Testimony of

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on behalf of

Free Press
Consumers Union
Consumer Federation of America
Public Knowledge

Regarding

A Legislative Hearing on H.R. 5353, The Internet Freedom Preservation Act of 2008

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Summary – Testimony of Ben Scott, Policy Director, Free Press, May 6, 2008

The Internet's open marketplace for speech and commerce is the hallmark of the most transformative communications technology since the printing press. Determining how to ensure an open Internet for consumers is the most important communications policy decision of the decade. It represents a pivotal moment for the future of the Internet -- a technology that is rapidly becoming the dominant communications infrastructure of our information society.

Two competing visions for the Internet stand before policymakers. The first is an open Internet with baseline rules to protect consumers' right to access the content and services of their choice. The second is a closed network that would permit experiments with content control and discriminatory service provisions that have been the hallmark of the old media world. It is a virtual clash of civilizations. Congress should choose the path of open markets for speech and commerce -- a path championed by virtually every consumer and innovator using the Internet.

The stakes of the debate have long been known. But the consequences of a closed Internet are sharpening in clarity. Comcast is currently under investigation by the Federal Communications Commission for allegations that it has secretly blocked consumers from using a popular Internet application. This case shows unequivocally that -- contrary to what telephone and cable companies said in 2006 -- consumer protection rules online are not a "solution in search of a problem." There is a very clear problem -- Comcast was just the first to cross the line and get caught. That case also demonstrates that the threat requires congressional action: Comcast disputes the FCC's legal authority to protect consumers.

The recent debate has been punctuated with misdirected concern about issues that are important in their own right but unrelated to this bill. To be clear, Network Neutrality is not mutually exclusive -- or even in tension -- with protecting copyright, network security or children. None of the proposed consumer protections safeguard illegal activity from prosecution. Further, this debate is not about file-sharing or peer-to-peer (P2P) programs. Far from being bad actors on the Internet, these technologies indicate a growing sector of innovation.

Reviewing the short history of debate over this issue demonstrates that everyone favors some kind of consumer protection principles or rules that guarantee an open Internet. It is not a question of *whether* consumers will have laws guarding against Internet gatekeepers, but *how* those laws will be crafted.

The last three years of legislative proposals and regulatory activity on the issue of Network Neutrality show remarkable unanimity of purpose and desired outcome. Republicans and Democrats in the legislature and at the FCC have all agreed that consumers are entitled to access the lawful content, applications and devices of their choice without interference from network owners. There is substantial precedent for establishing principles of nondiscrimination in the law and granting FCC authority to redress complaints brought by Internet users.

The Internet Freedom Preservation Act is a reasonable bill that includes elements of the legislative proposals and regulatory efforts that have preceded it. It draws from this consensus to establish consumer protections at the base of the Communications Act. It also directly clarifies the authority of the FCC to act in defense of consumers, an authority which is challenged by the cable industry in the Comcast case. Finally, this bill recognizes that we do not yet have all the answers. It calls for a broad public inquiry into the future of Internet policymaking on the backdrop of these baseline principles of consumer choice and open markets.

It is time for Congress to act. This is the right bill at the right time. The future of the Internet for everyone depends on it.

Background and Overview

For the last three years, the preservation of "Network Neutrality" has been a priority issue for nearly every major consumer organization in the country that works on communications policy. The reason is simple. We stand at a paradigm-shifting moment in the history of Internet policymaking.

The Internet is rapidly emerging as the dominant means of mass communication -- transforming traditional broadcasting and cable with new business models and decentralizing the tools of speech and commerce in the information society to all citizens. This critical moment is a singular opportunity to learn from the past. The Committee has spent years working to redress the problems in the current media system created by concentrated market power, gatekeepers and anti-competitive practices that reduce diversity, limit access and control the flow of content. Sitting on this Committee for a decade should make anyone an expert on what has gone wrong with traditional media.

Unfortunately, once the pie is baked; it is hard to un-bake it. The concentration of power in the broadcasting and cable industries is well-established -- and fiercely defended by legions of industry lobbyists. Policy decisions made at key points in the development of these technologies have played a central role in strengthening rather than weakening this consolidation. Now, this Committee spends a great deal of its time crafting reforms to create competition, lower consumer rates and foster more diverse content. But it is an uphill battle trying to undo outcomes in the communications market that were set in motion decades ago.

The Internet represents a new chapter in this history. What Congress and the Federal Communications Commission decide in the next few years of major technological change will determine how communication in the information society evolves. This is the time to learn from the mistakes of the past -- the time to undo cartels, promote free markets and guarantee consumer rights. Armed with the knowledge of what went wrong with the policies governing old media, we can make good policy decisions that protect the future of the Internet.

