

ARTICLES

INVOKING AND AVOIDING THE FIRST AMENDMENT: HOW INTERNET SERVICE PROVIDERS LEVERAGE THEIR STATUS AS BOTH CONTENT CREATORS AND NEUTRAL CONDUITS

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Much of the policy debate and scholarly literature on network neutrality has addressed whether the Federal Communications Commission ("FCC") has statutory authority to require Internet Service Providers ("ISPs") to operate in a nondiscriminatory manner. Such analysis largely focuses on questions about jurisdiction, the scope of lawful regulation, and the balance of power between stakeholders—generally adverse to government oversight and government agencies—apparently willing to overcome the same inclination. The public policy debate primarily considers micro-level issues without much thought about broader concerns such as First Amendment values.

While professing to support marketplace resource allocation and a regulation-free Internet, the FCC has selectively imposed compulsory duties on ISPs who qualify for classification as largely unregulated information service providers. Such regulation can tilt the competitive playing field, possibly favoring some First Amendment speakers to the detriment of others. Yet the FCC has summarily dismissed any concerns that the Commission's regulatory regime inhibits First Amendment-protected expression.

For their part, ISPs have evidenced inconsistency in how seriously they value and exercise their First Amendment speaker rights. Such reticence stems, in part, from the fact that ISPs combine the provision of conduits, using telecommunications transmission capacity, with content. While not operating as regulated common carriers (the traditional classification of conduit-only providers), ISPs can avoid tort and copyright liability when they refrain from operating as speakers and editors of content. In other instances, the same enterprise becomes an aggressive advocate for First Amendment speaker rights when selecting content, packaging it into an easily accessible and user-friendly "walled garden" and employing increasingly sophisticated information processing techniques to filter, prioritize, and inspect digital packets.

Technological and marketplace convergence creates the ability and incentive for ISPs to operate as publishers, editors, content aggregators, and non-neutral conduit providers. No single First Amendment media model (print, broadcast, cable television, and telephone) or legislative definition of "service" (telecommunications, telecommunications service, and information service) covers every ISP activity. Despite the lack of a single applicable model and the fact that ISPs provide different services, the FCC continues to apply a single, least-regulated classification. The inclination to classify everything that an ISP does into one category promotes administrative convenience, but ignores the complex nature of ISP services and the potential to harm individuals, groups, and First Amendment values absent government oversight. For example, the information service classification enables ISPs to engage in price and quality of service discrimination that network neutrality advocates worry will distort a free marketplace of ideas.

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This paper will examine the different First Amendment rights and responsibilities borne by ISPs when they claim to operate solely as conduits and when they combine conduit and content. The paper will show that ISPs face conflicting motivations, with light FCC regulation favoring diversification into content management services like that provided by editors and cable television operators, but with legislatively conferred exemptions from liability available when ISPs avoid managing content. The paper concludes that current media models provide inconsistent and incomplete direction on how to consider ISPs' joint provision of conduit and content. The paper provides insights on how a hybrid model can address media convergence and promote First Amendment values while imposing reasonable nondiscrimination responsibilities on ISPs.

TABLE OF CONTENTS

INTRODUCTION	1281
I. ISPs OPERATE AS CONTENT CREATORS AND MANAGERS, AS WELL AS CONDUITS.....	1284
II. ISPs HAVE THE MOTIVATION AND MEANS TO OPERATE AS BOTH CONTENT MANAGERS AND NEUTRAL CONDUITS.....	1296
A. <i>Component Parts of the World Wide Web</i>	1298
B. <i>Convergence Triggers a Regulatory Quandary</i>	1302
C. <i>ISPs Can Operate as First Amendment Speakers</i>	1305
D. <i>Case Law Supports Limited Regulation of Internet-Mediated Speech</i>	1306
E. <i>The FCC Tries to Dismiss the First Amendment Implication of Its Decisions</i>	1308
III. ISPs ALSO OPERATE AS NON-SPEAKER CONDUITS.....	1309
A. <i>Laws Now Incorrectly Assume ISPs Lack the Ability or Incentive to Monitor, Filter, Edit, and Otherwise Manage Content</i>	1311
IV. THE DEBATE ABOUT NETWORK NEUTRALITY RAISES FIRST AMENDMENT ISSUES.....	1313
A. <i>ISPs' First Amendment Freedoms</i>	1315
V. ISPs SHOULD NOT HAVE TWIN OPTIONS FOR AVOIDING SAFEGUARDS SIMPLY BECAUSE REGULATORS AND COURTS APPLY AN UNCALIBRATED DEFAULT OPTION.....	1317
A. <i>When ISPs Operate in a Non-Neutral Manner, They Qualify as First Amendment Speakers and Publishers Whose Rights May Conflict with Subscribers and Other Content Providers</i>	1320
VI. CONCLUSION AND RECOMMENDATIONS	1321

INTRODUCTION

Internet Service Providers (“ISPs”) can exploit inflexible and dichotomous regulatory classifications to qualify as both creators and managers of content, and as intentionally neutral conduits of content created by others. With nimble maneuvering, ISPs can toggle between claiming First Amendment-protected speaker rights¹ and invoking “safe harbor”² exemptions from liability for the content they carry.³ In the first instance, ISPs claim private property ownership rights,⁴ the need to manage their networks,⁵ their qualification as

¹ See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409 (1986) (“[T]he freedom of speech guaranteed by the first amendment amounts to a protection of autonomy—it is the shield around the speaker.”); Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 176 (2007) (“[T]he First Amendment protects speakers’ rights so that speakers can participate as they deem necessary in the formation of public opinion. This protection follows from the premise that the purpose of the First Amendment is to protect processes of democratic legitimation, and from the claim that autonomy of participation in public discourse is necessary for democratic legitimation.”).

² A safe harbor constitutes “[a]n area or means of protection . . . [or a] provision (as in a statute or regulation) that affords protection from liability or penalty.” BLACK’S LAW DICTIONARY 1363 (8th ed. 2004).

³ Section 230(c)(1) of the Communications Decency Act provides a safe harbor exemption from liability by eliminating the classification of providers and users of interactive computer service as speakers or publishers when delivering and presenting information provided by another information content provider. Communications Decency Act of 1996 § 509, 47 U.S.C. § 230(c)(1) (2006). Section 230(f)(2) defines interactive computer service as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” *Id.* § 230(f)(2). Information content provider “means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* § 230(f)(3).

⁴ See, e.g., Verizon Online Terms of Service, Attachment A: Acceptable Use Policy 11 (2009), http://www22.verizon.com/terms/files/FiOS_Internet_TOS.pdf (“Verizon reserves the sole discretion to deny or restrict your Service, or immediately to suspend or terminate your Service, if the use of your Service by you or anyone using it, in our sole discretion, violates the Agreement or other Verizon policies, is objectionable or unlawful, interferes with the functioning or use of the Internet or the Verizon network by Verizon or other users, or violates the terms of this Acceptable Use Policy (“AUP”).”).

⁵ See Comcast Corp., 23 F.C.C.R. 13,028, 13,058 (2008) (memorandum opinion and order) (“Comcast and several other commenters maintain a continual refrain that all network providers must manage bandwidth in some manner and that providers need flexibility to engage in the reasonable network management practices.” (internal quotation marks omitted)) (footnote call numbers omitted), *rev’d*, Comcast Corp. v. F.C.C., No. 08-1291, slip op. (D.C. Cir. April 6, 2010), available at <http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf>.

largely unregulated information services providers,⁶ and ample competition in the marketplace of ideas via an Internet-mediated forum,⁷ collectively support the view that government has limited, if any, oversight responsibilities. In the second instance, ISPs eschew any content creator or manager activities with an eye toward maintaining legislatively conferred insulation from liability for any harms resulting from the content they carry.

ISPs seemingly can turn on and off their speaker status to qualify for two different types of limits on government regulation of the content they deliver. When operating ostensibly as neutral conduits, these episodic advocates of free expression gladly abandon this status for an even more desirable one: qualifying for safe harbor exemptions from tort⁸ and copyright infringement liability.⁹ Unlike other media, such as cable television, whose operators rejected any parallel to conduit neutrality as anathema to their First Amendment speaker rights,¹⁰ ISPs heretofore have embraced conduit neutrality, which vi-

⁶ Information service is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20) (2006).

⁷ See Neil Weinstock Netanel, *New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 956 (2008) (“Today, anyone with access to a computer or smart phone can disseminate text, images, sounds, and video the world over. In our era of ubiquitous ‘cheap speech,’ some commentators insist, we have no need for speaker rights of access to the print and broadcast media (even if we did before the digital era); indeed, we have little justification for imposing any regulation on the mass media to further expressive diversity and informed public discussion of important issues.”); see also Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1083 (1999) (“Over the years, it has not been uncommon for scholars or jurists to analogize the right of free expression to a marketplace in which contrasting ideas compete for acceptance among a consuming public.”); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1847 (1995) (predicting that “the new technologies will make it much easier for all ideas, whether backed by the rich or the poor, to participate in the marketplace”).

⁸ See 47 U.S.C. § 230 (providing protection for the blocking and screening of offensive material).

⁹ See Digital Millennium Copyright Act of 1998 § 202(a), 17 U.S.C. § 512 (2006) (detailing limitations on copyright infringement liability relating to material online).

¹⁰ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653 (1994) (*Turner I*) (“Appellants maintain that the must-carry provisions trigger strict scrutiny because they compel cable operators to transmit speech not of their choosing. Relying principally on *Miami Herald Publishing Co. v. Tornillo*, appellants say this intrusion on the editorial control of cable operators amounts to forced speech which, if not *per se* invalid, can be justified only if narrowly tailored to a compelling government interest.” (internal citations omitted)).

tiates their expressive freedom but qualifies them for insulation from content liability.

This win-win brinksmanship opportunity shows how ISPs can exploit technological and market convergence to secure competitive advantages based on government-conferred regulatory classifications.¹¹ By qualifying for different types of exemption from government oversight based on shifting status as speaker and non-speaker, ISPs can engage in regulatory arbitrage, i.e., strategic use of regulatory classifications to avoid costly government oversight still applicable to competitors. For example, ISPs currently avoid regulation when they deliver video programming that duplicates and increasingly constitutes a competitive alternative to both broadcast and cable television.¹²

This paper will examine the different First Amendment rights and responsibilities borne by ISPs when they claim to operate solely as conduits and when they combine conduit and content. The paper will show that ISPs face conflicting motivations in light of FCC regulation favoring diversification into content management and information processing services, as opposed to legislatively conferred exemptions from liability available when ISPs avoid managing content. The paper concludes that current media models provide inconsistent and incomplete direction on how to consider ISPs' joint provision of conduit and content. The paper provides insights on how a hybrid model can address media convergence and promote First Amendment values while imposing reasonable nondiscrimination responsibilities on ISPs.

This paper concludes that conferring ISPs absolute First Amendment speaker priority ignores or subordinates equally worthy expres-

11 See generally Rob Frieden, *What Do Pizza Delivery and Information Services Have in Common? Lessons From Recent Judicial and Regulatory Struggles with Convergence*, 32 RUTGERS COMPUTER & TECH. L.J. 247 (2006) (discussing why the Supreme Court's affirming the FCC's classification of DSL as an information service effectively provides ISPs with a blanket deregulatory safe harbor).

12 See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 F.C.C.R. 542, 548 (2009) ("In addition, [Local Exchange Carriers] . . . are increasingly utilizing Internet Protocol Television ("IPTV") technologies. Verizon's FTTH [fiber to the home] network, marketed under the brand name 'FiOS,' allows delivery of multichannel video services, in addition to telephony and high-speed Internet access service. At the end of 2006, Verizon reported that it offered video programming via FiOS to more than 2.4 million households in 200 cities in 10 states and served 207,000 subscribers."). Internet Protocol Television ("IPTV") offers access to video programming via the Internet. Users can download files that contain such content for subsequent viewing. Alternatively, they can receive an online "stream" of video packets corresponding to an existing file, or a simulcast of "live" programming.

sion rights of ISP subscribers and content providers that need temporary passage through ISP networks. Put simply, ISPs should not have absolute freedom to invoke First Amendment priority when electing to operate as content creators/managers, but also the ability to evade regulation by invoking safe harbor exemptions when operating as quasi-neutral conduits. The paper concludes that structural separation of conduit and content functions provide ISPs with a simple, low cost vehicle to serve both markets in much the same way as incumbent telecommunications ventures created separate subsidiaries and spun-off ventures to serve wireless and directory publishing markets.

I. ISPS OPERATE AS CONTENT CREATORS AND MANAGERS, AS WELL AS CONDUITS

Both the United States Congress and the FCC have not fully addressed the consequences of technological and marketplace convergence that eliminates mutual exclusivity between ventures that operate as conduits for the delivery of content and ventures that create, edit, moderate, and otherwise select and package content. Traditionally, telecommunications services providers have qualified for regulatory status as common carriers¹³ based on their decision to operate solely as ventures delivering content created by others. The FCC relied on this conduit election and later required carriers operating as both conduit and content providers to create a separate subsidiary for offering any non-conduit, information creation, or processing function.¹⁴ The FCC subsequently abandoned structural separation based primarily on unproven carrier assertions that the requirement triggered burdensome costs, loss of operational efficiency, and infrastructure investment disincentives.¹⁵

13 See Communications Act of 1934, 47 U.S.C. §§ 201–74 (2006) (requiring providers of basic telecommunications services to operate on a nondiscriminatory, common carrier basis, providing services on just and reasonable charges and also subject to numerous entry regulations and tariffing, interconnection, and operating requirements).

