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Verizon First Amendment Challenge Of Net Neutrality Tests Century of Regulation

By: Paul Barbagallo - January 24, 2013

Does Verizon Communications Inc., as a provider of internet access, deserve the same First Amendment protection as a newspaper?

A case now before the U.S. Court of Appeals for the District of Columbia Circuit may settle that question (*Verizon Communications Inc. v. Federal Communications Commission,* D.C. Cir., No. 11-1355, 9/30/11).

A three-judge panel of the court is reviewing a novel and sharply controversial argument by Verizon that the Federal Communications Commission's *Open Internet* rules infringe on the company's First Amendment rights to control the "transmission of speech" over its network.

If the court agrees with Verizon, the FCC rules would be repealed, and every company that provides a pipeline through which consumers gain access to the internet, including Verizon, would be free to block websites or treat their own web content better than that of rivals.

But, perhaps more critically, a Verizon win also would open the way for these same companies to challenge any FCC regulation on First Amendment grounds.

"If the court rules for Verizon, it would be hard for anyone to explain the history of common carriage regulation in this country," Stuart Benjamin, a Duke University School of Law professor who served as the first FCC distinguished scholar in residence during the commission's drafting of net neutrality rules, told BNA in an interview. "If Verizon is right, then the old Ma Bell failed to avail themselves of this incredibly powerful argument that would have exposed every single aspect of telephone regulation to First Amendment scrutiny by the courts. And possibly a lot of that regulation would have been struck down."

Is Verizon an Editor?

For more than a century, the telephone system in the United States has been subject to common carriage laws, which require phone companies--formerly one company, AT&T--to treat all calls and customers equally. Today, companies cannot block calls or offer a tiered service in which a higher-paying customer's calls go through faster or more clearly. Such rules were meant to prevent AT&T from using its monopoly power to crush competitors and harm consumers.

In December 2010, more than 35 years after the court-ordered divestiture of AT&T, the FCC carried forward that same regulatory principle to the internet. In adopting its *Open Internet*

rules, the agency reasoned that, even though the internet is no longer primarily run on phone lines, the laws of equality--of *internet openness*--should still apply.

Less than a year later, Verizon brought the court challenge at issue, claiming the *Open Internet* rules violate the Communications Act of 1934 and the U.S. Constitution.

In briefs filed with the D.C. Circuit, Verizon cited the case of *Turner Broadcasting v. FCC*, in which the Supreme Court reviewed a challenge to the FCC "must carry" rules, which mandated that cable systems with more than 300 subscribers and 12 channels must devote a third of their channel capacity to carrying the signals of local commercial broadcast channels.

In a landmark decision in 1994, the court concluded that even though cable operators are "conduits for the speech of others," they nevertheless merit First Amendment protection.

But Benjamin said there is a stark difference between *Turner Broadcasting* and *Verizon*. One makes "substantively editorial" decisions about which speech to transmit, whereas the other does not, he said.

Benjamin argued in a paper titled "Transmitting, Editing, and Communicating: Determining What 'The Freedom of Speech' Encompasses," published in the *Duke Law Journal* in May 2011, that only an internet service provider that "explicitly provides a substantively edited internet experience" is considered a speaker under *Turner*.

Put another way, if Verizon always had "substantively edited the internet," and customers understood that they were paying for a "substantively edited internet," then the company would be protected by the First Amendment, according to Benjamin.

"Verizon is not the *Drudge Report*," he said in an interview with BNA. "Verizon provides you the whole World Wide Web, not a collection of links chosen for particular reasons. Consumers would not sign up for a curated, edited web experience in which Verizon says, 'Here, we're giving you the things we think are really cool.' From the outset, Verizon has disclaimed any desire to engage in exactly the kind of substantive editing that would make the First Amendment apply."

Could 'Dial-a-Porn' Have Bearing?

But some disagree, such as University of Pennsylvania Law School professor Christopher Yoo.

Yoo, who wrote a paper on the topic, "Free Speech and the Myth of the Internet as an Unintermediated Experience," published in the George Washington Law Review in 2010, said telephone companies do, in fact, edit--and the courts have allowed them to do so.

He referred to the case of *Dial Information Services Corp. of New York v. Thornburgh*, in which the U.S. Court of Appeals for the Second Circuit cleared the way in 1991 for the FCC and the Justice Department to enforce what was known as the "Helms amendment," a controversial law intended to control access to pornographic telephone services.

The law, authored by then-Sen. Jesse Helms of North Carolina (R) and enacted by Congress in 1989, was intended to protect children from possible harm caused by exposure to such telephone services.

In reversing a lower court ruling on the Helms amendment, the Second Circuit said "it is appropriate to define indecency as the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium."

"The dial-a-porn cases raised an important question," Yoo told BNA in an interview. "As common carriers, can telephone companies do this? Can they edit out indecent material? The answer was yes. They can still be editors to create a product that customers ultimately want."

In addition, a similar type of editing also occurs online, Yoo said.

Verizon blocks certain URLs believed to be security threats, filters spam, and offers parental controls--to block exactly the same type of content the Helms amendment targeted.

"If a provider wanted to go a step further and create a 'family values' internet service, would we allow that to happen?" Yoo said. "I can see a world in which this would actually be very good for the consumer, because it would actually give the consumer more control over what he gets--not less."

Another Historic Case Could Be in Play

Beyond FCC case law, some opponents of the agency's *Open Internet* rules have pointed to *Miami Herald Publishing Company v. Tornillo*, a case heard by the Supreme Court in 1974.

At issue in *Tornillo* was a Florida statute that required all of the state's newspapers to grant a "right of reply" to political candidates criticized in their pages.