There are two competing schools of thought on how Internet policy should be made. One school suggests that Congress should permit the dominant financial interests in today's broadband networks -- generally a local duopoly of phone and cable companies -- to control the Internet market of the future. The opposing school of thought suggests that Congress should strive to keep the Internet open as a free marketplace of ideas and commerce -- the first media form in history without centralized gatekeepers.

This is a veritable "clash of civilizations" that has been stalemated for three years. The correct choice should be clear. Congress should opt for competition and free markets, resisting the logic of deregulation that would hand over new media to the titans of old media. Deregulation is not a free market policy in this context -- it is the handmaiden of a 21st century media cartel. Will we embrace the openness that has shaped the Internet to the present day? Or will we permit network owners to move to the closed systems of content control we have had with cable television and broadcasting?

From a consumer perspective, the clash over the future of the Internet is about user control. Put simply, consumers want to preserve their freedom to use the Internet as they wish -- without interference from gatekeepers. This user experience depends on establishing minimum baseline consumer protections that guarantee openness on the Internet. The Internet Freedom Preservation Act would do just that.

Let me say a few words about openness on the Internet -- probably a more apt term than "Network Neutrality." Openness does not mean an end to all network management. It does not mean every bit should be treated exactly alike on the Internet. Openness does not reject protecting children or copyright or security on the Internet. Openness simply means that Internet policy should promote free speech and

commerce in the online marketplace. Openness means faithfully guarding against interference from the cable and telephone companies who have the technical and market power to become bottlenecks between consumers and producers of Internet content. Openness means deliberately refusing to accept marketplace behaviors that seek to discriminate.

These are the stakes of this debate, this bill and this legislative hearing. History will record these years as the pivotal juncture when the policies that shaped the future of the Internet were made. It is the time for Congress and the FCC to send the correct signals to the market that openness on the Internet will be the future of the technology -- not a closed system of content control and gatekeepers. Passing the Markey-Pickering bill would be a timely and appropriate method to accomplish this worthy goal.

The Internet Freedom Preservation Act - A Reasonable Proposal to Protect Consumers

Urgency to Act – FCC and the Comcast Case

The Internet Freedom Preservation Act is the right bill at the right time. Moreover, the urgency to move on this bill is rising. It is now unequivocal that passing a bill to protect consumer access to lawful content on the Internet is not a "solution in search of a problem." This was the mantra of the cable and phone companies throughout the congressional debate over Network Neutrality in 2006. In hearing after hearing, executives and trade association presidents promised Congress that network operators would never interfere with consumers' access to content on the Internet. Here is one example from National Cable & Telecommunications Association President and CEO Kyle McSlarrow's testimony before the Senate Commerce Committee:

> "I think we can all agree that consumers should have reasonable expectations from the companies that deliver high-speed Internet service to them. So let me be clear. NCTA's members have not and will not block the ability of their high-speed Internet service customers to access any lawful content, application or services available over the public Internet."[1]

Despite the warnings of Net Neutrality supporters at the time, the 110th Congress ended without a resolution on legislation guarding openness on the Internet.

Network operators promised they would not block consumer access to Internet content in 2006. But they did exactly that in 2007. A bellwether case now sits before the FCC -- a case involving Comcast and allegations that it is using network technologies to block and degrade consumer access to content on the Internet. The facts of the case are straightforward. Not only was Comcast blocking consumer access to Internet content -- they were doing so secretly, using technologies that "spoof" the computers of its customers and disguise the practice of blocking.

Millions of dollars have already been spent litigating this case and prosecuting its arguments in the media. The FCC has conducted to *en banc* field hearings in which **Massachusetts Institute of Technology** (**MIT**) engineers and the nation's leading Internet law professors from Harvard, Columbia and Stanford universities confirmed that Comcast has been blocking consumer access to Internet content. It is a precedent-setting case.

[1] National Cable and Telecommunications Association, President and CEO Kyle McSlarrow, Before the United States Senate Committee on Commerce, Science, and Transportation, Hearing on Net Neutrality, February 7, 2006, Available at http://commerce.senate.gov/pdf/mcslarrow-020706.pdf.

How was this momentous case kick-started? Was it Silicon Valley organizing its corporate might to challenge the telephone and cable companies in a battle of the titans? No. It was a barbershop quartet fan in Oregon. A network engineer named Robb Topolski began the network testing that ultimately triggered the FCC's Comcast case because he couldn't share his favorite non-copyrighted, 19th century barbershop tunes with his friends. Comcast first denied its interference. Months later, when the Associated Press confirmed Topolski's tests, Comcast acknowledged it but directly challenged the legitimacy of the FCC's authority to intervene. Finally, Comcast promised to stop at some undisclosed future time subject to an undefined agreement -- hoping the government would walk away.

Robb Topolski has proven what has always been obvious to those of us in the consumer groups working on this issue. This debate isn't about AT&T, Comcast, or Google or EBay. It's about every consumer wanting to seek or share information on the Internet. Even though very few of us can test networks like Topolski, and fewer still will see their attempt to share music become first-tier business for a federal agency, this is a singular case with historic implications for all consumers.