14 The FCC crafted a basic and enhanced services dichotomy with the former referring to telecommunications, regulated as essential public utility services, and enhanced services, unregulated and offered by a separate subsidiary. See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 486–87 (1980) (final decision), *reconsidered in* 84 F.C.C.2d 50 (1980) and 88 F.C.C.2d 512, 550 (1981), *aff'd sub nom.*, Computer and Commc'n. Indus. Ass'n v. FCC, 693 F.2d 198, 220 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, 28 F.C.C.2d 267, 285–86 (1971) (final decision and order), *aff'd in part sub nom.*, GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), *remanded to* 40 F.C.C.2d 293 (1973).

15 Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 14 F.C.C.R. 4289, 4289–93 (1999) (report and order); Computer III Fur-

For instances where a venture provides both conduit and content, such as broadcasting and cable television, the inclusion of the latter functions qualifies the venture for conditional First Amendment speaker rights.¹⁶ Broadcasters may qualify for comparatively fewer expression rights than those accruing to their consumers based on spectrum scarcity and other public policy factors,¹⁷ but the content delivery function they perform does not diminish their threshold qualification as First Amendment speakers. Similarly, cable television operators have recognized First Amendment speaker rights, conditioned not by the fact that they use spectrum and telecommunication networks to deliver content, but because reasonable governmental interests, e.g., preserving commercial broadcasting, can limit and constrain the potential adverse economic impact of cable television market entry vis-à-vis incumbent local broadcasters.¹⁸

ther Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 13 F.C.C.R. 6040, 6045–48 (1998) (further notice of proposed rulemaking), *reconsidered in* 14 F.C.C.R. 21628, 21628–30 (1999); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, 6 F.C.C.R. 7571, 7572 (1991) (report and order), *vacated in part and remanded*, California v. FCC, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995); Computer III Remand Proceedings, 5 F.C.C.R. 7719, 7720 (1990) (report and order), *reconsidered in* 7 F.C.C.R. 909 (1992), *petition for review denied*, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); Amendment to Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 2 F.C.C.R. 3072, 3073–74 (1987) (report and order); Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C. 2d 958, 1130 (1986) (report and order), *reconsidered in* 2 F.C.C.R. 3035 (1987), 3 F.C.C.R. 1135 (1988) and 4 F.C.C.R. 5927 (1989), *vacated in part*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

16 See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”).

17 See *id.* at 637 (“It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media.”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386–90 (1969) (“Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them.” (internal citations omitted)).

18 See *Turner Broad. Sys., Inc.*, 512 U.S. at 632–33 (“Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance.”); see also *id.* at 647 (“By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue—or, in the case of noncommercial broadcasters, sufficient viewer contributions—to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of

In a similar fashion, the FCC has chosen to subordinate or ignore ISPs' conduit function that uses owned or leased telecommunications networks to deliver content.¹⁹ Many ISPs provide both Internet access, i.e., a conduit for subscribers to access Internet-mediated content, and content in the form of World Wide Web pages. The Commission has evidenced an apparent inability to subject a single enterprise to two different regulatory classifications even when such a venture actually provides both types of service,²⁰ as often occurs. In

the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming." (internal citations omitted)).

19 See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4823 (2002) (declaratory ruling and notice of proposed rulemaking) ("Cable modem service is not itself and does not include an offering of telecommunications service to subscribers. We disagree with commenters that urge us to find a telecommunications service inherent in the provision of cable modem service. Consistent with the statutory definition of information service, cable modem service provides the capabilities described above 'via telecommunications.' That telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." (footnote call numbers omitted)), *aff'd sub nom.*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); see also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14,853, 14,910–11 (2005) (report, order, and notice of proposed rulemaking) [hereinafter DSL Reclassification Report and Order] (reclassifying DSL from a telecommunications service to an information service: "We conclude, consistent with *Brand X*, that such a transmission component is mere 'telecommunications' and not a 'telecommunications service.' As stated above, the Act defines telecommunications service as 'the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.' Thus, whether a telecommunications service is being provided turns on what the entity is 'offering . . . to the public,' and customers' understanding of that service. End users subscribing to wireline broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services—both Internet access service and a distinct *transmission* service, for example. Thus, the transmission capability is part and parcel of, and integral to, the Internet access service capabilities. Accordingly, we conclude that wireline broadband Internet access service does not include the provision of a telecommunications service to the end user irrespective of how the service provider may decide to offer the transmission component to other service providers." (footnote call numbers omitted)), *petition for review denied*, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

20 See Federal-State Joint Board on Universal Service, 13 F.C.C.R. 11,501, 11,522–23 (1998) (report to Congress) ("The language and legislative history of . . . [the Communications Act of 1996] indicate that the drafters . . . regarded telecommunications services and information services as mutually exclusive categories."); Communications Assistance for Law Enforcement Act and Broadband Access and Services, 20 F.C.C.R. 14,989, 14,996 (2005) (first report, order, and further notice of proposed rulemaking) [hereinafter CALEA Implementation] ("In keeping with the legislative history of the Communications Act, the Commission interprets that Act's definitions of 'telecommunications service' and 'information service' to be mutually exclusive." (citing Federal-State Joint Board on Universal Service, 13 F.C.C.R. at 11,520, 11,522–23)); see also *id.* at 14,994–98 (describing this

other common carrier regulated industries, such as electricity, water, and residential natural gas delivery, many public utilities have created separate subsidiaries to engage in unregulated activities.

The FCC classifies ISPs as information service²¹ providers, a category that emphasizes the content creation, selection, packaging, and processing function.²² Absent other considerations, such as exemption from liability for the content delivered, ISPs can invoke the FCC's information service classification as evidence that the expert government agency has recognized the importance in emphasizing ISPs' role in promoting a robust marketplace of ideas, largely free of government oversight, including regulation that would have applied if the ISPs' conduit function had predominated.

The Telecommunications Act of 1996²³ provides a definition for information service substantially different from telecommunications²⁴ and telecommunications service.²⁵ ISPs qualify for quite limited gov-

mutual exclusivity with respect to facilities-based wireline broadband Internet access services).

21 Information service is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20) (2006).

22 See DSL Reclassification Report and Order, *supra* note 19, at 14,864 ("Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as 'information services.' The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.*, e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service. Indeed, as with cable modem service, an end user of wireline broadband Internet access service cannot reach a third party's web site without access to the Domain Naming Service (DNS) capability 'which (among other things) matches the Web site address the end user types into his browser (or "clicks" on with his mouse) with the IP address of the Web page's host server.' The end user therefore receives more than transparent transmission whenever he or she accesses the Internet." (footnote call numbers omitted)).

23 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 59 (codified in scattered sections of 47 U.S.C.).

24 Telecommunications is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (2006).

25 Telecommunications service "means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(46). The Act defines telecommunications carrier as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that

ernment oversight based largely on the view that government must not regulate the content traversing the various networks that make up the Internet. Additionally, Congress and the FCC assume ISPs either operate in a robustly competitive marketplace, or alternatively that these ventures do not provide essential public utility service necessitating heavy-handed regulatory oversight to ensure fair and nondiscriminatory access to these services at reasonable prices. Having applied a default least regulated classification to information services, the FCC in several instances has had to devise legally suspect justifications for partial re-regulation on an ad hoc basis. Examples include forcing Voice over the Internet Protocol ("VoIP")²⁶ service providers

the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." *Id.* § 153(44).

- 26 Voice over the Internet Protocol ("VoIP") refers to the use of the Internet to carry and deliver on a real-time immediate basis packets of data that correspond to a voice conversation. VoIP services range in quality, reliability, and price and can link both computers and ordinary telephone handsets. For technical background on how VoIP works, see Susan Spradley & Alan Stoddard, Power Point Presentation at the FCC Office of Engineering and Technology, Tutorial on Technical Challenges Associated with the Evolution to VoIP, (Sept. 22, 2003) available at <http://www.fcc.gov/realaudio/presentations/2003/120103/comments/Nortel-RaymondLStrassburger.ppt>, and Intel.com, IP Telephony Basics (White Paper), http://www.intel.com/network/csp/resources/white_papers/4070web.htm; see also Stephen E. Blythe, *The Regulation of Voice-Over-Internet-Protocol in the United States, the European Union, and the United Kingdom*, 5 J. HIGH TECH. L. 161 (2005) (predicting that VoIP will become more regulated given the ever-improving quality of service and rate of substitution for older technologies); Charles J. Cooper & Brian Stuart Koukotchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J. TELECOMM. & HIGH TECH. L. 293 (2008) (arguing for immediate federal preemption of state regulation of local wireline telecommunications services); Mark C. Del Bianco, *Voices Past: The Present and Future of VoIP Regulation*, 14 COMMLAW CONCEPTUS 365 (2006) (offering a comprehensive history of VoIP regulation); R. Alex DuFour, *Voice over Internet Protocol: Ending Uncertainty and Promoting Innovation Through a Regulatory Framework*, 13 COMMLAW CONCEPTUS 471 (2005) (suggesting that VoIP should be regulated through only a skeleton framework until the technology evolves to avoid stifling growth); Jerry Ellig & Alastair Walling, *Regulatory Status of VoIP in the Post-Brand X World*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 89 (2006) (explaining why VoIP should be classified as an "information service" within the federal regulatory scheme); Amy L. Leisinger, *If It Looks Like a Duck: The Need for Regulatory Parity in VoIP Telephony*, 45 WASHBURN L.J. 585 (2006) (positing that regulators must implement a new approach to properly govern VoIP technology and recommending Congress revise the 2004 VoIP Regulatory Freedom Bill as a solution); Linda A. Rushnak, *The FCC & VoIP: A Tenuous Regulatory Relationship*, J. INTERNET L., Dec. 2007, at 3 (reviewing regulatory history of VoIP to illustrate how FCC's failure to classify VoIP as an information or telecommunications service effectively preempts state regulation and allows the FCC to bring specific portions of VoIP under its exclusive control); Melissa Winberg, Note, *Calling All Angles: Perspectives on Regulating Internet Telephony*, 10 VAND. J. ENT. & TECH. L. 241 (2007) (advocating that the FCC's paramount goals when crafting VoIP rules should be to promote technological innovation and to replace regulation with competition).

to subsidize universal telephone service,²⁷ to cooperate with law enforcement officials,²⁸ to adapt service for access by callers with disabilities,²⁹ to mandate service adjustments to support access to emergency services,³⁰ and to provide safeguards against abrupt discontinuance, reduction, or impairment of service.³¹ Notwithstanding a preference for “bright line” distinctions between service categories, the FCC has to confront the reality that convergence blends telecommunications and information services, conduit and content, and speakers qualifying for varying degrees of First Amendment protection.

The telecommunications services versus information services regulatory distinction creates a sharp demarcation between extensive and nearly non-existent regulation even though the dichotomy may not be so clear in practice.³² Ventures classified as information services have a financial incentive to secure the same sort of common carrier or conduit exemption from content regulation, not as First Amendment speakers, but as neutral conduits operating much like their telecommunications services counterparts. To secure safe harbor ex-

27 See Universal Service Contribution Methodology, 21 F.C.C.R. 7518, 7538 (2006) (report, order, and notice of proposed rulemaking) (extending § 254(d) permissive authority to require interconnected VoIP providers to contribute to the federal universal service fund (“USF”)), *reh’g denied, vacated in part on other grounds*, Vonage Holding Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007).

28 See Communications Assistance for Law Enforcement Act and Broadband Access and Services, 20 F.C.C.R. 14,989, 14,991 (2005) (first report, order, and further notice of proposed rulemaking) (concluding that the Communications Assistance for Law Enforcement Act applies to facilities-based broadband Internet access providers and providers of interconnected VoIP service), *aff’d sub nom.*, Am. Council on Educ. v. FCC, 451 F.3d 226 (D.C. Cir. 2006).

29 See IP-Enabled Services, 22 F.C.C.R. 11,275 (2007) (report and order) (extending the disability access requirements for telecommunications service providers and equipment manufacturers under § 255 of the Communications Act of 1934 to providers of VoIP services and to manufacturers of specially designed equipment used to provide those services), *amended by* 22 F.C.C.R. 18,319 (waiving for six months the requirements set forth in *IP-Enabled Services*, 22 F.C.C.R. 11,275 (2007), that interconnected VoIP providers must transmit 711 calls to an appropriate relay provider).

30 See IP-Enabled Services, 20 F.C.C.R. 10,245, 10,246 (2005) (first report, order, and notice of proposed rulemaking) (adopting rules requiring providers of interconnected VoIP service to supply enhanced 911 capabilities to their customers), *aff’d sub nom.*, Nuvio Corp. v. FCC, 473 F.3d 302 (D.C. Cir. 2006).

31 See IP-Enabled Services, 24 F.C.C.R. 6039 (2009) (report and order) (extending “to providers of interconnected VoIP service the discontinuance obligations that apply to domestic non-dominant telecommunications carriers under section 214 of the Communications Act of 1934”).

32 See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1009 (2005) (Scalia, J., dissenting) (“It is therefore inevitable that customers will regard the competing cable-modem service as giving them *both* computing functionality *and* the physical pipe by which that functionality comes to their computer . . .”).

emption from liability for the torts³³ and copyright infringement³⁴ committed by their subscribers, ISPs need to claim that they had nothing to do with the creation, editing, monitoring, and packaging of the content. So, on one hand, ISPs provide First Amendment-protected information that the ISP creates or for which it assumes management responsibility, but in many other instances, ISPs disclaim any management or creation responsibility as though they operated as the functional equivalent to a common carrier.

