

Freedom of Speech

CSE 312 – Legal, Social, and Ethical Issues in
Information Systems

Stony Brook University

<http://www.cs.stonybrook.edu/~cse312>

Ch 3: Freedom of Speech

3.1 Communication Paradigms

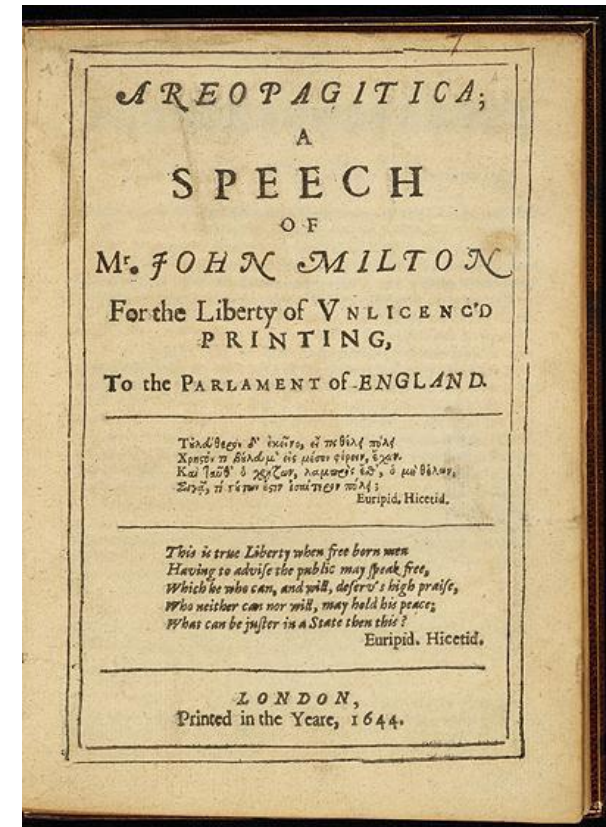
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3.1 Communication Paradigms

Congress shall make no law... abridging the freedom of speech, or of the press. . . .

—First Amendment, U.S. Constitution

- First Amendment protects freedom of speech
 - Print media (newspapers, magazines, books)
 - Broadcast (television, radio)
 - Common carriers (telephones, postal system)
 - Modern mediums: blogs, tweets, posts

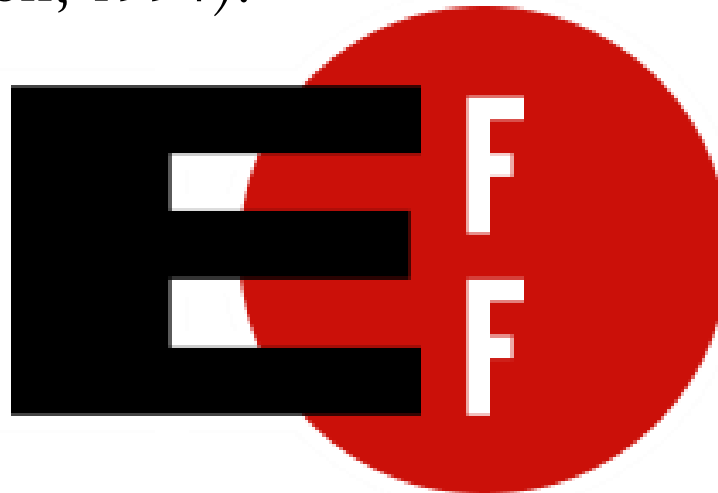
Communication Paradigms

- Internet brought us extraordinary opportunities for increasing free expression of ideas, easy and inexpensive communication between people of different countries, and extraordinary opportunities for access to many voices and points of view all over the world.
- Cliché: **Internet lets us all be publishers**
 - The number of blogs passed 150 million by 2010

Communication Paradigms

- So, Web is different:

*"It is a medium far different from the telephone, which is only a one-to-one medium, ill-suited for reaching large numbers of people. It is a medium far different from the newspaper or TV station, which are one-to-many media, ill-suited for feedback from the audience. **For the first time in history, we have a many-to-many medium**" (Mike Godwin, attorney with the Electronic Frontier Foundation, 1994).*



Communication Paradigms

- But freedom of speech has always been restricted to some degree:
 - Restricting the access of children to certain types on information (pornography, violence)
 - Restriction of spam (mass, unsolicited email)
 - Controversial speech (such as violent video games or leaking sensitive documents)