The Comcast case at the FCC demonstrates exactly why Congress should pass this bill. This bill establishes an important baseline protection for consumers -- one that is long overdue and much-needed given the behavior of network operators in the marketplace. This bill is also highly appropriate and timely given the debate over the FCC's authority to adjudicate this proceeding. In its filings and testimony before the agency, Comcast is directly challenging FCC authority to act on the complaint against them. "The Commission cannot lawfully issue an injunction against Comcast," the company wrote in its filing, "…even were it to conclude…that Comcast's behavior is inconsistent with the Internet Policy Statement."[2]

Notice how this statement is completely the opposite of what network owners claimed in 2006 -- that the FCC would act in the unlikely event of a consumer complaint. FCC Chairman Kevin Martin has been consistently firm in his belief that he does have authority. In April, he testified before the Senate Commerce Committee, reiterating what he has said for three years: "I also believe that the Commission has a responsibility to enforce the principles that it has already adopted. Indeed, on several occasions, the entire Commission has reiterated that it has the authority and will enforce these current principles."[3]

In light of this controversy and the likelihood of a judicial appeal of any FCC action drawing on Title I ancillary authority, it is perfectly reasonable for Congress to legislate -- reaffirming the FCC's authority and giving further guidance to the agency as to the character of the marketplace and the consumer rights the Congress intends to promote. In short, this bill would reaffirm the FCC's authority to act on behalf of consumers like Robb Topolski.

Copyright and Peer-to-Peer

The Comcast case highlights what this debate is all about. But it is important to clarify what this open-Internet debate over is *NOT* about. Too often, this question of open vs. closed Internet policy gets caught up in rhetorical sparring over issues that, while legitimate in their own right, have little or nothing to do with Network Neutrality or the legislation at hand.

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[2] Ex Parte Letter of Comcast Corporation, In the Matter of Broadband Industry Practices, WC Docket No. 07-52, March 11, 2008, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519866175.

[3] Written Statement of Federal Communication Chairman Kevin Martin, Before the United States Senate Committee on Commerce, Science and Transportation, April 22, 2008, p. 4, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281690A1.pdf.

First, Network Neutrality has nothing to do with excusing violators of intellectual property on the Internet. Online piracy is a huge and important issue of law enforcement. But the goals of Net Neutrality and copyright are not mutually exclusive in any way. The rights of consumers online that are protected by the Markey-Pickering bill apply exclusively to *lawful* content. Neither this bill nor any other Net Neutrality bill or regulation implemented or proposed in the history of this debate would in any way apply protections to illegal activity online.

Second, Net Neutrality is not strictly about peer-to-peer (P2P) applications. These technologies get a bad reputation because unfortunately some people use them for piracy. Those users can and should be prosecuted under existing copyright laws. But we shouldn't throw the baby out with the bathwater -- Congress should recognize that P2P is a flourishing field of application development on the Internet. It is a category of computer programs that is extending far and wide on the Internet -- becoming pervasive in many of the most popular things consumers do online.

The best example may be Skype. Skype is a P2P program than enables Internet users to have voice conversations online for free. The service can also do high definition video conferencing. Today, it has 308 million users worldwide that have had over 100 billion minutes of conversations in 28 languages. P2P services are also used by NASA to share images of the Earth from outer space; it's used by software developers to collaborate on new innovations. P2P is the standard used by ABC.com and, soon, NBC's online offering. Other than email, few programs are more ubiquitous.

Third, this debate is not about protecting the network from "bandwidth hogs." When Comcast was caught blocking P2P applications, the company tried to vilify P2P users as bad actors. Never have I heard of an industry complaining so loudly about people so eager to consume and buy their products. Can you imagine the oil companies scolding SUV drivers for using so much gas?

And it is important to point out that P2P services do *not* use more bandwidth than consumers have already paid for under the terms of their contracts. According to the *Wall Street Journal*, Comcast makes 80 percent profit margins on its broadband service, so consumers are paying a pretty penny for that bandwidth that Comcast doesn't want to deliver.[4] On top of that, many P2P applications hardly use any bandwidth at all. Skype, for example, uses just 8-20 kilobytes per second. That means you can use Skype on a dial-up connection just as easily as you can on a WiFi hotspot, a mobile device, a cable modem or a fiber line.

The bottom line is that guaranteeing an open Internet is not just about protecting these 308 million users of a P2P service -- it's about protecting the kind of innovation that creates a new medium of global communication.[5]

History and Context

Look at the legislative and regulatory efforts in the last three years on the question of Network Neutrality, and it is clear that we are no longer arguing about *whether* to have open Internet rules, but rather *how* to craft them. As this Committee attempts to build consensus around the right solution, it is critical to note that we all appear to be headed to the same outcome -- guaranteeing consumers access to the lawful Internet content of their choice without interference from network owners.