Heretofore, ISPs have successfully manipulated this bi-modal environment to their commercial advantage by finding ways to operate non-neutral networks without regulatory sanction. The nature and scope of First Amendment analysis has been limited and elementary, largely patterned on the Supreme Court's conclusion that the Internet qualifies for maximum protection from government intervention by promoting an open and robust marketplace of ideas.³⁵ The Internet certainly does promote openness and accessibility in light of the lack of natural resource limitations like radio spectrum. Yet, ISPs still operate the primary gateways providing the first and last link to the Internet,³⁶ and increasingly have both the incentive and ability to con-

³³ See *supra* note 3 and accompanying text.

³⁴ Title II of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 and 28 U.S.C.), added § 512 to the Copyright Act to create four new limitations on liability for copyright infringement by online service providers. See 17 U.S.C. § 512 (2006). The limitations are based on the following four categories of conduct by a service provider: 1) transitory communications; 2) system caching; 3) storage of information on systems or networks at direction of users; and 4) information location tools. See *id.* § 512(a)–(d). ISPs lose the safe harbor liability exemption when they have actual knowledge of copyright infringement. See, e.g., *id.* § 512(c)(1)(A). Each limitation completely bars monetary damages and restricts the availability of injunctive relief. See, e.g., *id.* § 512(a); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1369 (2004) (“Congress enacted the safe harbors in response to concerns expressed by online service providers about their potentially overwhelming liability for copyright infringement committed by their users.”).

³⁵ The Supreme Court considers Internet communications as a publishing activity and therefore a core element of First Amendment speaker/publisher rights. See *Reno v. ACLU*, 521 U.S. 844, 853 (1997) (“Any person or organization with a computer connected to the Internet can ‘publish’ information.”).

³⁶ Statistics compiled by the FCC show that cable modem and DSL Internet access serves approximately 80% of the market for broadband services exceeding 200 kilobits per second. See INDUS. ANALYSIS AND TECH. DIV., WIRELINE COMPETITION BUREAU, FED. COMM’N COMM’N, *HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2008* 7–8 (2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf.

Of the 86 million residential high-speed connections at year-end 2008, cable modem service represented 46%, DSL service represented 31%, mobile wireless data plans for full Internet access represented 18%, fiber optic cable delivered broadband represented 3%,

trol access and to manage their networks in non-neutral ways that prioritize traffic and impact First Amendment freedoms.³⁷

Much of the policy debate and scholarly literature on network neutrality³⁸ has addressed whether the FCC has statutory authority to require ISPs to operate in a nondiscriminatory manner. Such analy-

and all other technologies represented 1%. *Id.* at 7. The FCC has received justly deserved criticism for the way in which it has compiled statistics of broadband market penetration and the inferences it has derived from the collected data. The Commission frames its statistics with an eye toward overstating the scope of market penetration and competition by defining broadband as any service operating at 200 kilobits per second in one direction and by counting competitors on the basis of whether one subscriber exists within the geographical area represented by a postal zip code. See Rob Frieden, *Lies, Damn Lies and Statistics: Developing a Clearer Assessment of Market Penetration and Broadband Competition in the United States*, 14 VA. J.L. & TECH. 100 (2009), http://www.vjolt.net/vol14/issue2/v14i2_100%20-%20Frieden.pdf (comparing and contrasting the FCC's identification of broadband options in the author's home zip code with what actual options the author could identify).

³⁷ See Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 633 (2008) (concluding that ISPs' regulatory status as information service providers does not provide an absolute exemption from responsibilities to examine the content they carry and to provide reasonable safeguards for protecting copyrights).

³⁸ See Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273 (2009); Rob Frieden, *Internet 3.0: Identifying Problems and Solutions to the Network Neutrality Debate*, 1 INT'L J. COMM. 461 (2007); Rob Frieden, *Network Neutrality or Bias?—Handicapping the Odds for a Tiered and Branded Internet*, 29 HASTINGS COMM. & ENT. L.J. 171 (2007); Sascha D. Meinrath & Victor W. Pickard, *Transcending Net Neutrality: Ten Steps Toward an Open Internet*, J. INTERNET L., Dec. 2008, at 1; Daniel F. Spulber & Christopher S. Yoo, *Rethinking Broadband Internet Access*, 22 HARV. J.L. & TECH. 1 (2008); Kevin Werbach, *The Centripetal Network: How the Internet Holds Itself Together, and the Forces Tearing it Apart*, 42 U.C. DAVIS L. REV. 343 (2008); Christopher S. Yoo, *Network Neutrality, Consumers, and Innovation*, 2008 U. CHI. LEGAL F. 179; see also Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483 (2006); Brett M. Frischmann & Barbara van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS J. 383 (2007); Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103 (2006); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001); J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 J. COMPETITION L. & ECON. 349 (2006); Adam Thierer, *Are "Dumb Pipe" Mandates Smart Public Policy? Vertical Integration, Net Neutrality, and the Network Layers Model*, 3 J. TELECOMM. & HIGH TECH. L. 275 (2005); Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. TELECOMM. & HIGH TECH. L. 329 (2007); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847 (2006); Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. TELECOMM. & HIGH TECH. L. 23 (2004); Craig McTaggart, *Was The Internet Ever Neutral?*, Presentation at the George Mason University School of Law 34th Research Conference on Communication, Information and Internet Policy (Sept. 30, 2006), available at <http://web.si.umich.edu/tprc/papers/2006/593/mctaggart-tprc06rev.pdf>.

sis largely focuses on questions about jurisdiction, the scope of lawful regulation, and the balance of power between stakeholders, generally adverse to government oversight, and government agencies, apparently willing to overcome the same inclination. The public policy debate primarily considers micro-level issues, without much consideration of broader concerns, such as First Amendment values and whose First Amendment interests to champion when conflicts arise.³⁹

When ISPs operate as non-neutral content creators and managers, First Amendment analysis becomes more complex because divergent interests exist between the ISP, its end users downstream, and content providers upstream⁴⁰ that may partner or compete with the ISP. In light of such divergent interests, courts may have to reach conclusions about whose First Amendment rights predominate. In broadcasting, the Supreme Court determined that end users' listener/viewer rights predominated in light of broadcasters' use of scarce public spectrum. While the Internet has no equivalent natural resource scarcity, prioritization of First Amendment rights may still have to occur much like what happened when the Supreme Court in the *Turner Broadcasting System* cases evaluated the rights of cable operators vis-à-vis their subscribers and competing content providers, including television broadcasters who secured the congressionally mandated right to demand that cable operators must carry broadcast channels.

While professing to support marketplace resource allocation and a regulation-free Internet, the FCC has selectively imposed regulatory

³⁹ Scholarship that addresses network neutrality in the context of the First Amendment includes: Ammori, *supra* note 38; Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009); Brett M. Frischmann, *Speech, Spillovers and the First Amendment*, 2008 U. CHI. LEGAL F. 301; Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOFSTRA L. REV. 1211 (2007); Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 I/S: J.L. & PUB. POL'Y FOR INFO. SOC'Y. 197 (2007); Jennifer L. Newman, *Keeping the Internet Neutral: Net Neutrality and Its Role in Protecting Political Expression on the Internet*, 31 HASTINGS COMM. & ENT. L.J., 153 (2008); Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1 (2009); Moran Yemini, *Mandated Network Neutrality and the First Amendment: Lessons from Turner and a New Approach*, 13 VA. J.L. & TECH. 1 (2008), http://www.vjolt.net/vol13/issue1/v13i1_a1-Yemini.pdf.

⁴⁰ A complete Internet routing involves several interconnected links. End users access the Internet via a narrowband connection such as dial-up telephone service, or via broadband service provided through cable modems, DSL, satellites or terrestrial wireless networks. The first and last refers to the networks used to originate and terminate Internet traffic. Because the content desired by subscribers is stored in servers located in geographically diverse areas, the company providing the first and last links must interconnect with networks operated by other ventures. The end user's first and last link provider operates midway between its subscribers downstream and other networks and content sources located upstream.

compliance duties on ISPs despite their classification as largely unregulated information service providers.⁴¹ Such regulation can tilt the competitive playing field by imposing more regulatory cost on some operators vis-à-vis competitors. ISP regulation also has the potential for favoring some speakers to the detriment (or subordination) of others, by affecting ISPs' content packaging decisions.

The FCC has summarily dismissed any concerns that the Commission's regulatory regime inhibits First Amendment protected expression. The Commission avoids any consideration of the First Amendment and a comparative assessment of speaker rights by concentrating on the conduit function and emphasizing that ISPs use their conduits to provide information services.⁴²

Additionally, the Commission relentlessly underscores how the ISP marketplace evidences robust competition and successful market

41 While acknowledging the Internet's importance and accessibility, the FCC held that it could regulate ISPs based directly on legislative mandates to improve accessibility, and indirectly using "ancillary jurisdiction" to promote the public interest:

[A]s muddy as the legal waters may seem to Comcast, we think our ancillary authority to enforce federal policy is quite clear. Peer-to-peer TCP connections provided through Comcast's broadband Internet access service are undoubtedly a form of "communication by wire," so the subject matter at issue here clearly falls within the Commission's general jurisdictional grant under Title I. And though our exercise of authority must be "reasonably ancillary to the effective performance" of the Commission's responsibility for "something," first and foremost, the "something" Comcast is looking for is right in the Act itself—it is the national Internet policy enshrined in section 230(b) of the Act.

Comcast Corp., 23 F.C.C.R. 13,028, 13,035 (2008) (memorandum opinion and order) (footnote call numbers omitted) (asserting jurisdiction to enforce regulatory policies over ISPs and to sanction Comcast for violating such policies when the company blocked traffic in the absence of network congestion and credible network management justifications), *rev'd*, Comcast Corp. v. F.C.C., No. 08-1291, slip op. (D.C. Cir. April 6, 2010), available at <http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf>.

42 For example, in sanctioning Comcast for its interference with subscribers' traffic, the FCC emphasized that it could regulate how ISPs prioritize or degrade traffic and in turn the flow of content absent reasonable ISP network management objectives. Such regulation "[u]nder these circumstances . . . do[es] not raise First Amendment concerns." *Id.* at 13,053 n.203.

penetration,⁴³ despite credible statistics that challenge this assumption.⁴⁴

Technological and marketplace convergence creates the ability and incentive for ISPs to use their telecommunications networks as conduits for information services as well as functional equivalents to broadcast television, cable television, and telephony.⁴⁵ ISPs operate as publishers, editors, content aggregators, *and* non-neutral conduit providers. Accordingly, no single First Amendment media model (print, broadcast, cable television, and telephone), or legislative defi-

43 The FCC has concluded "that advanced telecommunications capability [a term contained in the Telecommunications Act of 1996 that the FCC uses to identify broadband access] is being deployed to all Americans in a reasonable and timely fashion." Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans, 23 F.C.C.R. 9615 (2008) (fifth report); *see* Comcast Corp., 23 F.C.C.R. at 13028, 13085 ("Presently, we are benefiting from over \$100 billion in broadband investment, robust industry competition and cooperation and unprecedented consumer options in this dynamic multi-platform marketplace.").

44 *See* ROBERT D. ATKINSON, DANIEL K. CORREA & JULIE A. HEDLUND, EXPLAINING INTERNATIONAL BROADBAND LEADERSHIP: EXECUTIVE SUMMARY (2008) <http://www.itif.org/files/2008BBExecutiveSummary.pdf>; DANIEL K. CORREA, THE INFO. TECH. & INNOVATION FOUND., ASSESSING BROADBAND IN AMERICA: OECD AND ITIF BROADBAND RANKINGS (2007), <http://www.itif.org/files/BroadbandRankings.pdf>; Directorate for Science, Technology and Industry, Organization for Economic Co-Operation and Development, OECD Broadband Portal (Jan. 19, 2010), http://www.oecd.org/document/54/0,3343,en_2649_33703_38690102_1_1_1_1,00.html; Directorate for Science, Technology and Industry, Organization for Economic Co-Operation and Development, OECD Broadband Subscribers per 100 Inhabitants by Technology (June 2009) (Jan. 19, 2010), www.oecd.org/dataoecd/37/39/38449070.xls; THE INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION, 2008 ITIF BROADBAND RANKINGS 1 (2008), <http://www.itif.org/files/2008BBRankings.pdf>; International Telecommunication Union, ITU Broadband Statistics for 1 January 2006 (May 22, 2006), <http://www.itu.int/osg/spu/newslog/ITU+Broadband+Statistics+For+1+January+2006.aspx>; TAYLOR REYNOLDS & SACHA WUNSCH-VINCENT, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BROADBAND GROWTH AND POLICIES IN OECD COUNTRIES (2008), *available at* <http://www.oecd.org/dataoecd/32/57/40629067.pdf>; S. DEREK TURNER, FREE PRESS, BROADBAND REALITY CHECK II: THE TRUTH BEHIND AMERICA'S DIGITAL DECLINE (2006), http://www.freepress.net/files/broadband_report.pdf; S. DEREK TURNER, FREE PRESS, 'SHOOTING THE MESSENGER' MYTH VS. REALITY: U.S. BROADBAND POLICY AND INTERNATIONAL BROADBAND RANKINGS (2007), http://www.freepress.net/files/shooting_the_messenger.pdf.