Communication Paradigms

- *"Each new medium is viewed at first by governments as uniquely threatening, because it is uniquely influential, and therefore a uniquely appropriate target of censorship"* (Law professor Eric M. Freedman)
- The Alien and Sedition Acts of 1798 to regulation of Political Action Committees have been used against newspaper editors who disagreed with the political party in power

Communication Paradigms

- Print media has the strongest First Amendment protection
 - Although books have been banned in the United States
- Television and radio **get broadcasting licenses** from the government
 - Federal Communication Commission (FCC) is the regulating body
 - The government has used threats of license revocation to get stations to cancel sexually oriented talk shows or to censor them
- Since 1971, the government has banned **cigarette ads** from radio, television, and electronic media under the control of the Federal Communications Commission (FCC), but the ads continued to be legal in magazines and newspapers

Communication Paradigms - Legal

- **Telecommunication Act of 1996** (signed by President Bill Clinton)
 - Prior: the **Communications Act of 1934** (“1934 Act”) was the statutory framework for U.S. communications policy, created FCC, the Act left most regulation of intrastate telephone services to the states.
 - Title V in the Telecommunication Act of 1996: **Communications Decency Act (CDA)**
 - **Regulates pornographic material on the Internet: Made it a crime to make available to anyone under 18 any obscene or indecent communication**
 - **Clarified the question of the liability of Internet Service Providers (ISPs):**
"No 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."
 - On June 26, 1997, the Supreme Court upheld the Philadelphia court's decision in *Reno v. American Civil Liberties Union*, stating that the indecency provisions were an **unconstitutional abridgement of the First Amendment right to free speech**

Communication Paradigms - Legal

- **Telecommunication Act of 1996**
- First major Internet censorship law
- Main parts ruled unconstitutional
- However, efforts to censor the Internet continued
- Print publishers and broadcasters are legally liable for content they publish or broadcast
 - They can be sued for libel (making false and damaging statements) and copyright infringement
 - They are legally responsible for obscene material in their publications and programs

Communication Paradigms

- Free-speech Principles
 - The First Amendment is a restriction on the power of government, not individuals or private businesses.
 - Written for offensive and/or controversial speech and ideas
 - Covers spoken and written words, pictures, art, and other forms of expression of ideas and opinions
 - When the government pays (no matter what side it is), it can choose to restrict speech that the Constitution would otherwise protect
 - In the 1980s, federally subsidized family planning clinics were not permitted to discuss abortion
 - A federal agency that provides funds for public radio stations rejected the application of a university because it broadcasts one hour a week of religious programming

Free-speech Principles

- Supreme Court principles and guidelines
 - Laws must not chill expression of legal speech
 - “Chilling effect” laws are generally unconstitutional
 - Distinguish speech from action. Advocating illegal acts is usually legal
 - Anonymous speech is protected
 - Libel and direct, specific threats are not protected
 - Inciting violence is illegal

3.2 Controlling Speech

*I disapprove of what you say, but
I will defend to the death your
right to say it.*

—Voltaire's biographer, S. G.
Tallentyre (Evelyn Beatrice Hall),
describing Voltaire's view of freedom
of speech



Controlling Speech

- Offensive speech: What is it? What is illegal?
- Answers depend on who you are.
 - political or religious speech, pornography, racial or sexual slurs, Nazi materials, libelous statements, abortion information, antiabortion information, advertising of alcoholic beverages, advertising in general, depictions of violence, discussion of suicide, or information about how to build bombs
- Different regions have different laws:
 - The state of Georgia tried to ban pictures of marijuana from the Internet
 - The Chinese government restricts reporting of emergencies (such as major accidents or disasters) and how the government handles them

Controlling Speech

- Most efforts to censor the Internet focus on pornographic and other sexually explicit material
 - rapid proliferation of pornography shocked some people
 - In 1973, the Supreme Court, in *Miller v. California*, established a three-part guideline for determining whether material is obscene under the law
 - Obscenity:
 - Depicts a sexual act against state law
 - Depicts these acts in a patently offensive manner that appeals to prurient interest as judged by a reasonable person using community standards
 - Lacks literary, artistic, social, political or scientific value
 - The First Amendment does not protect obscene material