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[4] Vishesh Kumar, "Is it time to tune in to cable?," Wall Street Journal, April 3, 2008, Available at http://money.aol.com/news/articles/qp/ap/_a/is-it-time-to-tune-in-to-cable/rfid88603833.

[5] All facts about Skype taken from, "Q1 2008 Skype Fast Facts," http://news.ebay.com/fastfacts_skype.cfm

In this context, I submit that the Markey-Pickering bill (HR 5353) is a reasonable proposal that accomplishes this goal. I have included in this testimony an appendix of the relevant sections of existing law, major legislative proposals (in the House), and regulatory actions at the FCC. I will analyze them all here in order to demonstrate the point that Republicans and Democrats -- in two Congresses and at the FCC -- have shared the fundamental goals of Network Neutrality policy, differing only in degree and approach.

A review of recent history illustrates how Congress has moved toward agreement on policy that protects the free market on the Internet. In the wake of the *Brand X* case in the summer of 2005, the FCC shifted broadband Internet services from Title II jurisdiction to Title I in its Wireline Broadband Order[6], released in September of 2005. That action distanced these broadband networks from a wide variety of common carrier regulations, including the important provisions in Sections 201, 202 and 230 that had long carried the banner of open communications systems as the policy of the United States.

Right now, broadband over cable lines, phone lines, powerlines, and wireless spectrum are subject to Title I -- not mandatory Title II -- jurisdiction. The policy guidance and regulatory authority vested in these sections, however, is still available to the FCC for application through its ancillary authority under Title I. This authority was upheld by the *Brand X* case, which affirmed the FCC's option "to impose additional regulatory obligations under its Title I ancillary authority jurisdiction to regulate interstate and foreign communications."[7] That assertion is now strongly challenged by the cable industry[8] in the matter of the consumer complaint against Comcast even as it is defended by consumer groups.[9]

Simultaneous with the September 2005 order, the commission issued its *Internet Policy Statement*, outlining its "four principles" of Network Neutrality to clarify how it would enforce consumer protection under Title I.[10] That policy statement is printed in full in the appendix. The four principles are straightforward statements of consumer rights on the Internet. The first three protect consumers' right to access the lawful content, applications and devices of their choice. The fourth principle entitles consumers to competition among networks, applications, services and content online.

Policy statements are meant to guide market participants on how an agency will interpret and enforce the agency's statutory authority and obligations. The policy statement roots its ancillary authority at least partly in Section 230 of the statute, in which Congress stated that the policy of the United States is "to preserve the vibrant and competitive free market that presently exists for the Internet" and "to encourage the development of technologies that maximize user control over what information is received by individuals."[11] Further, the commission's policy statement specifically reaffirms the FCC's ancillary authority under Title I (citing *Brand X*) to take action to protect consumer rights on the Internet.

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[6] Federal Communications Commission, Report and Order, In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, August 5, 2005, Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf.

[7] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688, slip op. at 3-4 (2005).

[8] Ex Parte Letter of Comcast Corporation, In the Matter of Broadband Industry Practices, WC Docket No. 07-52, March 11, 2008, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519866175; Comments of Time Warner, In the Matter of Broadband Industry Practices, WC Docket No. 07-52, February 13, 2008, p. 26, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519841176.

[9] Reply Comments of Free Press et al., In the Matter of Broadband Industry Practices, WC Docket No. 07-52, February 28, 2008, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519856406.

[10] Cite to Internet Policy Statement - http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf

[11] 47 U.S.C. § 230(b)(2) and (3).

When the policy statement was issued, many consumer advocates -- myself included -- feared that handing over the legacy of an open communications systems to such an untested guardian as a policy statement was a dangerous business. Today, we are watching the FCC test the mettle of that guardian in the Comcast case. Ironically, some of the network operators that once assured Congress that no laws were necessary because the FCC's policy statement was an adequate safeguard against content discrimination are now arguing that it is a paper tiger with no teeth to stop them from behaving however they wish.

In recent testimony before the Senate Commerce Committee, NCTA's McSlarrow presented the contradictory position that the cable industry fully supports the FCC's policy statement, but it does not support its enforcement to protect consumers. When questioned by senators about whether the FCC could bring an enforcement action guided by its four principles, McSlarrow replied: "It's not even a close call, the answer is no."[12] We do believe he is wrong, but the FCC's policy statement represents the absolute floor of basic consumer protection on the Internet. In my view, it is not enough, but it appears to be the last defense available to consumers absent congressional action.