45 Internet Protocol Television ("IPTV") offers access to video programming via the Internet. Users can download files that contain such content for subsequent viewing. Alternatively, they can receive an online "stream" of video packets corresponding to an existing file or a simulcast of "live" programming. Voice over the Internet Protocol ("VoIP") offers voice communications capabilities, much like ordinary telephone service, using the packet-switched Internet, for all or part of the link between call originator and call recipient. VoIP calls originating or terminating over the standard dial-up telephone network require conversion from or to the standard telephone network's architecture that creates a dedicated "circuit-switched" link, as opposed to the ad hoc, "best efforts" packet-switching used in the Internet.

inition of service (telecommunications, telecommunications service, and information service) covers every ISP activity. Despite the lack of a single applicable model and the fact that ISPs provide different services, the FCC continues to apply a single, least-regulated classification to convergent services. The inclination to classify everything that an ISP does into one category promotes administrative convenience but ignores the complex nature of ISP services and the potential for ISPs to harm individuals, groups, and First Amendment values.

For example, § 230 of the Communications Decency Act, which partially amended the Communications Act of 1934,⁴⁶ offers ISPs an opportunity to secure exemption from liability for transmitting content that has triggered a variety of quite serious personal and public harms including defamation,⁴⁷ child molestation,⁴⁸ and civil rights violations.⁴⁹ The exemption applies whenever an ISP eschews content creation and management functions and operates much like a common carrier.⁵⁰ ISPs also qualify for a safe harbor exemption from secondary liability for copyright infringement.⁵¹ Additionally, the FCC's application of an omnibus information service classification

⁴⁶ Communications Decency Act of 1996 § 509, 47 U.S.C. § 230(c) (2006).

⁴⁷ See, e.g., *Zeran v. Am. Online, Inc.* 129 F.3d 327, 328–29 (4th Cir. 1997) (“Section 230 . . . plainly immunizes computer service providers like AOL from liability [for defamation] for information that originates with third parties.”); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (“[T]he statutory language is clear: AOL is immune from suit . . .”).

⁴⁸ *Doe v. MySpace*, 474 F. Supp. 2d 843, 849–50 (W.D. Tex. 2007) (extending the immunity granted by the CDA to cases of child molestation).

⁴⁹ *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008) (holding that the web site operator did not manage the creation of content expressing discriminatory roommate preferences); cf. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1161–62, 1175 (9th Cir. 2008) (holding that § 230 did not insulate a web site operator that actively assisted in the creation of content identifying discriminatory intentions).

⁵⁰ For background on the § 230 safe harbor, see Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986 (2008); see also Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137 (2008); Amanda Groover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79 (2008); Tara E. Lynch, Comment, *Good Samaritan or Defamation Defender? Amending the Communications Decency Act to Correct the Misnomer of Section 230 . . . Without Expanding ISP Liability*, 19 SYRACUSE SCI. & TECH. L. REP. 1 (2008), available at <http://sslr.syr.edu/wp-content/uploads/lynch-final-version.pdf>; Cecilia Ziniti, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583 (2008). See generally Karen Horowitz, *When Is § 230 Immunity Lost?: The Transformation From Website Owner to Information Content Provider*, 3 SHIDLER J. L. COM. & TECH. 14 (2007), available at <http://www.lctjournal.washington.edu/Vol4/a08Horowitz.html>; Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101 (2007).

⁵¹ Digital Millennium Copyright Act of 1998 § 202(a), 17 U.S.C. § 512 (2006).

enables ISPs to engage in some types of price and quality of service discrimination that network neutrality advocates worry will distort a free marketplace of ideas.

II. ISPs HAVE THE MOTIVATION AND MEANS TO OPERATE AS BOTH CONTENT MANAGERS AND NEUTRAL CONDUITS

Innovations in information, communications, and entertainment (“ICE”) technologies now make it possible for ventures to provide a wide array of services that can exploit the efficiencies accruing from digitization,⁵² the versatility of the Internet and its operating protocols,⁵³ and declining unit costs. Key words such as faster, better, smarter, cheaper, and more convenient describe how digital networks offer a better value proposition for consumers. For example, digitization supports speedy delivery, duplication, and processing of ICE content. The Transmission Control Protocol and Internet ad-

⁵² Humans speak, hear, and see in an analog format where content modulates over a carrier. We speak by vibrating the larynx and projecting modulating frequencies using our lungs. We hear as sound vibrations stimulate the ear drum which sends signals to the brain. Our eyes receive visible light. Computers and other digital devices communicate and process information formatted into a series of bits. Digitization offers a comparatively more efficient medium for transmitting, processing, and storing content. See ABBY SMITH, COUNCIL ON LIBRARY AND INFORMATION RESOURCES, WHY DIGITIZE?, at iv (1999), <http://www.clir.org/pubs/reports/pub80-smith/pub80.pdf> (“Digitization has proven to be possible for nearly every format and medium presently held by libraries, from maps to manuscripts, and moving images to musical recordings. The use of hardware and software for capturing an item and converting it into bits and bytes, matched by a quickly developing set of practices for describing and retrieving digital objects, is giving form to the talk of a ‘library without walls.’”).

⁵³ See Konrad L. Trope, *Voice over Internet Protocol: The Revolution in America’s Telecommunications Infrastructure*, COMPUTER & INTERNET LAW, Dec. 2005, at 1, 4 (“The Internet is a vast network of individual computers and computer networks that communicate with each other using the same communications language, Transmission Control Protocol/Internet Protocol (TCP/IP). The Internet consists of approximately more than 100 million computers around the world using TCP/IP protocols. Along with the development of TCP/IP, the open network architecture of the Internet has the following characteristics or parameters: 1. Each distinct network stands on its own with its own specific environment and user requirements, notwithstanding the use of TCP/IP to connect to other parts of the Internet. Communications are not directed in a unilateral fashion. Rather, communications are routed throughout the Internet on a best efforts basis in which some packets of information may go through one series of computer networks and other packets of information go through a different permutation or combination of computer networks, with all of these information packets eventually arriving at their intended destination. 2. Black boxes, for lack of a better term, connect the various networks; these boxes are called ‘gateways’ and ‘routers.’ The gateways and routers do not retain information but merely provide access and flow for the packets being transmitted. 3. There is no global control of the Internet.” (footnote call numbers omitted)).

addressing protocols, coupled with packet-switching technology,⁵⁴ help make the Internet a centralized medium for the delivery of all sorts of ICE content that previously traversed separate networks. Digital technologies, including the Internet, help operators accrue operating efficiency gains from scale,⁵⁵ scope,⁵⁶ and positive network effects.⁵⁷

As technologies converge, ventures providing ICE services identify new opportunities to expand their array of offered services into a “triple play”⁵⁸ or “quadruple play”⁵⁹ bundle that combines telecommunications services, such as wired and wireless telephony; video services, such as cable television and Internet Protocol Television

⁵⁴ See Susan Landau, *National Security on the Line*, 4 J. TELECOMM. & HIGH TECH. L. 409, 424 (2006) (“In particular, the routes packets traverse is [sic] dynamically determined through addresses carried in the packets themselves. If a particular communication link is busy, the packet will be routed through a less-congested path. In theory—this occurs much less often in practice—each packet of a communication may travel a different route to its destination.”).

⁵⁵ See MEDIA ECONOMICS: THEORY AND PRACTICE 286 (Alison Alexander et al. eds., 3d ed. 2004) (“Declining levels of average cost accompanying greater expansion of product output and optimal use of plant and equipment. Cost advantages associated with the increasing size of firms.”); see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16,978, 17,029 n.245 (2003) (report, order on remand, and further notice of proposed rulemaking) [hereinafter Review of Section 251] (“Scale economies refer to lower average costs from producing a larger quantity of output. A more technical definition is that economies of scale exist at a particular range of output when the long run average total cost decreases as output expands. Scale economies can be a barrier to entry if entrants are likely to acquire fewer customers and sell less output than the incumbent, and the resulting higher average cost for the entrants makes it difficult for them to compete with the incumbent, particularly if retail prices are close to the incumbent’s average cost.” (internal citation omitted)).

⁵⁶ Review of Section 251, *supra* note 55, at 17,029 n.246 (“Economies of scope exist when one firm can produce two or more products at a lower total cost than if each product were produced separately by different firms. Scope economies can be a barrier to entry if entrants are unable to produce and sell all of the products the incumbent produces, and the resulting higher cost makes it unprofitable to enter the market.” (internal citation omitted)).

⁵⁷ See *id.* at 17,030 n.253 (“Network externalities (or network effects) exist if the benefit that a consumer derives from purchasing a good is affected by whether others take the same service. Consumers then derive greater benefit from purchasing services from larger networks. Thus, larger networks gain a competitive advantage over small networks, which allows them to charge higher prices. In telecommunications networks, network externalities refer to the greater value of a network in which all users can communicate with all other users.” (internal citations omitted)).

⁵⁸ See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, 22 F.C.C.R. 5935, 5938 (2007) (notice of proposed rulemaking) (noting entrance of “traditional phone companies that are primed to offer a ‘triple play’ of voice, high-speed Internet access, and video services over their respective networks” to the market).

⁵⁹ The quadruple play refers to the combination of “video, broadband Internet access, VoIP and wireless service.” AT&T Inc. and BellSouth Corporation Application for Transfer of Control, 22 F.C.C.R. 5662, 5736 (2007) (memorandum and order).

("IPTV"); and information services, such as Internet access. This bundling of services results in a convergence of previously discrete and separate markets, all but eliminating any distinction between ventures that provide content-delivery, conduit services and ventures that create, package, manage, format, and edit the content that traverses telecommunications conduits.

A. Component Parts of the World Wide Web

ISPs can operate as both content provider/manager and conduit because of the technical architecture of the Internet that makes it possible for a single venture to pursue multiple lines of business. ISP's most obvious commercial venture involves the provision of broadband links between individual subscribers and what is commonly referred to as the Internet cloud⁶⁰ within which the ISP interconnects with other ISPs' networks to provide subscribers with access to content not housed on the "home" ISP's facilities, and to provide links to other Internet subscribers. ISPs provide the first and last links to subscribers via wireline facilities operated by incumbent cable television and telephone companies offering cable modem⁶¹ and Digital Subscriber Line⁶² services, respectively. Other ISP-delivered links

60 The Internet cloud refers to the vast array of interconnected networks that make up the Internet and provide users with seamless connectivity to these networks and the content available via these networks.

61 See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4818–19 (2002) (declaratory ruling and notice of proposed rule-making), *aff'd in part and vacated in part*, Brand X Internet Servs. v. F.C.C., 345 F.3d 1120 (9th Cir. 2003), *rev'd and remanded*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

62 See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans, 23 F.C.C.R. 9615, 9620 (2008) (fifth report) ("Local telephone carriers primarily use digital subscriber line (DSL) service offerings to provide consumers with broadband services where they have not deployed fiber technologies."). Digital Subscriber Links provide Internet access via the copper wires initially used solely to provide narrowband telephone service. Telephone companies retrofit the wires to provide medium speed broadband services by expanding the available bandwidth by about 1500 kilohertz. The FCC provides the following definition:

Digital Subscriber Line is a technology for bringing high-speed and high-bandwidth, which is directly proportional to the amount of data transmitted or received per unit time, information to homes and small businesses over ordinary copper telephone lines already installed in hundreds of millions of homes and businesses worldwide. With DSL, consumers and businesses take advantage of having a dedicated, always-on connection to the Internet.

Federal Communications Commission, FCC Consumer Facts: Broadband Access for Consumers, <http://www.fcc.gov/cgb/consumerfacts/dsl2.html> (last visited May 11, 2010).

to end users include wireless options provided by terrestrial⁶³ and satellite networks.⁶⁴

Additionally, most ISPs offer their subscribers some content that appears on the ISP's "home page," the first screen generated when subscribers log on and initiate an Internet access session. Content, which appears on the ISP's home and subsequent pages, is located either on the premises of the ISP, usually at a computerized storage device, commonly known as a server, or at servers of other ventures, including other ISPs located elsewhere. In most instances, an ISP can deliver in-house content using the ISP's leased or owned telecommunications lines, but for content generated by affiliated or unaffiliated ventures located elsewhere, the ISP must interconnect with other ISPs to secure access via their networks that eventually reach the source of content and establish a complete link.⁶⁵ Unaffiliated ISPs agree to reciprocal traffic routing duties, commonly referred to as peering,⁶⁶ so that their subscribers can secure access to all sources of content and all subscribers, regardless of who provides the first and last link to originate and terminate their Internet traffic. Through

⁶³ See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 F.C.C.R. 5901, 5901 n.1 (2007) (declaratory ruling) (addressing terrestrial wireless broadband and not satellite broadband access).

⁶⁴ See WildBlue, About WildBlue High-Speed Internet via Satellite, <http://www.wildblue.com/aboutWildblue/index.jsp> (last visited May 11, 2010) ("WildBlue offers you high-speed Internet access via satellite to almost every corner of the U.S.!").

⁶⁵ See Nicholas P. Dickerson, Comment, *What Makes the Internet So Special? And Why, Where, How, and by Whom Should Its Content Be Regulated?*, 46 HOUS. L. REV. 61, 69 (2009) ("In very general terms, the Internet consists of four primary components: the end user, the Internet service or access provider, the host or content provider, and the communication networks linking the first three. The Internet itself is actually a cooperative collaboration of thousands of individual networks, most of which are privately managed and funded by companies such as ISPs. Private companies are also largely responsible for building and selling access to Internet backbones, the high-capacity lines that make up the physical infrastructure of the Internet through which information flows." (footnote call numbers omitted)).