Controlling Speech

- Straining old legal standards
 - A couple in California operated a computer bulletin board system (BBS) called Amateur Action that made sexually explicit images available to members
 - A postal inspector in Memphis, Tennessee downloaded sexually explicit images in Memphis
 - The couple, who lived and worked in California, were prosecuted in Tennessee and found guilty of distributing obscenity under the local community standards
 - The definition of “community”
 - On the Internet, communities have no physical locations
 - The definition of “distribution”
 - The postal inspector connected through dialup to the BBS

Controlling Speech

- Distinguish speech from action
 - Advocating illegal acts is (usually) legal
- Solve speech problems by least restrictive means
 - It can be difficult to design a law that keeps inappropriate material from children while allowing access for adults
 - The Supreme Court ruled unanimously, in *American Civil Liberties Union et al. v. Janet Reno*, that the censorship provisions of the CDA were unconstitutional
 - *“the Internet deserves the highest protection from government intrusion.”*

Controlling Speech

- Internet Censorship Laws & Alternatives
 - Communications Decency Act of 1996 (CDA) mentioned before:
 - Attempted to avoid conflict with First Amendment by focusing on children
 - Made it a crime to make available to anyone under 18 any obscene or indecent communication
 - Found to be unconstitutional (1997)
 - It was too vague and broad
 - The worst material threatening children was already illegal
 - It did not use the least restrictive means of accomplishing the goal of protecting children

Controlling Speech

- Internet Censorship Laws & Alternatives
 - Child Online Protection Act of 1998 (COPA)
 - More limited than CDA
 - Federal crime for commercial Web sites to make available to minors material “harmful to minors” as judged by community standards
 - Also found to be unconstitutional (2000)
 - It would restrict the entire country to the standards of the most conservative community
 - Restricts access to lawful content for adults
 - Chilling effect

Controlling Speech

- Internet Censorship Laws & Alternatives
 - In **libraries**, people used the terminals to look at “X-rated” pictures within view of children or other library users who found them offensive
 - **Children's Internet Protection Act of 2000 (CIPA)**
 - Requires schools and libraries that participate in certain federal programs to install filtering software
 - **Upheld in court (2003)**
 - Does not violate First Amendment since it does not require the use of filters, impose jail or fines
 - It sets a condition for receipt of certain federal funds

Controlling Speech

- Video Games
 - Some are very gory; some depict murder and torture; some focus on violence against women and members of specific ethnic and religious groups
- A California law banned sale or rental of violent video games to minors.
 - In 2011, the Supreme Court of California ruled it violated the First Amendment.
 - violence and gore are common in classic fairy tales (for example, the grim Grimm Brothers), cartoons (Elmer Fudd always shooting at Bugs Bunny), superhero comics, and literature teenagers are required to read in high school

Controlling Speech

- Alternatives to censorship
- Filters
 - Blocks sites with specific words, phrases or images
 - Parental control for sex and violence
 - Parents have a responsibility to supervise their children and to teach them how to deal with inappropriate material and threats
 - Parents can choose categories to filter (e.g., sex or violence), add their own list of banned sites, and review a log their child's activity
 - Updated frequently but may still screen out too much or too little
 - Not possible to eliminate all errors
- Policies
 - Commercial services, online communities, and social networking sites develop policies to protect members
 - Video game industry developed rating system that provides an indication for parents about the amount of sex, profanity, and violence in a game

Controlling Speech

- Child Pornography and Sexting
 - Includes pictures or videos of actual minors (children under 18) engaged in sexually explicit conduct.
 - Production is **illegal** primarily **because of abuse of the actual children**, not because of the impact of the content on a viewer.
 - Child pornography laws were intended to **apply to adults who commit a repugnant abuse of children**
- Sexting means sending sexually suggestive or explicit text or photos, usually by cellphone or social media
 - Can meet the definition of child pornography if subject is under 18
 - difficult to remove something from cyberspace once it is out there
 - extreme cases lead to suicide

Controlling Speech

- **Spam**: term adopted in the 1990s to mean **unsolicited bulk email**
- What's the problem?
 - Mostly commercial advertisement, but not only
 - ads for Viagra, ads for low mortgage rates, promotions for various stocks, and Nigerian refugees who need help getting \$30,000,000 out of Africa
 - Email is extremely cheap compared to printed direct-mail advertising
 - Angers people because of content and the way it's sent
 - Spam imposes a cost on recipients
- Why not just ban spam?
 - Free speech issues: Cyber Promotions obtained an injunction against AOL's use of filters, claiming AOL violated its First Amendment rights
- Spam filters do not violate free speech (free speech does not require anyone to listen)