What does the policy statement do in essence? It seeks to modernize the openness principles once at the core of a larger set of common carrier regulations in Title II and then deploy them in Title I. No final resolution has been reached about whether this endeavor will succeed. Throughout the last three years of debate, the network owners have asserted their right to create a closed system for the Internet. In fact, it was network owners' comments in late 2005 and early 2006 that triggered the Net Neutrality debate in Congress in 2006.[13] Because the carriers claimed the right to discriminate amongst content on the Internet, many in Congress began to believe that the FCC's policy statement would not stick.

As a result, we got two main legislative responses -- both of which are excerpted in the appendix. The first was the Network Neutrality Act of 2006, introduced by Mr. Markey. The second was the Net Neutrality section of the Communications Opportunity, Promotion, and Enhancement (COPE) Act of 2006 Act, introduced by Mr. Barton. The 2006 Markey bill proposed to expand on the FCC's policy statement and direct the commission to establish enforceable rules to protect consumer rights on the Internet.

The bill captures all of the four principles and adds a so-called "fifth principle," which combines a nondiscrimination principle with a rule that bars the sale of services by network operators that privilege or degrade Internet content in a discriminatory manner. This is the specific provision that would prohibit pay-for-play "fast lanes" and "slow lanes" on the Internet. The Barton bill, by contrast, simply codifies the four principles in the FCC's policy statement. Beyond that, it gives the FCC explicit authority to enforce those principles through adjudication and fines. However, it strictly denies the FCC authority to adopt or implement rules based on the four principles. Neither bill became law; neither was reintroduced in the 110th Congress.

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[12] See Anne Broache, "Net Neutrality Battle Returns to US Senate," 22 April 2008, *CNet*, http://www.news.com/8301-10784_3-9925517-7.html

[13] "William L. Smith, chief technology officer for Atlanta-based BellSouth Corp., told reporters and analysts that an Internet service provider such as his firm should be able, for example, to charge Yahoo Inc. for the opportunity to have its search site load faster than that of Google Inc." Jonathan Krim, Executive Wants to Charge for Web Speed, Washington Post, Dec 1, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30/AR2005113002109.html; SBC CEO Edward Whitacre: "Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes?" At SBC, It's All About "Scale and Scope," BusinessWeek, Nov 7, 2005, http://www.businessweek.com/magazine/content/05_45/b3958092.htm.

The next action on Net Neutrality came at the end of 2006 when AT&T acquired BellSouth. As a condition of that acquisition, the new company agreed to abide by enforceable Net Neutrality rules. These rules included all of the FCC's four principles from the policy statement -- verbatim -- plus a fifth principle of nondiscrimination that also barred the sale of services that would allow the network owner to create fast lanes and slow lanes for Internet content. The details of the fifth principle differed slightly from the Markey Network Neutrality Act of 2006 -- but its impact was the same, except of course, that it only applied to the new, expanded AT&T. That condition expires at the end of 2008.

While there was no new legislative or regulatory activity in 2007, there were several incidents in the marketplace that demonstrated how the network operators can and do interfere with content on the Internet. It now appears that Comcast was secretly blocking consumer use of peer-to-peer technologies throughout 2007. In August, AT&T censored the political speech of a musician during a concert webcast.[14] In September, Verizon Wireless refused to send text messages carrying the political communication of NARAL Pro-Choice America to its membership.[15] Though both AT&T and Verizon hastened to reverse themselves under heavy media scrutiny, the specter of Internet gatekeepers was raised in the minds of consumers. And, of course, the Comcast case presents a paradigmatic Network Neutrality violation -- a company secretly blocking its innovative new competitors. The company has not backed down from this stance -- which is why it stands as a bellwether case at the FCC.

Finally, we move to 2008, when Mr. Markey and Mr. Pickering introduced HR 5353, the bill under discussion here today. This bill fits squarely in between the COPE Act and the AT&T/BellSouth merger condition. And it addresses directly the question of Title I authority for the FCC's four principles currently under dispute at the agency. It clarifies exactly what policies the Congress desires to guide the Commission to produce the desired outcome for protecting consumers online. It establishes a revised version of the four principles directly into Title I of the Communications Act. It captures the intent of all of the FCC's existing four principles -- protecting consumer access to content, applications, devices and competition. Beyond that it adds policy principles that seek to protect consumers against unreasonable discrimination and interference by network operators. These form a fifth principle similar to those that appeared in the Network Neutrality Act of 2006 and in the AT&T/BellSouth merger condition. However, unlike either of these, HR 5353 does not require enforcement of these principles.

The principles in HR 5353 establish a baseline consumer protection on the Internet as one of the basic congressional intentions of the Communications Act. Adoption and implementation of rules are left to the agency. As an immediate practical matter, it simply strengthens the hand of the FCC's principles and clarifies its authority in the adjudication of complaints based on the statute. Its purpose, in that sense, is similar to that of the COPE Act, though it does not go nearly as far in dictating an enforcement process or setting a penalty. Instead, it instructs the commission to conduct studies and public hearings to evaluate the core issues that will inform a national broadband policy in the future. It injects extremely valuable transparency and a public process into a complex debate over policymaking in the information society. This element of the bill should not be underappreciated. It is of signal importance.