In a unanimous decision, the court struck down the law, ruling that the government had no right under the First Amendment to tell a newspaper what to print.

Randolph May, president of the free-market think tank Free State Foundation and a former FCC associate general counsel, said the FCC *Open Internet* rules are really "compelled access" mandates, similar to the Florida right-of-reply statute overturned in *Tornillo*.

In a 2007 paper published in *I/S: A Journal of Law and Policy for the Information Society*, May contended that any rules requiring internet service providers to treat all sources of data equally would run afoul of the First Amendment.

Such rules, May wrote in "Net Neutrality Mandates: Neutering the First Amendment in the Digital Age," in effect force companies to convey and make available web content that, in their editorial judgment, they might not otherwise choose to convey and make available.

In an interview with BNA, May explained that, simply because the *Open Internet* rules "compel speech" rather than restrict it, does not mean the FCC is on solid constitutional ground.

“Constitutionally, it makes no difference whether the government forces broadband providers to speak in certain ways or not to speak at all,” May wrote in an amicus brief filed with the D.C. Circuit in *Verizon* last July. Other organizations supporting the brief included TechFreedom, the Competitive Enterprise Institute, and the Cato Institute.

For support, May referred again to *Tornillo*, noting that the protections against compelled speech extend to “business corporations generally, not only to professional publishers.”

Verizon's Argument a Contradiction, Lawyer Says

To one lawyer, whether the court agrees or not, the Verizon First Amendment argument will only come back to haunt the company later.

“Verizon is behaving like a multi-headed hydra,” Jonathan Askin, Brooklyn Law School professor and former FCC senior attorney, told BNA. “The company argues, on one hand, that it is a speaker when it transmits communications across its network, and therefore [the *Open Internet*] rules violate its First Amendment rights. Then, on the other, it argues that it is a neutral platform without control over the content and therefore is guaranteed the protections of the [Communications Decency Act of 1996] and [Digital Millennium Copyright Act of 1998].”

Two provisions of those laws currently shield Verizon from any legal liability as a provider of an internet access service.

The first, Section 230 of the Communications Decency Act, gives Verizon immunity from liability for publishing information produced by others.

The second, subsection 512(c) of the Digital Millennium Copyright Act, sets forth the limitations on Verizon's liability for “storage, at the direction of a user, of copyrighted material residing on a system or network controlled or operated by or for the service provider … ”

Though Askin acknowledges that the Verizon “asymmetrical” legal tactic is common, he said the company may eventually regret the move.

“They will lose in the long run,” he said. “If Verizon wins on First Amendment grounds, all of a sudden, with the rights of a speaker come the responsibilities of a speaker. The company will be subject to the copyright infringement that flows on its networks and the indecency that flows on its networks. And that's a dangerous path.”

Win or Lose, Argument Seen as Just the Beginning

Even if Verizon loses, some supporters of the FCC *Open Internet* rules say they fear the company will continue advancing the argument--in the courts and at the FCC.

“The Verizon argument has been made in a more muted fashion in the 'net neutrality’ proceedings over time, and the network providers are always grumbling that they're more like media companies than utilities,” Susan Crawford, a visiting professor at Harvard Law School who served as a special assistant to President Obama for science, technology, and innovation policy, told BNA in an interview. “But the breathtaking, slashing quality of the argument in

Verizon's brief ... signals that they're going to be banging on this drum in every forum, starting now."

In the end, the D.C. Circuit may not even take up the argument. If, for instance, the court decides the case for Verizon on statutory grounds and vacates the *Open Internet* rules, the company's First Amendment challenge easily could be avoided. Verizon still wins and the rules are repealed.

But Reed Hundt, chairman of the FCC during the Clinton administration, cautioned that there is nothing to stop the D.C. Circuit from also ruling on the Verizon First Amendment claims.

"The judges, if they feel like saying, 'Oh, by the way, we agree with Verizon's constitutional arguments,' they could do that," Hundt told BNA in an interview.

In November, Hundt filed an amicus brief in *Verizon v. FCC* with Crawford and several other former FCC commissioners, and also held a briefing on Capitol Hill to warn of the implications of a Verizon victory in the case.

"We would hate the D.C. Circuit to think, 'Oh, what Verizon's saying is fine with everybody,' " Hundt said following the briefing. "We don't want that. That's why we're doing this."

Hundt and Crawford, in their joint brief, cited the 2006 Supreme Court case of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, in which the high court rejected a First Amendment challenge to a statute requiring law schools to host military recruiters, whether or not the institution agreed with the military's position on gay and lesbian rights. The court said the conduct "compelled" by the statute was not protected by the First Amendment because the schools were not the ones "speaking" when they "hosted interviews and recruiting receptions at which the military expressed itself."

Just as in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, Verizon's "transmission of data" does not meet the threshold for a First Amendment claim, Hundt and Crawford explained.

To them, Verizon is a not "speaker," but rather a "transmitter," more like FedEx and UPS.

As Hundt admitted, one consequence of a Verizon victory is likely to be First Amendment challenges of regulations from other, similar "transmitters."

"Part of the confusion that exists in this legal, doctrinal space around the First Amendment is that courts are still unclear how to analyze questions of code, questions of bits being pushed through communications networks and the information that they hold," Andrea Matwyshyn, an assistant professor of legal studies and business ethics at the Wharton School of the University of Pennsylvania, told BNA in an interview. "But we're starting to see technology dynamics, and the law emerging there, filtering back into physical spaces."

Case law, Matwyshyn noted, is used by attorneys across digital and physical spaces.

"It's an open question--and a serious one," she said.