Controlling Speech

- Spam
 - A former Intel employee, Ken Hamidi, maintained a website critical of Intel
 - He sent six emails to more than 30,000 Intel employees over a period of less than two years
 - Intel argued that freedom of speech gave Hamidi the right to operate his own website, but it did not give him the right to intrude in Intel's property and use its equipment to deliver his messages
 - Intel argued that the email was a form of trespass
 - **The California Supreme Court ruled in favor of Hamidi: Hamidi's bulk emailing was not trespass, because it did not damage Intel's computers or cause economic harm to the company**

Controlling Speech

- Reducing the spam problem: many people now see very little spam because their mail service provider filters it out
- Anti-spam Laws:
 - **Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act of 2003)**
 - Targets commercial spam
 - Criticized for not banning all spam, legitimized commercial spam
 - **Unsubscribe compliance**
 - A visible and operable unsubscribe mechanism is present in all emails.
 - Consumer opt-out requests are honored within 10 business days

3.3 Posting, Selling, and Leaking Sensitive Material

- Policies of large companies for posting pornography and hate material
 - A private company has property rights in its business that include making decisions about what to sell
 - Yahoo had an adult section
 - Due to public outcry, Yahoo reversed policy and removed ads for adult material
- A site with risks: consider a site about suicide for terminally ill patients in constant, severe pain
 - Do you have an ethical responsibility to help a terminally ill person in pain to commit suicide?
 - The answers are sometimes not obvious or easy
 - Freedom of speech is not the deciding factor. Consider unintended readers or users

3.3 Posting, Selling, and Leaking Sensitive Material

- Leaks
 - The Web is a convenient and powerful tool for whistleblowers
 - Type of material:
 - corruption and abuse of power in businesses and governments are common topics
 - serious violations of laws or professional ethics
 - safety lapses in large systems that affect the public
 - Leaks can provide value to society (awareness or wrongdoing)
 - But the documents belong to someone, so getting them means theft
AND A leak can cause serious damage to a person or organization without their doing anything wrong

Posting, Selling, and Leaking Sensitive Material

- We should remember that leaking begins with a strong ethical case against it
 - Freedom of speech and press do not legitimate stealing files and publishing them
 - This does not mean that leaking is always wrong
 - It means that the reasons for leaking the material must be strong enough to overcome the ethical arguments against it, and the publisher of the leaked material must handle it responsibly
- Documents that include significant evidence of serious wrongdoing are reasonable candidates for leaks

Posting, Selling, and Leaking Sensitive Material

- Leaks
 - Climategate
 - Emails leaked in 2009 and 2011 showed that researchers at the University of East Anglia pursued a variety of methods to deny access to their temperature data by scientists who question some aspects of global warming
 - Denying access to the data is a violation of scientific practice
 - The research center had broken Britain's Freedom of Information Act
 - Investigation did not show scientific misconduct

Posting, Selling, and Leaking Sensitive Material

- WikiLeaks

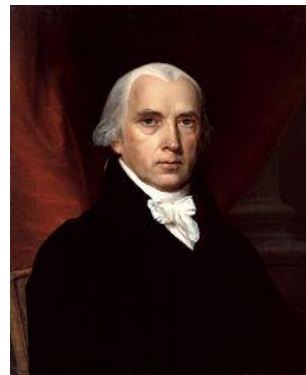
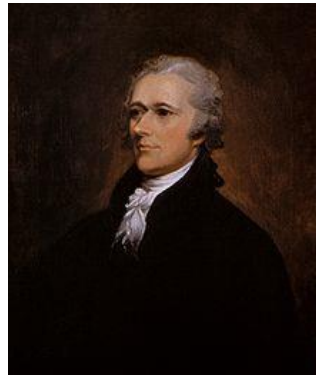
- documents exposing corruption in various governments
- exposing murders by police in Kenya
- large set of U.S. military and diplomatic documents
 - *Does the value of informing the public outweigh the value of confidential discussion when developing diplomatic policies?*
- Releasing a huge mass of documents: 250,000 diplomatic cables
 - *Did the leakers review and evaluate all the documents they released to be sure they met reasonable criteria to justify the leaks?*
- The public has a reasonable claim to a right to know what is being done in its name and with its money
- On the other hand, criminal investigations and national security often require secrecy

Posting, Selling, and Leaking Sensitive Material

- Leaks
 - Responsibilities of operators of websites for leaks
 - The intent of some leaks is to sabotage a competitor or a political opponent.
 - Verification of the authenticity and validity of leaked documents can be difficult, but it is a responsibility of the site operators.