⁶⁶ See Bringing Broadband to Rural America: Report on a Rural Broadband Strategy, 24 F.C.C.R. 12,791, 12,828 (2009) ("Rural broadband networks are fundamentally similar to broadband networks in other areas in that, in order to have broadband access to the Internet, they must include local access, or last-mile, broadband access to the end user and backhaul, or middle-mile, capabilities to an available Internet peering point. The last-mile network connects residential and business end users to a local ISP. In this configuration, the middle-mile or backhaul component connects the local ISP to an Internet peering point or node. In rural settings, either or both of these components may not support robust broadband connectivity. The choice of any local access or 'middle-mile' technology in a rural setting must take into account factors including desired capacity, cost, reach, and the need for additional resources like radiofrequency spectrum, electronic equipment, access to poles and rights of way, and power." (footnote call numbers omitted)).

these reciprocal traffic routing agreements, ISPs generally can offer their subscribers access to every source of content and to every individual subscriber. The characterization of the Internet as a “network of networks”⁶⁷ refers to the seamless integration of the many unaffiliated networks providing content delivery services.

As a network of networks, the Internet combines content and conduit, and subscribers generally do not distinguish between the ISP’s conduit function and its content creation and management activities. The monthly subscription paid by subscribers is considered Internet access, but the fee combines payment for the first and last mile link to the Internet cloud, other links farther upstream from the home ISP’s facilities, and all content for which no additional fees are charged.

Because of the close integration of content and conduit, ISPs increasingly have incentives and opportunities to provide any of the component elements of so-called Internet access in a non-neutral manner. Customer-tiering⁶⁸ refers to diversification of pricing and quality of service options available to subscribers of the first and last link in Internet access. ISPs increasingly seek to differentiate services and charge different rates as a function of the content delivery speed (bit rate) offered, as well as the amount of content (throughput) delivered in a month. The current predominant pricing model offers unmetered, flat-rate (“all-you-can-eat”)⁶⁹ Internet access that can sti-

⁶⁷ See James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 31 (2003) (“The Internet is a network of networks, and its utility largely depends on the principle of universal interconnectivity. This is true both as a technical and as an economic matter.”).

⁶⁸ See *Network Neutrality: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 109th Cong. (2006) [hereinafter Lessig Testimony] (statement of Professor Lawrence Lessig, Professor of Law, Stanford Law School), available at <http://commerce.senate.gov/pdf/lessig-020706.pdf>.

⁶⁹ See Stan J. Liebowitz & Stephen E. Margolis, *Bundles of Joy: The Ubiquity and Efficiency of Bundles in New Technology Markets*, 5 J. COMPETITION L. & ECON. 1, 4–5 (2009) (“Go into an all-you-can-eat buffet restaurant and what you are offered is neither a tie nor a fixed bundle. The food items are consumed in variable proportions, but there is no tie in the normal sense. You are given access to an unlimited bundle of goods (from the point of view of an ordinary consumer), and what is consumed varies for each consumer. The price that you pay is an entrance fee and is not a function of use—customers can eat as much or as little as they want. We refer to this as *all-you-can-eat* pricing. Cable TV, which provides only ‘packages’ of numerous channels, is an example of this type of pricing as opposed to a traditional bundle. No individual can watch all of the programs on all of the channels but they can watch as much as they wish of any channel in the bundle for one flat fee (per month).”).

multate overconsumption and impose higher costs on low volume users.⁷⁰

Access-tiering⁷¹ refers to similar diversification upstream from the home ISP, a process more likely to trigger network neutrality concerns in light of the inability of subscribers to know how and why their service, by type of traffic and even by source of content, is expedited, delayed, or rendered inoperative.⁷² Advocates for network neutrality argue that ISPs can prioritize traffic, even to the point of creating artificial congestion, with an eye toward favoring the traffic of some content providers, including the ISP and its affiliates, to the financial detriment of others.⁷³ Unlike legitimate technical network management functions, operating a biased, non-neutral network could have a direct, adverse, and unnecessary impact on the marketplace of ideas by favoring certain types of content and speakers who pay for the privilege, or have an affiliation with the ISP.

Because ISPs must constantly upgrade their networks to handle ever increasing content transmission delivery requirements of subscribers, ISPs consider it essential that they find new ways to recoup infrastructure costs. When ISPs deviate from a single, “plain vanilla” all-you-can-eat service plan, they can customize existing services and

⁷⁰ See Jonathan E. Nuechterlein, *Antitrust Oversight of An Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELECOMM. & HIGH TECH. L. 19, 29 (2009) (“Most Internet access plans today include ‘all you can eat’ connectivity; consumers pay a flat fee for a particular level of bandwidth but do not generally pay any incremental per-bit price for causing extra data traffic to cross shared network facilities. They have traditionally paid the same for a 3 Mbps connection whether they have used that connection once a day, to download a static webpage, or all day, to download and upload high-definition video files. There have thus been no price signals to deter a minority of subscribers from overconsuming network capacity at the expense of the majority.”).

⁷¹ See Lessig Testimony, *supra* note 68, at 2 n.2 (describing access-tiering as “any policy by network owners to condition content or service providers’ right to provide content or service to the network upon the payment of some fee”).

⁷² See Comcast Corp., 23 F.C.C.R. 13,028, 13,051 (2008) (memorandum opinion and order) (“Furthermore, Comcast’s interruption of customers’ uploads by definition interferes with Internet users’ downloads since ‘any end-point that is uploading has a corresponding end-point that is downloading.’ Also, because Comcast’s method—sending RST packets to both sides of a TCP connection—is the same method computers connected via TCP use to communicate with each other, a customer has no way of knowing when Comcast (rather than its peer) terminates a connection.” (footnote call numbers omitted)), *rev’d*, Comcast Corp. v. F.C.C., No. 08-1291, slip op. (D.C. Cir. April 6, 2010), *available at* <http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf>.

⁷³ See Balkin, *supra* note 39, at 431 (“[M]ost network discrimination will be for economic reasons—to favor business partners and protect incumbent business models.”); Frischmann & van Schewick, *supra* note 38, at 387–88 (noting that “[n]etwork neutrality proponents are concerned that network providers may use the new technology to exclude applications and content from their networks or discriminate against them,” resulting in a significant reduction in the Internet’s value for society).

create new ones that can better serve specific customer requirements and in turn generate higher revenues. Customers and content providers upstream, benefitting from neutral, “best efforts” Internet access, may object to many types of service diversification because it typically results in higher costs, e.g., a rate hike for heavy volume users and selective surcharges for content providers who secure priority treatment of their traffic.

B. Convergence Triggers a Regulatory Quandary

Technological and marketplace convergence presents a quandary for regulators. On one hand, innovations may lower barriers to market entry and support more robust competition. Under this scenario, regulators should reduce the scope and nature of their oversight in light of greater opportunities for ICE ventures to self-regulate, and for marketplace forces to prevent price gouging and other unfair trade practices that could harm consumers. On the other hand, convergence may promote market consolidation and concentration of ownership and control as ventures seek to accrue scale and scope economies, as well as positive networking externalities. If competition wanes and does not match the expectations used to justify deregulation, convergence may increase market power possessed by a small number of firms and potentially constrain access and a competitive marketplace of ideas. In both scenarios, regulators also have to confront the consequences of having to use service definitions that contemplate discrete and mutually exclusive markets. In the United States, the basic telecommunications law contains language first drafted in the early 1900s,⁷⁴ with the last major amendments occurring in 1996.⁷⁵

The Communications Act of 1934, as amended, establishes service definitions for broadcasting,⁷⁶ cable television,⁷⁷ telecommunications,⁷⁸ telecommunications service,⁷⁹ and information service⁸⁰ models. Using these limited options, the FCC has shoehorned everything

⁷⁴ See Communications Act of 1934, ch. 652, 48 Stat. 1064 (current version at 47 U.S.C. §§ 151–614 (2006)). This law updated and expanded provisions contained in the Radio Act of 1927, ch. 169, 44 Stat. 1162, the Radio Act of 1912, ch. 287, 37 Stat. 302, and the Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539.

⁷⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

⁷⁶ 47 U.S.C. §§ 301–399(b) (2006) (provisions relating to radio).

⁷⁷ *Id.* §§ 521–549 (cable communications).

⁷⁸ *Id.* § 153(43) (general provisions).

⁷⁹ *Id.* § 153(46) (general provisions).

⁸⁰ *Id.* §§ 151–161 (general provisions); see, e.g., *id.* § 153(20) (defining information service).

an ISP does into the information services classification. Having decided that ISPs need not separate content delivery telecommunications services from content creation and management services, the Commission faces a growing problem when convergence makes it possible for an ISP to offer an array of services that arguably fit within two or more of the service definitions contained in the Communications Act. Absent structural separation, which would enable the FCC to apply a single regulatory regime and operating service definition to an ISP's telecommunications, information, and video service ventures, the Commission faces challenges of whether and how to make one service definition expand and fit all of an ISP's bundled services.

The FCC has opted to avoid specifying what service definition applies, e.g., for VoIP telephone services⁸¹ and IPTV. Additionally, the FCC has stretched the information service definition to cover, in a consistent manner,⁸² all ISP services for which the Commission has determined that it must make a classification, e.g., to apply the lightly regulated information service classification to cable modem,⁸³ DSL,⁸⁴ broadband over powerline,⁸⁵ and wireless broadband⁸⁶ services.

⁸¹ In *Pulver.com's Free World Dialup*, the FCC stated that computer-to-computer voice communications, which do not access conventional telephone service lines, constituted an information service. "We conclude that FWD is an information service because FWD offers 'a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.'" 19 F.C.C.R. 3307, 3313 (2004) (memorandum opinion and order).

In *Vonage Holdings Corp.*, the FCC preempted the states from regulating VoIP services on the grounds that VoIP services cannot segment into intrastate and interstate components. The FCC concluded that any state regulation would frustrate federal policy, but while asserting jurisdiction the Commission expressly declined to state whether such services constituted an information or telecommunications service. 19 F.C.C.R. 22,404, 22,411 (2004) (memorandum opinion and order) ("We find that the characteristics of DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme, and that permitting Minnesota's regulations would thwart federal law and policy. We reach this decision irrespective of the definitional classification of DigitalVoice under the Act, *i.e.*, telecommunications or information service, a determination we do not reach in this Order.").

⁸² See *Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 F.C.C.R. 13,281, 13,281–82 (2006) (memorandum and order) (establishing a "goal of developing a consistent regulatory framework across broadband platforms by regulating like services in a similar manner").

⁸³ *High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002) (declaratory ruling and notice of proposed rulemaking), *aff'd sub nom.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

⁸⁴ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14,853 (2005) (report, order, and notice of proposed rulemaking), *aff'd sub nom.*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

⁸⁵ See *Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 F.C.C.R. at 13,281; see also *Annual Assessment of the Status of Competi-*

Using a strategy of avoiding having to make a service classification, or expanding and applying the information services classification, offers one point of clarity: ISPs do not operate as conventional telecommunications common carriers, subject to nondiscrimination and other forms of economic regulation established in Title II of the Communications Act.⁸⁷ In other words, by not applying Title II requirements to ISPs, the FCC in effect has shifted its regulatory focus away from ISPs' conduit function and onto their content creation and management function. In eliminating its Title II regulatory option, the FCC has emphasized the difference between ventures that provide telecommunications as part of an information service versus ventures that offer telecommunications services to end users.⁸⁸ In the

tion in the Market for the Delivery of Video Programming, 20 F.C.C.R. 2755, 2827 (2005) ("Several utility companies have been experimenting with a technology called 'broadband-over-power-line (BPL)' service, which uses power lines to carry high-speed data signals the 'last mile' to the home. BPL uses fiber optic lines or another traditional medium to deliver data to the power line. While the primary objective of this technology is to provide high-speed Internet access services, some companies have expressed plans to offer video streaming services, but not traditional video services." (footnote call numbers omitted)).

⁸⁶ Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 F.C.C.R. 5901 (2007) (declaratory ruling).

⁸⁷ See 47 U.S.C. §§ 201–276 (2006) (setting forth the duties and operations of common carriers). But even this conclusion may not persist. In response to the D.C. Circuit Court of Appeals reversal of the FCC's decision to sanction Comcast for meddling with subscribers' traffic even in the absence of network congestion, the Commission may try to apply selected portions of Title II requirements to the access conduit function provided by ISPs. See Julius Genachowski, Chairman, Federal Communications Commission, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf (rejecting a renewed attempt to find a way to extend Title I ancillary jurisdiction or reclassifying all aspects of Internet access as a telecommunications service); Austin Schlick, General Counsel, Federal Communications Commission, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* (May 6, 2010) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf (providing legal rationale for narrow application of selected sections of Title II regulatory authority over Internet access).

⁸⁸ See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. at 14,910 ("We conclude, consistent with *Brand X*, that such a transmission component [in a DSL service] is mere 'telecommunications' and not a 'telecommunications service.' As stated above, the Act defines telecommunications service as 'the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.' Thus, whether a telecommunications service is being provided turns on what the entity is 'offering . . . to the public,' and customers' understanding of that service. End users subscribing to wireline broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services—both Internet access service and a distinct transmission service, for example. Thus, the transmission capability is part and parcel of,

former, the telecommunication component is subordinate, insignificant, and integral to the predominant information service. In the latter, the telecommunication service predominates and triggers conventional common carrier Title II regulation.