Make no mistake, this is a compromise bill. It is such a compromise, to be honest, that some of our old allies were alarmed. While I would prefer something stronger -- I believe that this bill represents a very significant step in the right direction. What amazes and disappoints me is that it has not yet become the

[14] K.C. Jones, "Pearl Jam Blasts AT&T for Cut Lyrics in Lollapalooza Webcast," InformationWeek, August 9, 2007, Available at http://www.informationweek.com/news/internet/showArticle.jhtml?articleID=201310731.
[15] Adam Liptak, "Verizon Blocks Messages of Abortion Rights Group," New York Times, September 27, 2007, Available at http://www.nytimes.com/2007/09/27/us/27verizon.html.

vehicle of general compromise that it deserves to be. The middle ground that opponents of Net Neutrality once called for is now available -- but they appear no longer willing to stand on it.

So what do we learn from this walk down memory lane? We have to evaluate what each of the preceding Net Neutrality bills and regulations tell us about the Internet Freedom Preservation Act. Is it moderate or extreme? Are we debating *whether* to have Net Neutrality protections consumers or *how* to have Net Neutrality protections? Here are the three take-home analytical points:

- All of the actions taken by FCC and Congress to protect consumer rights on the Internet contain some version of the FCC's "four principles" -- consumers are entitled to the lawful Internet content, applications and devices of their choice as well as to competitive markets.

- Some of the Net Neutrality actions contain a "fifth principle" of nondiscrimination in one form or another. In the case of the Markey bill from 2006 and the AT&T/BellSouth merger condition, that fifth principle of nondiscrimination is enforced as a rule and prohibits the sale of discriminatory quality of service. The Barton bill and the FCC's policy statement have no fifth principle at all. The Markey-Pickering bill has a fifth principle that authorizes the commission to guard broadly against unreasonable discrimination -- but it is does not establish a specific rule that the FCC must follow.

- Some of the Net Neutrality actions specify enforcement as rules or through adjudicatory proceedings. The FCC's policy statement draws broadly on its ancillary authority from Title I to make policy -- through rules or through adjudicating complaints -- but it does not specify a precise rule based on the exact language of the principles. The Barton bill codifies the FCC's authority to enforce the specific language of the four principles and specifies an adjudicatory process and penalties. The 2006 Markey bill specifies a precise rule and enforcement process. The AT&T merger condition functions as an enforceable rule, though it is temporary. The Markey-Pickering bill does not specify an enforceable rule, nor does it specify an adjudicatory process. It simply clarifies the intent of Congress and the authority of the commission to act to protect consumers' rights under Title I.

The Internet Freedom Preservation Act captures the intent of all of the Net Neutrality actions taken or proposed by Congress or the FCC in the last three years. It takes a substantially different approach to the issue than the Network Neutrality Act of 2006, hewing closer to the strategy of the COPE Act, in some ways going further (with a fifth principle) and in some ways not as far (it does not have specific enforcement provisions or penalties). Although recent developments in the marketplace bear out the concerns voiced by Net Neutrality advocates in 2006, this bill represents a substantial compromise -- meant to ensure consumer protection, free speech and free competition, while not overly specifying the actions of the FCC.

Conclusion

This debate is a clash between two competing visions for the Internet -- open or closed networks. Congress and the FCC have begun to turn the corner toward acting to ensure an open Internet -- in part because the network providers have begun blocking and discriminating. The recent history of Internet policymaking was premised on this idea: we will remove some regulations from the network operators, but we will draw a line on ensuring consumers' access to an open Internet and all of the content and applications on it. Deregulation has led us to the bright red line of basic consumer protection. We should not stray beyond it.

Now is the time to firmly establish that precedent. It is the moment to recognize that action for an open Internet is the best path toward redressing the problems of concentrated power in the old media marketplace. It is the path to protecting consumers' rights to access all lawful content of their choice online. It is the path to guaranteeing innovation and entrepreneurship in our information economy. It is a path to expanding public input in the process as we work toward shaping the broadband policies that will guide the nation in the coming decades.

At the end of the day, consumers are relying on Congress and the FCC to set a baseline standard to protect openness on the Internet. A duopoly market of access providers will not discipline itself. Nor can we expect that fans of barber shop quartets will always be the white knights that ride to the rescue. This is a clear moment for the Congress to act and pass the Internet Freedom and Preservation Act. The future of the Internet for everyone depends on it.

Appendix

Communications Act of 1934 as Amended

SEC. 201. [47 U.S.C. 201]

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities regulations for operating such through routes.
(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful…

SEC. 202. [47 U.S.C. 202] DISCRIMINATION AND PREFERENCES.

