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By Fax to 202-219-3923 or -0130 (and e-mail)

Re: Supplemental Material of Hearing Witnesses
Notice of Proposed Rulemaking 2005-10
The Internet: Definitions of "Public Communication" and
"Generic Campaign Activity" and Disclaimers

Dear Mr. Deutsch:

On behalf of the Center for Democracy & Technology, I would like to submit some additional information to supplement my testimony before the Federal Election Commission ("FEC") on Notice of Proposed Rulemaking 2005-10, entitled 'The Internet: Definitions of "Public Communication" and "Generic Campaign Activity" and Disclaimers' (the "NPRM"). We appreciate that the Commission decided to keep the record open for one week following the hearing. The following discusses why we believe that the Internet user's experience is fundamentally different than that of users of newspapers and traditional broadcast media, and thus why policy makers – including this Commission – cannot simply import offline regulation into the online world.

The Unique Nature of the Internet

On the second day of the hearing two Commissioners expressed their perception that the user experience on the Internet was similar to the experiences of newspaper readers and TV viewers, in that newspaper readers could turn right to a preferred section of the paper, and TV viewers could use their remote controls to select what to watch. With respect, we disagree and believe that the Internet user's experience is fundamentally different from that of other media, and that the differences are relevant to policy makers' consideration of rules that may apply to

the Internet. As discussed below, the open and democratic nature of the Internet makes it wholly different from traditional mass media, and the degree of an Internet user's control over his or her media experience is unprecedented.

The Reno v. ACLU Decision: A starting point for assessing the unique characteristics of the Internet is the landmark litigation that culminated in Supreme Court's decision in *Reno v. ACLU* striking down as unconstitutional the "Communications Decency Act of 1996."¹ In the first comprehensive assessment of the Internet by an American court, the trial court in *Reno* found what it termed "a unique and wholly new medium of worldwide human communication."² As one judge put it, the "Internet is a far more speech-enhancing medium than print, the village green, or the mails."³

In concluding that speech on the Internet merited the highest level of constitutional protection, the Supreme Court explained:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.⁴

One of the trial judges specifically identified "[f]our related characteristics of Internet communication have a transcendent importance" to the conclusion that the Internet deserves the highest levels of constitutional protection:

First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.⁵

¹ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). CDT was instrumental in organizing one of the two lawsuits that were consolidated into the *Reno* case. As a partner with the Jenner & Block law firm at the time, the undersigned was one of the lead counsel in that case, and had primary responsibility among counsel for the development and presentation to the court of the technical evidence about the Internet and how communications over it work.

² *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996), *aff'd*, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

³ *Id.* at 882 (Dalzell concurring).

⁴ *Reno*, 521 U.S. at 870 (citation omitted).

⁵ *ACLU*, 929 F. Supp. at 877 (Dalzell concurring).

The judge continued:

It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country – and indeed the world – has yet seen. The plaintiffs in these actions correctly describe the “democratizing” effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen.⁶

In its Findings of Fact, the *Reno* trial court concluded:

76. Such diversity of content on the Internet is possible because the Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and magazines. This enables operation of their own Web sites not only by large companies . . . but also by small, not-for-profit groups

. . . .

79. Because of the different forms of Internet communication, a user of the Internet may speak or listen interchangeably, blurring the distinction between “speakers” and “listeners” on the Internet. . . .

80. It follows that unlike traditional media, the barriers to entry as a speaker on the Internet do not differ significantly from the barriers to entry as a listener. Once one has entered cyberspace, one may engage in the dialogue that occurs there. In the argot of the medium, the receiver can and does become the content provider, and vice-versa.⁷

The “openness” of the Internet translates into an unprecedented ability of speakers to speak and listeners to receive content, free (to date) from significant governmental or private interference. Internet users have a wide range of choices as to how to access the Internet and what to do with the communications medium once online. Users can speak to the entire world with little or no investment. Listeners can access a vast wealth of content quickly and easily, without significant governmentally- or privately- imposed limitations. In short, the Internet offers individuals, communities, non-profit organizations, companies, and governments an unprecedented ability to speak and be heard.

⁶ *Id.* at 881 (Dalzell concurring).

⁷ *Id.* at 843-44.

Affirmative User Control and the Diversity of Content on the Internet: Although users of newspapers and TV have an element of control over what information they receive – in that they can turn to a particular section of the paper or choose a particular channel – users of the Internet have orders of magnitude greater control over their user experience. This greater user control flows, at a minimum, from (a) the unlimited capacity of the Internet, (b) the immediacy of content on the Internet, (c) the radically more diverse sources of content available on the Internet, and (d) the technical means users have to choose what information to receive. Each of these is briefly discussed below.