3.4 Anonymity

- Jonathan Swift published his political satire *Gulliver's Travels* anonymously
- Thomas Paine's name did not appear on the first printings of *Common Sense*, the book that roused support for the American Revolution
- Alexander Hamilton, James Madison, and John Jay published the *Federalist Papers* in newspapers in 1787 and 1788 under a pseudonym, *Publius*, and argued for adoption of the new U.S. Constitution



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Anonymity

- Mary Ann Evans and Amantine Lucile Aurore Dupin published under male pseudonyms, or pen names (George Eliot and George Sand)



Anonymity

- Positive uses of anonymity:

- **Protect political speech**

Anonymity is a shield from the tyranny of the majority.

—U.S. Supreme Court

- **Protect against retaliation**

- Anonymizing services

- Many people use anonymous Web browsers to thwart the efforts of businesses to collect information about their Web activity and build dossiers for marketing purposes

- used by individuals, businesses, law enforcement agencies (e.g., when they "go under cover"), and government intelligence services

- A business might want to keep its research and planning about new products secret from competitors

Anonymity

- Negative uses of anonymity:
 - protects criminal and antisocial activities
 - aids fraud, harassment, extortion, distribution of child pornography, theft, and copyright infringement
 - masks illegal surveillance by government agencies
- So, Is anonymity protected?
 - judges should examine the individual case and determine if the evidence is strong enough that the organization requesting the identity is likely to win a lawsuit

SLAPP

- SLAPP (Strategic Lawsuit Against Public Participation)

A SLAPP is a lawsuit filed (generally libel) intended to censor/intimidate/silence critics by burdening them with the cost of a legal defense. Identities of critics obtained via subpoena

- At least 26 states have enacted anti-SLAPP laws

- Allows subject to file a motion

- If granted, motion reduces legal requirements of defendant and awards legal fees to defendant

- Issue of action when an ISP receives a subpoena for the identity of an “anonymous” user

SLAPP

- Political speech is always protected. But businesses and companies try to silence critics
 - In Georgia, Judge Marvin Shoob ruled that a state law forbidding anonymity online is unconstitutional since it violates free speech and free association rights. That state law is so broadly written, the judge indicated, that even America Online screen names could be considered illegal.
 - Free speech advocates develop legal defenses for fighting subpoenas for the names of people who are exercising free speech and not committing libel or posting proprietary company material.

Anonymity

- Discussion Questions
 - *Where (if anywhere) is anonymity appropriate on the Internet?*
 - *What are some kinds of Web sites that should prohibit anonymity?*
 - *Where (if anywhere) should laws prohibit anonymity on the Internet?*

Anonymity

- Glowing reviews (such as those posted on eBay or Amazon.com) may actually be from the author, publisher, seller, or their friends

3.5 The Global Net: Censorship and Political Freedom

Tools for communication, tools for oppression

- Authoritarian governments have impeded flow of information and opinion throughout history.
- The vibrant communication of the Internet threatens governments in countries that lack political and cultural freedom
 - Email and fax machines played a significant role during the collapse of the Soviet Union and the democracy demonstrations in China's Tiananmen Square
 - Facebook and cellphones were key tools in organizing the 2011 Arab Spring
- Governments learned and adopted countermeasures to block the flow of information

The Global Net: Censorship and Political Freedom

- Some countries (such as China and Saudi Arabia) own the Internet backbone within their countries and block specific sites and content at the border
 - Intercept any traffic: sophisticated firewalls and filters to block
- Some countries ban all or certain types of access to the Internet

“The office of communications is ordered to find ways to ensure that the use of the Internet becomes impossible. The Ministry for the Promotion of Virtue and Prevention of Vice is obliged to monitor the order and punish violators.”

