TELECOMMUNICATIONS

INFRINGING FREE SPEECH IN THE BROADBAND AGE: NET NEUTRALITY MANDATES

*BY RANDOLPH J. MAY **

There are many reasons why Congress should not adopt laws mandating so-called "net neutrality" for broadband Internet service providers (ISPs). But an often overlooked and underappreciated one is that such mandates would likely violate the free speech rights of the ISPs. This is a case where greater paid sensitivity to constitutional values, if not constitutional dictates, will lead to sound policy.

While at this writing several different net neutrality proposals have been put forward in the House of Representatives and the Senate, all have this in common: One way or another, they propose to restrict directly, or give the Federal Communications Commission ("FCC") the authority to restrict, broadband ISPs from taking any action to "block, impair or degrade" consumers from reaching any website 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-ME) and Byron Dorgan (D-ND), 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."[1] A bill passed by the House of Representatives contains a provision that grants the FCC the authority to enforce a net neutrality mandate, stating that "consumers are entitled to access the lawful Internet content of their choice."[2]

It is generally agreed that except for a few isolated and quickly remedied incidents,[3] neither the cable operators nor the telephone companies providing broadband Internet services to date have blocked, impaired or otherwise restricted subscriber access to the content of unaffiliated entities. This is not surprising because the broadband Internet access market is rapidly becoming more competitive.[4] It is unlikely that ISPs like Verizon and Comcast, or for that matter broadband providers using other technological platforms such as wireless or satellite operators, will take any action that meets with consumer objection or resistance. As a matter of policy, Congress should be very hesitant to pass a law in anticipation of conjectured harms that may never materialize. This is especially so with regard to a technologically dynamic area. As the Internet continues to evolve, such a law, with open-ended terms such as "interfere with," "impair" and "degrade" at its core, almost certainly would turn out to be overly broad in application. This vagueness inevitably would act to restrict efficient business arrangements that otherwise would allow ISPs to make available services demanded by consumers at lower costs. Moreover, the vague terms of the neutrality mandates would be grist for the litigation mills for years to come.

Even if they made good policy sense, which they do not, there is another, more fundamental reason why net neutrality mandates should not be adopted. They impinge on the ISPs' 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. In *Miami Herald Publishing Company v. Tornillo*,[5] the Supreme Court held unanimously that a Florida statute, requiring a newspaper that published an editorial critical of a political candidate to print the candidate's reply, violated the First Amendment. In doing so, the Court noted—and rejected—Tornillo's argument that the Florida mandatory access statute does not amount to a restriction of the newspaper's right to say whatever it pleases:

> Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.[6]

Neutrality laws mandating an ISP to "post," "use" or "send" all lawful content are for all practical purposes compelled access mandates, akin to the Florida right to access statute at issue in *Tornillo*. Even though these mandates do not literally "restrict" an ISP from publishing content of its own choosing, they compel the ISP to convey content it otherwise, for whatever reason, may choose not to convey.

**Randolph J. May is President of The Free State Foundation, an independent, free-market-oriented think tank based in Potomac, MD. An earlier, much briefer version of this article appeared in* The National Law Journal.

Relying expressly on *Tornillo*, a federal court in Florida held unconstitutional, under the First Amendment, a county ordinance requiring a cable operator to allow competitors access to its cable system on terms at least as favorable as those on which it provides such access to itself.[7] The court declared: "Under the First Amendment, government should not interfere with the process by which preferences for information evolve. Not only the message, but also the messenger receive constitutional protection."[8] And in language directly pertinent to the current net neutrality debate, the court proclaimed: "Compelled access like that ordered by the Broward County ordinance both penalizes expression and forces the cable operators to alter their content to conform to an agenda they do not set."[9]

In *Tornillo*, Chief Justice Burger painstakingly took note of claims by proponents of the compelled access statute that newspapers had come to exercise monopolistic control over the dissemination of information in their communities. For example, he summarized the proffered "concentration of control" justification for compelled access this way:

> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues.[10]

In other words, according to the Court: "The First Amendment interest of the public in being informed is said to be in peril because 'the marketplace of ideas' is today a monopoly controlled by the owners of the market."[11]

No matter. For purposes of First Amendment protection, the Court said: "However much validity may be found in these arguments [concerning concentration of control], at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."[12]