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.
(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.
(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

SEC. 230. [47 U.S.C. 230]

(a) FINDINGS.--The Congress finds the following:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY.--It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

FCC Internet Policy Statement (September 23, 2005)

To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet,

Consumers are entitled to access the lawful Internet content of their choice;

Consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;

Consumers are entitled to connect their choice of legal devices that do not harm the network;

Consumers are entitled to competition among network providers, application and service providers, and content providers.[16]

Network Neutrality Act of 2006 - HR 5273 (May 2, 2006)

SEC. 3. POLICY.

It is the policy of the United States--

(1) to maintain the freedom to use broadband telecommunications networks, including the Internet , without interference from network operators, as has been the policy for Internet commerce and the basis for user expectations since its inception;
(2) to ensure that the Internet , and its successors, remain a vital force in the United States economy, thereby enabling the country to preserve its global leadership in online commerce and technological innovation;
(3) to preserve and promote the open and interconnected nature of broadband networks that enable consumers to reach, and service providers to offer, lawful content, applications, and services of their choosing, using their selection of devices that do not harm the network;

[16] FCC Internet Policy Statement, September 23, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf

(4) to encourage escalating broadband transmission speeds and capabilities that reflect the evolving nature of the broadband networks, including the Internet , and improvements in access technology, which enables consumers to use and enjoy, and service providers to offer, a growing array of content, applications, and services;
(5) to provide for disclosure by broadband network operators of prices, terms, and conditions, and other relevant information, including information about the technical capabilities of broadband access provided to users, to inform their choices about services they rely on to communicate and to detect problems; and
(6) to ensure vigorous and prompt enforcement of this Act's requirements to safeguard and promote competition, innovation, market certainty, and consumer empowerment.

SEC. 4. NET NEUTRALITY SAFEGUARDS.
(a) In General- Each broadband network provider has the duty to--

(1) enable users to utilize their broadband service to access all lawful content, applications, and services available over broadband networks, including the Internet ;

(2) not block, impair, degrade, discriminate against, or interfere with the ability of any person to utilize their broadband service to--

(A) access, use, send, receive, or offer lawful content, applications, or services over broadband networks, including the Internet ; or

(B) attach any device to the provider's network and utilize such device in connection with broadband service, provided that any such device does not physically damage, or materially degrade other subscribers' use of, the network;

(3) clearly and conspicuously disclose to users, in plain language, accurate information about the speed, nature, and limitations of their broadband service;
(4) offer, upon reasonable request to any person, a broadband service for use by such person to offer or access unaffiliated content, applications, and services;
(5) not discriminate in favor of itself in the allocation, use, or quality of broadband services or interconnection with other broadband networks;
(6) offer a service such that content, applications, or service providers can offer unaffiliated content, applications, or services in a manner that is at least equal to the speed and quality of service that the operator's content, applications, or service is accessed and offered, and without interference or surcharges on the basis of such content, applications, or services;
(7) if the broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, prioritize or offer enhanced quality of service to all data of that type (regardless of the origin of such data) without imposing a surcharge or other consideration for such prioritization or quality of service; and
(8) not install network features, functions, or capabilities that thwart or frustrate compliance with the requirements or objectives of this section.

…

(c) Implementation- Within 180 days after the date of enactment of this Act, the Commission shall adopt rules that--

(1) permit any person to complain to the Commission of anything done or omitted to be done in violation of any duty, obligation, or requirement under this section;

(2) provide that any complaint filed at the Commission that alleges a violation of this section shall be deemed granted unless acted upon by the Commission within 90 days after its filing;

(3) require the Commission, upon prima facie showing by a complainant of a violation of this section, to issue within 48 hours of the filing of any such complaint, a cease-and-desist or other appropriate order against the violator until the complaint is fully resolved, and, if in the public interest, such order may affect classes of persons similarly situated to the complainant or the violator, and any such order shall be in effect until the Commission resolves the complaint with an order dismissing the complaint or imposing appropriate remedies to resolve such complaint; and

(4) enable the Commission to use mediation or arbitration or other means to resolve the dispute.

(d) Enforcement- This section shall be enforced under titles IV and V of the Communications Act of 1934 (47 U.S.C. 401, 501 et seq.). A violation of any provision of this section shall be treated as a violation of the Communications Act of 1934, except that the warning requirements of section 503(b) shall not apply. In addition to imposing fines under its title V authority, the Commission also is authorized to issue any order, including an order directing a broadband network operator to pay damages to a complaining party.

Communications Opportunity, Promotion, and Enhancement Act of 2006 - HR 5252 (passed by the House, June 8, 2006)

TITLE II—ENFORCEMENT OF BROADBAND POLICY STATEMENT

…

''SEC. 715. ENFORCEMENT OF BROADBAND POLICY STATEMENT.

''(a) AUTHORITY.—The Commission shall have the authority to enforce the Commission's broadband policy statement and the principles incorporated therein.