Having opted to classify ISP services as information services, the FCC has dismissed the need for conventional Title II economic safeguards. The Commission has concluded that it can largely exempt ISPs from regulation based on the Commission's emphasis on the content generated or managed by the ISP. Additionally, the Commission perceives that the public interest does not require economic and behavioral regulation of ISPs. The FCC's emphasis on content and the Commission's reticence in regulating content implies that ISPs have First Amendment speaker rights and that the Commission must respect these rights when applying any form of non-Title II, non-conduit related regulation.⁸⁹

C. ISPs Can Operate as First Amendment Speakers

Even as the FCC has ample reasons not to call attention to, and validate, ISPs' First Amendment speaker rights, the Commission's determination that ISPs operate as information service providers nonetheless triggers some degree of First Amendment protection. By definition, ISPs have the option of creating, processing, and otherwise managing content as non-common carriers. Put another way, the inapplicability of Title II common carrier regulations means that ISPs do not operate solely as neutral conduits. When operating as non-conduits, ISPs perform tasks closely aligned with or analogous to

and integral to, the Internet access service capabilities. Accordingly, we conclude that wireline broadband Internet access service does not include the provision of a telecommunications service to the end user irrespective of how the service provider may decide to offer the transmission component to other service providers." (footnote call numbers omitted)).

⁸⁹ The FCC has largely avoided analysis of the permissible scope of First Amendment freedom applicable to ISPs and information service providers. However, the Commission has noted that the Supreme Court made a general comparison of First Amendment speakers' rights in *Reno v. ACLU*, 521 U.S. 844 (1997), where the Court elevated Internet speaker protections over those granted to broadcasters: "[U]nlike the Internet, the broadcast medium has traditionally 'received the most limited First Amendment protection.'" Broadcast of the Fox Television Network Program "Married By America," 23 F.C.C.R. 3222, 3234 n.74 (2008) (forfeiture order) (quoting *Reno v. ACLU*, 521 U.S. at 867). In the *Reno* case, which addressed the lawfulness of Internet content regulation designed to protect children from harm, the Court supported maximum First Amendment freedom for Internet-based speakers as compared to the comparatively less freedom available to broadcasters.

speaking, editing, and processing content. ISPs create World Wide Web pages that contain content or offer links to content.

Few would dispute that cable television operators qualify for First Amendment protection in light of their content selection and packaging function.⁹⁰ ISPs qualify for similar rights when serving as a platform, interface, or intermediary for similar content. Most ISPs offer access to both Internet-mediated content created by unaffiliated ventures and to content that ISPs offer on the pages of their web sites. The term “walled garden”⁹¹ refers to content packaged by ventures such as ISPs and presented in ways that encourage subscribers to continue consuming content generated by the ISP or by affiliates and other ventures with which the ISP has an agreement to showcase and prioritize access.

D. Case Law Supports Limited Regulation of Internet-Mediated Speech

Even as technological and market convergence further challenges a medium-specific application of the First Amendment, courts continue to identify varying degrees of speaker rights based on the type and nature of the transmission medium. On a continuum running from least to most robust First Amendment speaker rights, the Internet qualifies for maximum protection along with print journalism,⁹² with cable television in the middle⁹³ and broadcasting at the opposite

⁹⁰ See Michael J. Burstein, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1053 (2004) (“In cable, the [Supreme] Court has held that the selection of channels offered to consumers on a cable network is an act of editorial discretion. While arguably not the expression of a particular message, this decision still involves a choice of *what* content to present to an audience, and is therefore protected.” (citing *City of Los Angeles v. Preferred Comm’n, Inc.*, 476 U.S. 488, 494–95 (1986), *Satellite Broad. & Comm’n Ass’n v. FCC*, 275 F.3d 337, 352–53 (4th Cir. 2001)); see also *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996) (upholding cable television operator’s refusal to carry indecent programming on the operator’s leased access channel as opposed to regulated public access channels).

⁹¹ See Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 23 F.C.C.R. 2241, 2315 (2008) (“Although U.S. mobile service providers tend to keep tight control on what applications are available and what services consumers can access on mobile handsets by selling content through their own branded portals (the ‘walled garden’ approach), operators have begun selectively to allow third-party content providers to market multimedia content directly to their subscribers, in exchange for a share of the revenue generated by the sale of these services.” (footnote call number omitted)).

⁹² See *Reno*, 521 U.S. at 853 (“From the publisher’s point of view . . . [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can ‘publish’ information.”).

⁹³ See, e.g., *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997) (holding that intermediate scrutiny supports “must carry” regulations, which primarily achieve econom-

pole.⁹⁴ In *Reno v. ACLU*,⁹⁵ the Supreme Court considered the Internet a vast medium for the publication of ICE content worthy of substantial protection from government regulation, even when the government presents a compelling reason for intervening, e.g., protecting children from the potential harm resulting from access to obscene or indecent material. On several occasions, the Internet's importance as a mass medium of expression trumped legislative efforts to protect children from harmful Internet-mediated content.⁹⁶ These cases offer clear precedent mandating close scrutiny of content-based regulations with the government bearing a substantial burden of demonstrating that content-affecting regulations are narrowly drawn and do not unduly restrict lawful access to content by adults.

The Supreme Court has not imposed such a high burden on government when seeking to regulate other media such as cable television and broadcasting. First, the Court has evidenced greater willingness to consider regulation in terms of achieving economic public policy goals as opposed to whether and how they affect speech. The Court accepted the duty to balance speaker rights against other public policy objectives such as promoting widespread access to certain types of media, e.g., commercial, advertiser-supported broadcasting. Second, the Court has acknowledged that media have different characteristics that affect accessibility and competitiveness. Unlike the Internet, which heretofore has evidenced low barriers to market entry by content providers, other media have higher market entry barriers, e.g., the need to install costly infrastructure, or to secure a government-granted franchise or license to use public spectrum and rights of way. For these types of media, the Court will examine regulation-sponsoring law in the broader context of supporting public policy goals, especially ones articulated by Congress, as opposed to a narrower view that the resulting regulations directly affect content and

ic and social goals in requiring cable operators to relinquish a portion of their First Amendment content programming rights); *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994).

94 See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (stating that pervasiveness and reach of broadcasting justifies content-based regulations); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (holding that the "fairness doctrine" promotes proper FCC regulations); *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943) (noting that spectrum scarcity justifies regulation).

95 521 U.S. at 844.

96 See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (stating that the prohibition on commercial transmission of material harmful to minors is deemed unconstitutionally overbroad when less restrictive alternatives, such as filtering, are readily available).

the right of a particular type of speaker, e.g., cable network operators versus television broadcasters.

In the *Turner* “must carry” cases, a majority of the Supreme Court narrowly ruled twice that a law mandating carriage of broadcast television channels by cable television operators was content-neutral and therefore subject to a less onerous level of scrutiny.⁹⁷ The Court affirmed a law that forced cable operators to subordinate their First Amendment content selection and packaging speaker rights to the congressionally identified national interest accruing from mandatory carriage of commercial broadcast content. Not willing to allow marketplace forces to operate, which arguably would have created necessary incentives for cable operators to carry subscriber-desired broadcast content, the Court endorsed the notion that the legislature could impose access and carriage requirements that served the national interest, i.e., continued viability of commercial broadcasters, even as they prioritized First Amendment rights between cable operators, television broadcasters, providers of content available only via cable television, and consumers of each medium.

E. The FCC Tries to Dismiss the First Amendment Implication of Its Decisions

The FCC has attempted to frame its regulation of ISPs as having no First Amendment consequences whatsoever. By avoiding any First Amendment analysis, the FCC does not consider it necessary to state whether any regulation of ISPs impacts content or the speaker rights of ISPs. Such avoidance also supports the FCC’s goal of justifying regulatory forbearance in most instances, coupled with the option of applying selective regulation on an ad hoc, as-needed basis. This pursuit of absolute flexibility supports the FCC’s predisposition not to regulate Internet-based operators, while nevertheless reserving the option to regulate whenever the Commission deems it necessary. In addition to creating significant uncertainty about the nature, scope,

⁹⁷ See *Turner II*, 520 U.S. at 224–25 (“We cannot displace Congress’ judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination. Those requirements were met in this case, and in these circumstances the First Amendment requires nothing more.”); *Turner I*, 512 U.S. at 649 (“In short, Congress’ acknowledgment that broadcast television stations make a valuable contribution to the Nation’s communications system does not render the must-carry scheme content[-]based. The scope and operation of the challenged provisions make clear, in our view, that Congress designed the must-carry provisions not to promote speech of a particular content, but to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content.”).

and reach of permissible regulation, the FCC creates uncertainty over what, if any, First Amendment speaker rights ISPs deserve.

When confronted with ISP claims that FCC regulation thwarts their First Amendment speaker rights, the Commission has sought to frame the matter as a lawful extension of a regulatory mandate that has no impact on anyone's First Amendment freedom:

Nor do we find Time Warner Cable's analogy of a broadband provider to a newspaper to be apt. For one, the Commission is not dictating the content of any speech. Nor are we persuaded that Comcast's customers would attribute the content delivered by peer-to-peer applications to Comcast, rather than attributing them to the other parties with whom they have chosen to interact through those applications. Under these circumstances, we find that our actions do not raise First Amendment concerns.⁹⁸

The FCC's decision to apply the information services classification to ISPs supports the Commission's view that it should not pervasively regulate the Internet, nor should the Commission meddle in a medium that can support a more robust marketplace of ideas than what previous media achieved. To support its service classification, as well as the reclassification of Digital Subscriber Line services from telecommunications service to information service, the FCC emphasized that unregulated status would best achieve legislative mandates to promote widespread access to basic and advanced telecommunications and to promote content diversity. In essence, promoting access to competing technologies and carriers helps achieve a parallel outcome, namely a robust marketplace of ideas.

III. ISPs ALSO OPERATE AS NON-SPEAKER CONDUITS

In addition to their content creation, selection and packaging function, ISPs operate or lease telecommunications facilities that transmit and deliver bit streams to and from subscribers. Ordinarily the ISPs' bit delivery function operates in an uncontroversial manner providing connectivity and accessibility for all subscribers. ISPs interconnect their networks with the networks of other ISPs, a process that

⁹⁸ Comcast Corp., 23 F.C.C.R. 13,028, 13,053 n.203 (2008) (memorandum opinion and order) (internal citations omitted), *rev'd*, Comcast Corp. v. F.C.C., No. 08-1291, slip op. (D.C. Cir. April 6, 2010), *available at* <http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf>. Note that the FCC correctly states that subscribers attribute content to the identifiable source without considering whether and how the conduit provider might affect access. Conduit operators can affect accessibility by specifying and enforcing bit rate, priority status, and by slowing or throttling content delivery speeds when subscribers exceed monthly content downloading quotas. Subscribers cannot readily determine the cause of most instances where service has degraded.

collectively makes it possible to provide all subscribers with access to any other subscriber and sources of content within the Internet cloud. From its inception, the protocols that establish standard operating procedures favor a non-discriminatory Internet offering “best efforts” routing of traffic on a first-come, first-serve basis. Technological innovations, coupled with compelling business needs, support deviation from absolute neutrality, including traffic prioritization that offers subscribers “better than best efforts” routing.

Notwithstanding technological opportunities and business incentives to operate in a non-neutral manner, ISPs can qualify for a near absolute insulation from liability for harms caused by the content they carry if they continue to operate in a neutral manner. Section 230(c) of the Communications Decency Act states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁹⁹

This liability exemption has shielded ISPs from any legal responsibility when another person creates content that results in, or contributes to, such harms as defamation,¹⁰⁰ sexual assault,¹⁰¹ and violations of civil rights.¹⁰² The Digital Millennium Copyright Act (“DMCA”) provides ISPs with a safe harbor exemption from secondary copyright infringement liability when they operate as neutral conduits and agree to remove infringing content upon notice.¹⁰³

⁹⁹ 47 U.S.C. § 230(c)(1) (2006).

¹⁰⁰ *See, e.g.,* Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003) (holding that even though the editor of a newsletter made choices whether to include or not include electronic mail submissions, the inclusion of defamatory content alleging Nazi affiliation of an art dealer did not trigger loss of the § 230 safe harbor); *Blumenthal v. Drudge*, 922 F. Supp. 44 (D.C. Cir. 1998) (holding that unproven allegation of wife abuse did not trigger liability for America Online based on its lack of content management); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding that § 230(c)(1) confers immunity on service providers for both publisher and distributor liability with respect to tort claims).

¹⁰¹ *See, e.g.,* *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (holding that a social networking site is not responsible for sexual assault occurring when a girl lied about her age to access the site).

¹⁰² *See, e.g.,* *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (holding that § 230(c)(1) creates a definition that removes online services such as Craigslist from the ranks of publishers and speakers for the purposes of substantive law, including housing anti-discrimination laws). *But cf.,* *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (refusing to apply the § 230 safe harbor when the web site operator contributed to and facilitated the creation of content expressing discriminatory preferences for sharing housing).

¹⁰³ Section 512(a) of the Digital Millennium Copyright Act, 17 U.S.C. § 512(a) (2006), states that:

[A] service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copy-

A. *Laws Now Incorrectly Assume ISPs Lack the Ability or Incentive to Monitor, Filter, Edit, and Otherwise Manage Content*

Safe harbor provisions in the CDA and the DMCA offer liability exemptions based on the assumption that an ISP could not effectively operate its business if it had to provide content management functions.¹⁰⁴ At the time these laws were enacted, technological means did not exist for low cost, effective, and instantaneous monitoring and filtering of harmful content. Even if such capabilities had existed, Congress opted to provide exemptions so that the Internet could thrive as a robust, largely unregulated forum for expression. The drafters of safe harbor exemptions may not have contemplated the breadth and depth of the harms Internet-mediated communications can cause, but they did legislate exemptions with a clear intention of freeing ISPs from liability if the carriers opted for conduit neutrality in lieu of content management. As time passes from enactment of the CDA and the DMCA, technologies for monitoring, filtering, and inspecting content have substantially improved. ISPs now can elect to use techniques that identify content flagged as copyright protected, tagged as qualifying for priority delivery, and externally classifiable as

right by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

A service provider is defined as "an entity offering transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received," or "a provider of online services or network access, or the operator of facilities thereof." *Id.* § 512(k)(1)(A)–(B).