- Excerpt from Taliban edict banning Internet use in Afghanistan (2001)
- Avoiding censorship: the global nature of the Net allows restrictions (or barriers) in one country to be circumvented by using networks in other, less restrictive countries.

The Global Net: Censorship and Political Freedom

- Turkey banned YouTube for about two years.
- Pakistan banned Internet telephony.
- Burma (Myanmar) banned use of the Internet or creation of Web pages without official permission
- Before the revolution in Egypt in 2011, the Egyptian government used spyware to intercept Skype communications planted on people's computers that intercepted a communication before it was encrypted on the sender's computer or after it was decrypted on the recipient's computer.
 - During the revolution, the government temporarily shut down the Internet and cellphone service entirely
- The government of Iran, at various times, blocked the sites of amazon.com, Wikipedia, the New York Times, and YouTube

The Global Net: Censorship and Political Freedom

- Aiding Foreign Censors and Repressive Regimes
 - Search engine companies, social media companies, and news and entertainment companies offer services in countries with strict censorship and repressive government
 - Providing services, obeying local laws
 - The Chinese sites of Yahoo and MSN comply with local law and omit news stories that offend the government
 - Google held out longer than some companies, refusing to censor its search engine
 - 2006 Chinese version: google.cn comply with Chinese law
 - In 2010, searching via all Google search sites, including Google Mobile, were moved from mainland China to Hong Kong
 - On March 30, 2010, searching via all Google search sites in all languages was banned in mainland China

The Global Net: Censorship and Political Freedom

- Repressive governments intercept citizens' communications and filter Internet content.
- Companies in Western democracies sell them the sophisticated tools to do so.
- Selling surveillance tools
 - to filter Internet content,
 - to hack cellphones and computers,
 - to block text messages,
 - to collect and analyze massive amounts of Internet data,
 - to plant spyware and other malware (malicious software),
 - to monitor social networks,
 - to track cellphone users.

The Global Net: Censorship and Political Freedom

- Shutting down communications in free countries
 - Motivated by coordinated violence
 - In public safety cases
 - In 2011, the Bay Area Rapid Transit system (BART) in the San Francisco Bay Area shut off wireless service in some of its subway stations
 - In March 2012, the FCC requested public comment on the question of whether or when the police and other government officials can intentionally interrupt cellphone and Internet service to protect public safety
 - In the U.S., the Supreme Court would probably declare unconstitutional a law that authorized a government agency to order a private communications service to shut down.

3.6 Net Neutrality Regulations or the Market?

- Net Neutrality
 - Refers to a variety of proposals for restrictions on how telephone and cable companies interact with their broadband customers and set fees for services.
 - Argue for equal treatment of all customers
- Should companies be permitted to provide different levels of speed at different prices?
 - “Tiered” service: different levels of service with different charges
 - Equal treatment includes charging all customers the same rate for sending information over the Internet and not giving priority to any particular content or customer
- Market
 - Flexibility and market incentives will benefit customers

Net Neutrality Regulations or the Market?

- *Common carriers* were prohibited from providing own content, and from discrimination based on content or source, called line-sharing (open-access) requirements
- It was argued that line-sharing/inflexible prices reduced incentive for investment to improve broadband capacity and innovation
 - FCC eliminated line-sharing requirements (2003-2005)
- ❑ Net Neutrality refers to a variety of proposals for restrictions on how telephone and cable companies interact with their broadband customers and set fees for services

Net Neutrality Regulations or the Market?

- Should companies be permitted to exclude or give special treatment to content transmitted based on the content itself or on the company that provides it?
- Should companies be permitted to provide different levels of speed at different prices?
- Net Neutrality
 - Argue for equal treatment of all customers
- De-regulation
 - Flexibility and market incentives will benefit customers

Net Neutrality

Pros

- Equal treatment of all customers, content
- Not enough competition among network providers to ensure fairness
- Consistent with other common carrier practices

Cons

- Flexibility and market incentives will benefit customers
- Companies should be permitted to provide different levels of speed at different prices
- Companies should be permitted to exclude or give special treatment to certain content

FCC Net Neutrality Order (2010)

- **Transparency.** Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, terms and conditions of their broadband services
- **No blocking.** Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video phone services
- No unreasonable discrimination. **Fixed broadband providers may not unreasonably** discriminate in transmitting lawful network traffic
- Court challenges still on-going