''(b) ENFORCEMENT.—

'(1) IN GENERAL.—This section shall be enforced by the Commission under titles IV and V. A violation of the Commission's broadband policy statement or the principles incorporated therein shall be treated as a violation of this Act.

''(2) MAXIMUM FORFEITURE PENALTY.—For purposes of section 503, the maximum forfeiture penalty applicable to a violation described in paragraph (1) of this subsection shall be $500,000 for each violation.

''(3) ADJUDICATORY AUTHORITY.—The Commission shall have exclusive authority to adjudicate any complaint alleging a violation of the broadband policy statement and the principles incorporated therein. The Commission shall complete an adjudicatory proceeding under this subsection not later than 90 days after receipt of the complaint. If, upon completion of an adjudicatory proceeding pursuant to this section, the Commission determines that such a violation has occurred, the Commission shall have authority to adopt an order to require the entity subject to the complaint to comply with the broadband policy statement and the principles incorporated therein. Such authority shall be in addition to the authority specified in paragraph (1) to enforce this section under titles IV and V. In addition, the Commission shall have authority to adopt procedures for the adjudication of complaints alleging a violation of the broadband policy statement or principles incorporated therein.

''(4) LIMITATION.—Notwithstanding paragraph (1), the Commission's authority to enforce the broadband policy statement and the principles incorporated therein does not include authorization for the Commission to adopt or implement rules or regulations regarding enforcement of the broadband policy statement and the principles incorporated therein, with the sole exception of the authority to adopt procedures for the adjudication of complaints, as provided in paragraph (3).[17]

AT&T/BellSouth Merger Commitments (December 28, 2006)

Net Neutrality

1. Effective on the Merger Closing Date, and continuing for 30 months thereafter, AT&T/BellSouth will conduct business in a manner that comports with the principles set forth in the Commission's Policy Statement, issued September 23, 2005 (FCC 05-151).

2. AT&T/BellSouth also commits that it will maintain a neutral network and neutral routing in its wireline broadband Internet access service. This commitment shall be satisfied by AT&T/BellSouth's agreement not to provide or to sell to Internet content, application, or service providers, including those affiliated with

[17] Communications Opportunity, Promotion, and Enhancement Act of 2006, HR 5252, 109th Congress.

AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination. This commitment shall apply to AT&T/BellSouth's wireline broadband Internet access service from the network side of the customer premise equipment up to and including the Internet Exchange Point closest to the customer's premise, defined as the point of interconnection that is logically, temporally or physically closest to the customer's premise where public or private Internet backbone networks freely exchange Internet packets.

This commitment does not apply to AT&T/BellSouth's enterprise managed IP services, defined as services available only to enterprise customers 16 that are separate services from, and can be purchased without, AT&T/BellSouth's wireline broadband Internet access service, including, but not limited to, virtual private network (VPN) services provided to enterprise customers. This commitment also does not apply to AT&T/BellSouth's Internet Protocol television (IPTV) service. These exclusions shall not result in the privileging, degradation, or prioritization of packets transmitted or received by AT&T/BellSouth's non-enterprise customers' wireline broadband Internet access service from the network side of the customer premise equipment up to and including the Internet Exchange Point closest to the customer's premise, as defined above.

This commitment shall sunset on the earlier of (1) two years from the Merger Closing Date, or (2) the effective date of any legislation enacted by Congress subsequent to the Merger Closing Date that substantially addresses "network neutrality" obligations of broadband Internet access providers, including, but not limited to, any legislation that substantially addresses the privileging, degradation, or prioritization of broadband Internet access traffic.[18]

Internet Freedom Preservation Act of 2008 - HR 5353 (introduced February 12, 2008)

SEC. 3. BROADBAND POLICY.

Title I of the Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by adding at the end the following new section:

`SEC. 12. BROADBAND POLICY.
`It is the policy of the United States--

`(1) to maintain the freedom to use for lawful purposes broadband telecommunications networks, including the Internet, without unreasonable interference from or discrimination by network operators, as has been the policy and history of the Internet and the basis of user expectations since its inception;

`(2) to ensure that the Internet remains a vital force in the United States economy, thereby enabling the Nation to preserve its global leadership in online commerce and technological innovation;

`(3) to preserve and promote the open and interconnected nature of broadband networks that enable consumers to reach, and service providers to offer, lawful content, applications, and services of their choosing, using their selection of devices, as long as such devices do not harm the network; and

`(4) to safeguard the open marketplace of ideas on the Internet by adopting and enforcing baseline protections to guard against unreasonable discriminatory favoritism for, or degradation of, content by network operators based upon its source, ownership, or destination on the Internet.'.[19]

[18] Letter of Commitment, AT&T, December 28, 2006, WC Docket No. 06-74.
[19] Internet Freedom Preservation Act of 2008, HR 5353, 110th Congress.