¹⁰⁴ See Lemley & Reese, *supra* note 34, at 1369 ("Congress enacted the safe harbors in response to concerns expressed by online service providers about their potentially overwhelming liability for copyright infringement [and other offenses] committed by their users.").

possibly harmful.¹⁰⁵ ISPs increasingly have operational and financial incentives to employ traffic interrogation techniques, including deep packet inspection,¹⁰⁶ a technique that enables an ISP to examine, on a “real time” basis, both routing information contained in the header, as well as the actual content contained in the payload portion of every packet that traverses the ISP’s network.

These “packet sniffing” technologies¹⁰⁷ can help ISPs operate more efficiently and with less risk of harm to their network caused by a cascade of service requests designed to cause congestion or outages, proliferation of undesired commercial messages commonly referred to as spam, and the variable, legitimate service demands of subscribers. These technologies also can help ISPs offer new services that facilitate non-neutral network operation with an eye toward providing customized services that prioritize or downgrade traffic streams based on classifications of customers and the traffic they generate for downstream or upstream delivery.¹⁰⁸

Arguably, ISPs no longer operate as neutral conduits when they employ deep packet inspection and other techniques that prioritize traffic based on a variety of service discrimination criteria. Such non-neutral operation surely can better match individual customer requirements with ISP efforts to accommodate specific wants and needs. But such non-neutrality also calls into question whether the ISP can continue to qualify for safe harbor exemptions based on its lack of ability to monitor and manage content, or assumptions that content management would constitute an unreasonable operational

105 See Rob Frieden, *supra* note 37, at 636–37 (“ISPs have upgraded, or soon will upgrade, their networks with hardware and software that enables them to acquire knowledge about what kinds of content they switch, route and transmit.”).

106 See Cisco Systems, *Optimizing Application Traffic with Cisco Service Control Technology*, http://www.cisco.com/en/US/products/ps6150/prod_brochure0900aecd80241955.html (last visited May 11, 2010) (“Using stateful deep packet inspection, operators can optimize traffic on their networks, thereby increasing efficient use of network resources, reducing costs, and maximizing capital investment. State-of-the-art bandwidth management can be applied to network traffic on a global, subscriber, or individual flow-level hierarchy, helping ensure that operators can better manage network resource distribution.”).

107 See *What Your Broadband Provider Knows About Your Web Use: Deep Packet Inspection and Communications Laws and Policies: Hearing Before the Comm. on Energy and Commerce*, 110th Cong. (2008), available at http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1400&catid=32&Itemid=58 (last visited May 11, 2010).

108 See M. CHRIS RILEY & BEN SCOTT, *FREEPRESS, DEEP PACKET INSPECTION: THE END OF THE INTERNET AS WE KNOW IT?* (2009), http://www.freepress.net/files/Deep_Packet_Inspection_The_End_of_the_Internet_As_We_Know_It.pdf (explaining that the discrimination of Internet messages is now possible due to technologies such as deep packet inspection).

or financial burden on ISPs. When an ISP takes affirmative steps to manage content so that it can offer a variety of non-neutral network and content management services, the ISP arguably has migrated from a neutral conduit provider to an active content manager. Affirmative steps voluntarily taken by ISPs to manage content arguably should trigger not only First Amendment speaker status, but also void or reduce the near complete safe harbor liability exemptions ISPs currently secure.

IV. THE DEBATE ABOUT NETWORK NEUTRALITY RAISES FIRST AMENDMENT ISSUES

In addition to their Internet access conduit function, most ISPs manage content as editors, moderators, distributors, contractors, and creators. ISPs construct World Wide Web pages and erect a readily available walled garden of content on their Web sites. While subscribers can maneuver outside the ISP's walled garden to access other content having no affiliation with the ISP, the fact that ISPs offer a package of preselected content raises First Amendment issues. As a threshold matter, ISPs qualify for some degree of First Amendment protection in their capacity as content packagers, in much the same way as cable television operators load channels of content onto various programming tiers of service. Having so qualified, conflicting First Amendment protection claims may arise between ISPs and unaffiliated content providers upstream, who need to have their content traverse one or more ISP networks to reach consumers, and between ISPs and their subscribers downstream.

Remarkably, the debate over network neutrality has largely ignored the First Amendment,¹⁰⁹ perhaps because various commentators can stake their claims on more concrete foundations. For ISPs, the right to operate non-neutral networks involves network management functions as well as the sovereignty of property owners to determine who qualifies for access to their networks and on what terms and conditions. Network neutrality opponents have emphasized economic factors such as the disincentives to infrastructure investment that mandatory network neutrality requirements would impose.

¹⁰⁹ But see Balkin, *supra* note 39, at 427 (noting that while decisions affecting free speech on the Internet may focus on technological design, they should also focus on the First Amendment and constitutional law). See generally Nicholas P. Dickerson, *supra* note 65, at 61 (discussing that all governmental regulation of the Internet must be done within the boundaries set forth by the First Amendment); Moran Yemini, *supra* note 39, at 1 (explaining that the First Amendment has as much to do with the debate over network neutrality as do the "economic and technological aspects of Internet governance").

Network neutrality advocates have framed the debate in broad terms about how discriminatory practices would harm the Internet's utility, and more narrowly, in terms of whether start up ventures could reach critical mass if they had to pay more to reach consumers.

In light of the increasing importance of the Internet as both a conduit for access to ICE content and as the medium constructed by ISPs to deliver packaged content, First Amendment conflicts will arise. Indeed, the network neutrality issue, considered in the context of the First Amendment, requires an assessment of whose rights predominate when interests conflict. Do ISPs have comparatively more robust rights than both their subscribers and unaffiliated and competing sources of content because ISPs participate in a robust marketplace, as measured in economic terms and more general notions of accessibility of ideas?¹¹⁰ Do competing sources of content have comparatively more robust rights to compensate for the ability and incentive of ISPs to control access to the Internet cloud, especially for the first and last links,¹¹¹ i.e., from content sources into the Internet cloud and onward, downstream to end users, and from end users through primarily DSL and cable modem links upstream into the Internet cloud? Do end users have comparatively more robust rights based on the Internet's importance to a participatory democracy, and perhaps also based on the fact that most ISPs have secured access to their subscribers using public resources, e.g., rights of way over public

110 See Hannibal Travis, *Of Blogs, EBooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1575 (2007) ("Opponents of net neutrality requirements have opined that the First Amendment rights of corporate owners of telecommunications infrastructure should trump the First Amendment rights of individual speakers and users of telecommunications media. Under this view, the foremost free speech interests on the Internet are those of broadband infrastructure owners, rather than the senders and recipients of Internet speech such as Web content, blogs, eBooks, or online videos.").

111 See Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 942-43 (2008) ("Thus, if we want to promote media access today, we need to look beyond the boundaries of judicially created First Amendment rights. Telecommunications regulation—and, in particular, the debate over open access and network neutrality—has important consequences for media access. To be sure, network neutrality policies prevent certain forms of content censorship by conduits, and open access policies promote competition among ISPs that will lead at least some ISPs to promise not to censor. Yet, a more important argument for these policies is that they might promote innovation in content delivery, applications, and content production that comes from entrepreneurs outside the current duopoly of cable and phone companies. People should be able to create new applications to be laid on top of the broadband network without fear that they will be blocked by broadband providers. And individuals and start-ups should be able to serve not only text, but also video and multimedia, without fear that they will be blocked or slowed down because their content and applications compete with broadband companies or their business partners.").

roads and property secured with limited direct compensation paid by cable television and telephone companies as well as use of public spectrum by wireless ventures?¹¹²

A. ISPs' First Amendment Freedoms

The need to recoup broadband investments and generate profits, coupled with enhanced packet sniffing technologies, evidences both incentives and the ability of ISPs to exercise First Amendment rights by operating non-neutral networks. Non-neutrality supports price and quality of service discrimination as well as an interest in executing service contracts that provide certain content providers with preferential access to the ISP's subscribers. Some types of discrimination do not adversely impact First Amendment values, but other types do. In the former category, customer-tiering options offer end users different levels of service in terms of bit transmission speed offered or guaranteed and the permissible amount of content that a subscriber can download in a month without triggering surcharges, or bit rate "throttling," i.e., deliberate reductions imposed by the ISP on the speed of content delivery.

In the latter category, ISPs can engage in access-tiering strategies that exceed reasonable targeting of individual content providers for preferential access to subscribers and expedited delivery of content. Arguably, ISPs trigger First Amendment concerns when they couple affirmative efforts to expedite and favor the content of preferred customers with additional deliberate efforts to impede, delay, and even block traffic of non-preferred customers, despite having ample transmission capacity and bit-processing resources to maintain a baseline of acceptable service. While offering "better than best efforts" routing favors one type of speech over other types and one speaker over others, such offers constitute a normal business practice where the quality of access is offered as a function of price elasticity, i.e., the willingness and ability to pay for access. Because ISPs are neither charities nor common carriers, they should have ample opportunities to prioritize bit streams and offer superior service to customers willing and able to pay a premium.

On the other hand, the ability to offer premium service and the resulting prioritization of traffic and messages does not include the option to handicap and degrade non-premium paying subscribers to make the premium service qualitatively even better, or to punish cus-

¹¹² Before the need to competitively bid for auctioned spectrum, wireless carriers received licenses at low cost.

tomers who have refused to pay for premium service. First Amendment values are not adversely impacted when an ISP devises creative ways to improve service or to offer optional service enhancements. However, such values are harmed when ISPs offer premium service, not by providing technological enhancements, but by providing preferred customers or corporate affiliates with premium access simply by handicapping, degrading, blocking, or otherwise thwarting the speed, quality, and reach of non-preferred speakers. The adverse impact on First Amendment values occurs most significantly when an ISP operates a non-neutral conduit not just to generate new revenue streams, but also to achieve additional benefits, some of which may not be easily quantified or measured in terms of direct financial benefits.

Put another way, when ISPs operate their conduit function in a non-neutral way, the First Amendment rights of speakers upstream and subscribers downstream may be impacted negatively if the ISP engages in discrimination designed not to provide legitimate premium delivery services for an additional fee, but to discipline, punish, competitively handicap, and otherwise degrade or block messages of disfavored customers. While largely speculative or anecdotal,¹¹³ such First Amendment-implicating strategies appear to be feasible options for ISPs to pursue when they infer that ample competitive public relations or financial opportunities exist.

First Amendment values may not always be implicated if an ISP engages in discrimination solely to favor its services or those offered by affiliates. While punishable as unreasonable economic discrimination and a violation of a statutory mission articulated for the FCC, e.g., to promote access to basic and advanced telecommunications services, efforts by a rural telephone company to block DSL-mediated access to competitive long distance telephone services probably does not impact the First Amendment. Blocking a competitive alternative, VoIP telephone service, to the company's dial-up long distance service does not thwart access to a competitive marketplace of ideas. Similarly, Comcast's use of software to detect and degrade peer-to-peer file transfers does not impact First Amendment values unless the

¹¹³ For example, the FCC has investigated only two instances where an ISP has deliberately interfered with traffic without legitimate network management justifications. *See* Madison River Communications, LLC, 20 F.C.C.R. 4295 (2005) (order) (detailing an FCC Consent Decree with a small, rural telephone company that included a voluntary payment of \$15,000 to the Federal Treasury for blocking DSL subscriber access to Internet-based voice communications services).

content carried in these transfers would no longer be available for sharing and dissemination.

ISPs adversely impact the First Amendment interests of content providers and/or subscribers when non-neutral network operating strategies succeed in substantially blocking access to specific messages and types of content. The Supreme Court affirmed compulsory carriage of broadcast television signals on both economic grounds and a sense that First Amendment values would be frustrated if such carriage did not occur. Mandatory carriage of broadcast television signals provides an economic boost to broadcasters, i.e., shelf space on an increasingly important distribution technology. But more important in terms of the First Amendment was the Court's inference that without such carriage, the marketplace of ideas would suffer when few cable subscribers would take the affirmative steps necessary to configure their television sets to continue receiving broadcast signals when these sets plug into cable television networks that have refused to carry broadcast television channels.

When ISPs block or degrade certain types of traffic and the content of specific vendors, few consumers may know the source and cause of such deteriorating access. Fewer still will have the technological knowhow and follow-through to devise ways to continue accessing such disfavored content or to counter quality of service degradation by an ISP. Even if competitive alternatives and different technological options exist, First Amendment values suffer when ISPs successfully block or degrade content access because consumers cannot, or do not, pursue remedies.