Although the *Tornillo* Court emphasized the result would have been the same even if the mandated right to reply was costless to the newspaper, it pointed out that the Florida statute necessarily imposes penalties and burdens on the newspaper required to print a reply: "The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the costs in printing and composing time and materials and in taking up space that could be devoted to other material that the newspaper may have preferred to print."[13] Similarly, in the Broward County case, the court observed that the equal access provision applicable to cable operators "distorts and disrupts the integrity of the information market by interfering with the ability of market participants to use different cost structures and economic approaches based on the inherent advantages and disadvantages of their respective technology."[14]

To put the matter of free speech rights starkly, a mandate—and all the net neutrality proposals contain similar ones—that prevents an ISP from "blocking" access by its subscribers to any lawful website would mean the ISP could not choose to restrict access to material that in its view is, say, "indecent," "homophobic," or "unpatriotic." (I am not suggesting that an ISP should adopt practices restricting access to any content or that such a restriction would be a successful business strategy. 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, the Supreme Court, in a 1994 5-4 decision in *Turner Broadcasting System v. FCC*,[15] 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 broadcast stations. And in today's competitive environment, it cannot be contended seriously that cable operators any longer have control of the video content that enters consumers' homes, if they ever did.

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 this form of compelled access regulation against First Amendment challenge in 1969 in *Red Lion Broadcasting Co. v. FCC*,[16] 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 do not want to import Fairness Doctrine-type speech restrictions into the newly-competitive environment of broadband ISPs.

In effect, what the current crop of net-neutrality proposals really seeks 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[17] by turning ISPs into common carriers required to carry all messages indifferently and to grant compelled access to all comers. It may well be that, as a matter of law, Congress or the FCC itself has the authority consistent with the Constitution to impose common carrier or common carrier-like obligations on the broadband ISPs—although there is doubt about the extent of the authority to do so in a competitive communications environment such as that which presently exists.[18]

The main point here is that largely unexplored but nevertheless significant First Amendment interests are at stake in the raging net-neutrality debate. The *Broward County* court put it well back in 2000, when competition among broadband ISPs, although beginning to flourish, was not nearly as robust as it is today:

> It is ironic that a technology, which is permitting citizens greater ease of access to channels of communication than has existed at any time throughout history, is being subjected to the same arguments rejected by the Supreme Court in *Tornillo*.[19]

Ironic indeed. This is an instance in which greater appreciation for free speech values not only will be consistent with our constitutional heritage, but also will lead to sounder communications policy.

FOOTNOTES

[1] S. 2917, "Internet Freedom Preservation Act," introduced May 19, 2006.

[2] H.R. 5252, "Consumer Opportunity, Promotion, and Enhancement Act of 2006," as passed in the House of Representatives on June 8, 2006, granting the FCC the authority to enforce the neutrality principles that the agency had promulgated in a Policy Statement (FCC 05-151; CC Docket No. 02-33) released on September 23, 2006.

[3] *See*, *e.g.*, Consent Decree between Madison River Communications, LLC and the FCC (under which the Madison River Telephone Company agreed to cease blocking ports used by Voice over Internet Protocol applications that competed with Madison River's traditional local telephone service offerings). Madison River Communications, LLC, DA 05-543, File No. EB-05-IH-0110.

[4] In its most recent report tracking penetration of high-speed broadband services, the FCC found that, as of December 31, 2005, on a nationwide basis at least 94% of the country's zip codes had available two or more broadband providers. Indeed, approximately 88% of the nation's zip codes had available three or more competitors. This does not mean the competition was available ubiquitously in the zip code, but it is a good indication of the extent to which competition is proliferating. (The figures are approximate because of rounding errors. *See* FCC Report, "High-Speed Services for Internet Access: Status as of December 31, 2005," released July 2006, at Table 17.

[5] 418 U.S. 241 (1974).

[6] *Id.* at 256.

[7] Comcast Cablevision of Broward County, Inc. v. Broward County, Florida, 125 F. Supp. 2d 685 (S.D. FL. 2000).

[8] *Id.* at 693.

[9] *Id.* at 694.

[10] 418 U.S. at 250.

[11] *Id.* at 251.

[12] *Id.* at 254.

[13] *Id.* at 256.

[14] 125 F. Supp. 2d at 694.

[15] 512 U.S. 622 (1994).

[16] 395 U.S. 367 (1969).

[17] 125 S. Ct. 2688 (2005).

[18] In *Turner Broadcasting*, Justice Kennedy stated, "The First Amendment's command that the government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." 512 U.S. at 657. Even assuming this is an accurate statement of existing First Amendment jurisprudence, and note that it is at odds with the Court's unanimous rejection of the relevance of the "monopoly" control argument in *Tornillo*, in today's communications environment there is no one ISP that can be said to control a critical pathway of communication.

[19] 125 F. Supp. at 694.