proper reasons, Congress or the FCC presumably could reverse the current state of affairs and formally declare broadband ISPs to be common carriers.

Short of that, however, to my mind, the *de facto* imposition of common carrier regulation through net neutrality mandates raises serious Fifth Amendment property rights issues under the Takings Clause. This is because the mandate to carry traffic that ISPs might otherwise choose not to carry, or to carry traffic at faster speeds than the service providers otherwise might prefer, or to refrain from charging more to those who impose greater capacity demands, is not costless. Regulations requiring such ISP actions translate, sooner rather later, into the need for the ISPs to invest in more network capacity. Such investments in additional facilities are costly. Government mandates that impose such costs, but which, at the same time, restrict ISPs' freedom to recover such costs, implicate the ISPs' property rights.

So there are fundamental freedoms and rights at stake in the net neutrality battle. Net neutrality proponents not surprisingly try to seize the mantle of freedom in naming their bills, and sometimes even their organizations. That's perfectly fine. But there is a wide chasm between the way in which net neutrality proponents view freedom and the way I do. The net neutrality proponents are convinced that broadband ISPs do not have First Amendment free speech rights or Fifth Amendment property rights because, in essence, they are mere common carriers subject to government control. To the contrary, I believe broadband ISPs like Verizon, AT&T, Comcast, Time Warner, T-Mobile, and so forth, do possess free speech and property rights. And that these rights are worth protecting, even when the ISPs themselves are not making such arguments.

As I said above, as a matter of policy, I do not believe that net neutrality mandates should be imposed. At present, in large part due to technological advances, competitive market forces are sufficient to protect consumers and enhance consumer welfare. But policy views aside, and more importantly, I do not believe such mandates should be imposed because they impinge upon important constitutional values that should matter to us all.

First principles matter, and, at the end of the day, it may be that they matter more than anything else in the net neutrality debate.

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