V. ISPs SHOULD NOT HAVE TWIN OPTIONS FOR AVOIDING SAFEGUARDS SIMPLY BECAUSE REGULATORS AND COURTS APPLY AN UNCALIBRATED DEFAULT OPTION

Nothing in the Communications Act or the FCC's administrative rules requires the Commission to shoehorn every ISP line of business into a single regulatory classification. The Communications Act establishes separate service definitions linked to different regulatory requirements, but nothing in the Act explicitly states that only one service definition can apply to a single venture. At least in theory, the FCC has found it possible to apply multiple regulatory classifications as it nominally applies Title II "common carrier" regulation to cell phone carriers' voice telephone services, while at the same time subjecting these same carriers to negligible information service regula-

tion in their capacity as wireless broadband Internet access providers.¹¹⁴

The FCC's decision to apply a single "information service" regulatory classification for everything offered by an ISP reflects the FCC's interest in administrative convenience and a preference for applying the least intrusive regulatory classification. While one might applaud the FCC's inclination not to regulate and expand its oversight wingspan, in practice the Commission replaces this strategy with selective re-regulation on occasions where the Commission pragmatically needs to come up with a way to remedy the consequences of its regulatory forbearance. Examples of after the fact re-regulation of information service providers include the decision to establish parity in regulatory burdens between certain types of VoIP service providers and their conventional Title II regulated competitors. VoIP service providers, which offer services that access conventional phone numbers, must make compulsory universal service subsidies¹¹⁵ and undertake expensive service retrofits to make VoIP functionally equivalent to conventional dial-up telephone service in terms of accessibility for wiretaps by law enforcement officials,¹¹⁶ use by persons with hearing disabilities,¹¹⁷ and access to emergency services, including automatic location identification.¹¹⁸

The Supreme Court validated the Commission's decision to establish an either/or dichotomy between telecommunications services and information services. In *National Cable and Telecommunications Association v. Brand X Internet Services*,¹¹⁹ the Supreme Court affirmed the

114 *Compare* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, 22 F.C.C.R. 15,817, 15,824 (2007) (report, order, and further notice of proposed rulemaking) (reiterating common carrier requirements for cell phone service providers) *with* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 F.C.C.R. 5901, 5909 (2007) (declaratory ruling) (declaring wireless broadband access an information service).

115 Universal Service Contribution Methodology, 21 F.C.C.R. 7518 (2006) (report, order, and notice of proposed rulemaking) (extending § 254(d) permissive authority to require interconnected VoIP providers to contribute to the USF), *petition for review denied and vacated in part on other grounds*, Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007).

116 Communications Assistance for Law Enforcement Act and Broadband Access and Services, 20 F.C.C.R. 14,989, 15,001–02 (2005) (first report, order, and notice of proposed rulemaking), *aff'd*, Am. Council on Educ. v. FCC, 451 F.3d 226 (D.C. Cir. 2006).

117 IP-Enabled Services, 22 F.C.C.R. 11,275 (2007) (report and order), *on partial reconsideration*, 22 F.C.C.R. 18,319 (2007).

118 IP-Enabled Services, 20 F.C.C.R. 10,245 (2005), *aff'd*, Nuvio Corp. v. FCC, 473 F.3d 302 (D.C. Cir. 2006).

119 545 U.S. 967 (2005) (upholding the FCC's determination that cable modem provided Internet access constitutes an information service); *see also* Rob Frieden, *Neither Fish nor Fowl: New Strategies for Selective Regulation of Information Services*, 6 J. ON TELECOMM. & HIGH

lawfulness of the FCC's classification of cable modem Internet access as an information service, largely on administrative law precedent favoring deference to the expertise of expert regulatory agencies.¹²⁰ The Court may have to revisit the nature and scope of such deference and the extent to which the FCC can re-regulate information services based on a broad public interest mandate contained in Title I of the Communications Act, having determined that Title II does not apply.¹²¹

The FCC has stated that it has statutory authority to establish and enforce rules of conduct on ISPs, like cable modem service provider Comcast, even in the absence of a direct link to Title II common carrier services. The Commission established apparently binding rules without notice-and-comment rulemaking, based in part on its determination that it need only establish a "Policy Statement" which creates policies that, if ignored, would trigger liability for a monetary forfeiture.¹²² Remarkably, in the FCC's articulation of the statutory grounds justifying what appears as regulatory oversight and potential limitation on ISPs' First Amendment freedoms, the Commission invoked § 230 of the Communications Act, which lies within Title II of the Communications Act—the part of the law applicable to "common carrier" telecommunications service providers. Section 230 creates the non-publisher/non-speaker classification for ISPs. Section 230 also offers a safe harbor exemption from liability when an ISP acts as a "good Samaritan" to restrict or block access to content that it deems "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."¹²³ In addition, the statute articulates that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media."¹²⁴ The Commission uses this broad policy pronouncement to justify its decision to apply the largely unregulated

TECH. L., 373 (2008) (noting that the FCC may have overstepped its boundaries with its deregulatory campaign). See generally Rob Frieden, *What Do Pizza Delivery and Information Services Have in Common? Lessons From Recent Judicial and Regulatory Struggles with Convergence*, 32 RUTGERS COMPUTER & TECH. L.J. 247 (2006) (writing that because the FCC cannot make either/or distinctions between services, competition is muddled in the marketplace).

120 See *Brand X*, 545 U.S. at 986–1000 (applying the *Chevron* standard of review to the FCC's decision).

121 See, e.g., *Comcast Corp. v. F.C.C.*, 579 F.3d 1 (D.C. Cir. 2009).

122 E.g., *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14986, 14988 (2005) (policy statement).

123 47 U.S.C. § 230(c)(2)(A) (2006).

124 *Id.* § 230(b).

“information service” classification, as well as its decision to impose what constitutes binding regulatory requirements on information service providers.

Courts generally have supported the dichotomous treatment created by the FCC. Additionally, most cases requiring an analysis of § 230 end up applying the safe harbor exemption without qualification. Little empirical analysis is required to determine whether an ISP actually operated neutrally. Courts appear to assume neutrality, notwithstanding the fact that when an ISP acts to block or restrict content as a “good Samaritan,” the ISP is acting in a manner that is anything but neutral. An ISP can do nothing to retain its appearance as a neutral conduit, but may nonetheless qualify for similar non-liability when operating in a non-neutral manner by opting to examine content to determine if the content poses harm. Given the new and expanding upside financial opportunities offered by deep packet inspection, and noting that ISPs need not lose their safe harbor qualification, it appears that ISPs may become more active monitors of content. Such activity may adversely impact the First Amendment speaker rights of content creators subject to filtering, blocking, and other restrictions. Additionally, such activity belies the assumption that the ISPs’ baseline mode is one of neutrality, having no potential whatsoever to either make First Amendment-impacting judgments about content, or to favor one type of speaker or speech vis-à-vis others.

A. When ISPs Operate in a Non-Neutral Manner, They Qualify as First Amendment Speakers and Publishers Whose Rights May Conflict with Subscribers and Other Content Providers

Marketplace conditions, including the opportunity to pursue new revenue streams, create attractive incentives for ISPs to operate in a non-neutral manner. When ISPs make this election, they qualify as First Amendment speakers and publishers and may not lose certain safe harbor liability exemptions. However, this election should not place ISPs in a superior position vis-à-vis their subscribers, or competing content providers, in terms of First Amendment protections. The potential exists for ISPs to establish superiority based on their control of the conduit used to deliver content and perhaps the residual, but no longer valid, assumption that ISPs remain neutral conduit providers.

When ISPs jointly operate as content publishers, speakers, and packagers, as well as conduit providers, they can easily commingle these roles, ostensibly to achieve synergies and efficiencies. But

whatever the operating efficiency gains, the potential exists for ISPs to exploit undifferentiated status in ways that secure unfair competitive advantages by unreasonably stifling, subordinating, and otherwise handicapping particular traffic flows. The ISP might mask its anti-competitive motivations on grounds that it had to block traffic, drop packets, throttle traffic delivery speeds, or degrade service to specific types of traffic or customer for legitimate-sounding network management rationales. Because so much of non-neutral network operation occurs without easy detection and forensic examination by subscribers or an expert government agency, an ISP could easily claim network management needs when in fact it had mixed motivations. When the FCC sanctioned Comcast for interfering with subscribers' peer-to-peer traffic, even in the absence of network congestion, the company persisted in claiming network management requirements necessitated such intervention. Comcast could just as easily have had an additional or primary motivation to create disincentives for its broadband subscribers to use the company's conduit for sharing video content that offered a competitive alternative to the company's other commercial video programming services, including cable television and pay-per-view access to premium content.

Most ISPs manage their networks and provide new, non-neutral quality of service differentiating services with limited, if any, transparency. ISPs specify in their service contracts non-negotiable terms for ordinary subscribers, including residential users of DSL and cable modem service. Such ISPs provide no service level agreements and bear no duty to disclose whether and how they deviate from the customary "best efforts routing" of traffic. As ISPs find new technological ways to provide non-neutral service and as they continue to perceive increasing financial benefits from service diversification, the need for government-mandated transparency grows.

VI. CONCLUSION AND RECOMMENDATIONS

The Internet continues to evolve and diversify. ISPs and their customers can benefit when price and quality of service discrimination make it possible for the ISP to customize services and offer more than a one-size-fits-all, plain vanilla service package. The motivations to create different Internet access services may also prompt an ISP to pursue network management practices designed to favor corporate affiliates and other ventures that have partnered with the ISP or that have paid a premium for a type of service unavailable to anyone else. ISPs do not engage in unfair trade practices when they offer "better than best efforts" routing, or even when they deliberately favor the

content of certain ventures by facilitating a faster, better, smarter, and more convenient routing of their traffic. But it becomes quite easy, absent transparency and regulatory oversight, for an ISP to cross the line and use network management as a blanket justification for tactics designed to handicap competitors by blocking, throttling, delaying, and dropping traffic packets.

The First Amendment interests of subscribers and unaffiliated, and possibly competing, content providers should force any ISP offering non-neutral service to adhere to several best practices standards. Requiring transparency in operation, imposing reporting requirements, and intervening in disputes does not constitute an unlawful or unreasonable intervention by a government agency, be it the FCC, Federal Trade Commission, or Justice Department. Transparency in operation means that ISPs should have the duty to disclose what types of quality of service diversification it offers subscribers, including the disclosure of any “most favored nation” or other exclusive arrangements relating to how the ISPs route traffic both upstream into the Internet cloud and downstream from the cloud to subscribers. ISPs should regularly report to the FCC traffic statistics, including any instance where the ISP had to downgrade service based on congestion or had agreed by contract to expedite traffic delivery for specific types of traffic and customers.

An ideal regulatory mechanism exists that would provide consumer safeguards while allowing ISPs to pursue non-neutral service diversification. This mechanism calls for the structural separation between the ISP’s conduit function and its content creation, management, publishing, and packaging functions. Such separation does not bifurcate the ISP into a common carrier and non-carrier entity, but instead imposes rules for ensuring that the ISP’s content-related ventures compete on a level, competitive playing field in the marketplace of ideas and in the commercial marketplace.

One can readily expect ISPs to object to structural separation on the same grounds as the telephone companies objected to the *Computer Inquiry* rules. Many of the largest ISPs are subsidiaries of the telephone companies that convinced the FCC that structural separation would result in lost operating efficiencies, create disincentives for investment in next generation infrastructure, and prevent the telephone companies from becoming effective competitors outside basic telecommunications markets. While these companies vociferously objected to structural separation between telecommunications and information services, on their own initiative they have employed

structural separation, or complete divestiture in other more closely related markets, such as wireless telephone service¹²⁵ and telephone directory publishing.¹²⁶ Even as the FCC has abandoned structural safeguards, governments in the United Kingdom,¹²⁷ New Zealand,¹²⁸ and Australia,¹²⁹ as well as individual commercial telecommunications ventures, have considered or implemented this option. The FCC never provided empirical evidence showing the monetary impact of structural safeguards or how these requirements concretely stifled investment, innovation, and operating synergies.

Structural separation also would remedy the apparent inability of the FCC and courts to deal with a single venture that pursues telecommunications, information processing, and video markets. The separation would not necessarily result in one regulated and one or more unregulated ventures. Instead, it would require ventures that operate conduits to provide access to affiliates and competitors on a fair commercial basis, neither compelled to provide access to anyone on a common carrier basis, nor obligated to file public tariffs for all services offered. Structural separation of an ISP's conduit and content functions, the duty to operate in a transparent fashion, modest reporting requirements, and formal dispute resolution rules should

125 See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 24 F.C.C.R. 6185 (2009) ("Verizon Wireless is a joint venture of Verizon Communications, Inc. ('Verizon') and Vodafone Group PLC ('Vodafone'). Verizon owns 55 percent of Verizon Wireless, and Vodafone owns 45 percent.").

126 See Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control, 20 F.C.C.R. 18,433, 18,439 (2005) (memorandum opinion and order) ("Verizon's subsidiary, Information Services, operates directory publishing businesses and provides electronic commerce services.").

127 See United Kingdom Office of Communications, Implementation of BT's Undertakings, <http://www.ofcom.org.uk/telecoms/btundertakings/> (last visited May 11, 2010) (stating that British Telecom, the dominant telecommunications service provider established an operationally separate business unit to provide access to network services for other BT business units and competitors).

128 See Government of New Zealand, Ministry of Economic Development, Operational Separation of Telecom, http://www.med.govt.nz/templates/ContentTopicSummary_26310.aspx (last visited May 11, 2010) (describing how Telecom New Zealand, the dominant, incumbent carrier, split itself into three separate ventures serving wholesale, retail and network markets).

129 See AUSTRALIAN GOVERNMENT, NATIONAL BROADBAND NETWORK: REGULATORY REFORM FOR 21ST CENTURY BROADBAND DISCUSSION PAPER 17 (2009), available at http://www.dbcde.gov.au/__data/assets/pdf_file/0006/110013/NBN_Regulatory_Reform_for_the_21st_Century_Broadband_low_res_web.pdf (considering the need for structural separation in lieu of ineffectual accounting and regulatory oversight); Functional Separation, Op. European Regulators Group, <http://www.ictregulationtoolkit.org/en/Document.3659.pdf> (last visited May 11, 2010).

accrue ample dividends, including assurance of parity between the ISP, its subscribers, and unaffiliated content providers.