First, the Internet has overwhelmingly more capacity than any other medium. Taking today's Washington Post as an example, a reader is able to choose what to read from approximately 95 full articles and 65 brief news items (plus stock tables, box scores, etc.). In a generous evening of cable TV viewing (assuming 8 half hour shows on each of 150 channels), a viewer can choose what to watch from 1200 TV shows. On the Internet, in contrast, (1) a search of "Google News" indicates that it added more than 2,000,000 news stories in the past 24 hours (including all of the stories contained in the Washington Post), (2) a search of "Google Groups" indicates that at least 300,000 new postings were made to subject-specific "newsgroups" in the past 24 hours, and (3) tens of millions of web pages, blogs, and other Internet sites have certainly added new content in that same time frame.

Second, the vast content on the Internet is available on whatever schedule suits the users, whether it be at 3:00 a.m. (before the morning paper has been delivered) or 3:00 p.m. (before the major network evening newscasts).

Third, the sources of news and information are far narrower in the print or broadcast media. All of the news stories in the Washington Post, for example, were chosen for inclusion by the employees of a single company. More broadly, the ownership of traditional media in the United States is consolidated in the hands of a relatively small number of companies. According to one recent analysis, "in 2000, despite more than 25,000 outlets in the United States, twenty-three corporations controlled most of the business in daily newspapers, magazines, television, books, and motion pictures."⁸ Collectively, those companies serve as powerful gatekeepers, deciding each day what news and information will be made available to the American people. This contrasts with the tens of millions of different sources of content on the Internet.

Finally, Internet users can use tools such as search engines and "RSS feeds" (which monitor web sites and alert users to new content) to jump to specific content desired by the users or have that content automatically appear on the users' computer "desktops."⁹

A single example illustrates the greater ability of Internet users to control what content they receive. Assume a hypothetical media consumer wanted to learn about the hearing conducted last week by the Commission in this proceeding. If that user only subscribed to the

⁸ K. Smith, "The FCC Under Attack," 2003 Duke Law & Technology Review 19 at n.38 (citations omitted).

⁹ For more information on RSS feeds, see for example http://en.wikipedia.org/wiki/RSS_Feed.

Washington Post, she would have been entirely out of luck – that paper did not cover or write about the hearings. The user would have been able to see a very short report on one network news report, and could have heard a somewhat longer story on public radio – but only if she happened to tune in at just the right times for the broadcasts. On the Internet, in contrast, Google News could take the user to over 25 relevant news stories on more than 300 different web sites. Moreover, one could learn about and discuss the hearings on a range of blogs and web sites, including at least one blog that included comments in real time.¹⁰

Far more than with traditional media, Internet users can directly control what content they access, and can access at any time a far broader range of content than is ever available in more traditional media.

Preventive User Control: Beyond the Internet users' ability affirmatively to access desired content, users also have the ability to proactively *avoid* content that they do not want to receive. Although TV viewers can change channels if they do not want to watch a particular show or advertisement, Internet users can take steps to avoid undesired content in advance. For example, Internet users today can install software tools that block the display of the vast majority of advertisements on the Internet, so that the users are shielded from both political and commercial banner advertisements.¹¹

Moreover, if there are entire categories of content that a user does not want to access (or, for example, to which a parent wants to block a child's access), there are a broad range of tools that can screen or filter access to particular content.¹² Although some of these tools were originally aimed at blocking sexual content, many can now block a far broader range of content – indeed, an Internet user could choose to be shielded from all Internet content relating to “politics” and “government.”¹³

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¹⁰ See <http://www.dailykos.com/story/2005/6/28/12514/1317>.

¹¹ See, e.g., <http://adblock.mozdev.org/>.

¹² For a description of the range of “user empowerment” tools, see <http://www.getnetwise.org/>.

¹³ Content categories that can be blocked include “Abortion Advocacy, Abusive Behavior by Others, Activist Groups, Adult Language, Advertising, Advertising for Adults, Alcohol, Alternative Journals, Anarchy, Art, Bomb, Broadcast Media, Cartoon Violence, Chat Rooms, Cults, Drugs, File Transfer, Free Mail, Free Pages, Gambling, Game Sites, Gay/Lesbian/Bisexual Lifestyles, Gothic, Government, Gross, Hacking, Hate Groups, Humor, Illegal Activity, Immoral Activities, Investments, Job Search, Leisure Activities, Lingerie, Message/Bulletin Boards, Militancy, Movies, MS Macro Files, Murder, New Age, Nudity, Obscenity, Occult, Online Auction, Online Games, Personal Ads, Personal Information, PICS Ratings Adult Topics, Politics, Popup Windows, Pornography, Profanity, Racism, Religion, Satanic, School Cheating Information, Search Engines, Self-Help, Sex/Acts, Sex/Attire, Sex/Nudity, Sex/Personals, Sexual Education (multiple levels), Sexually Oriented, Sexually Predatory, Shopping, Sports, Stock Quotes, Suicide, Swimsuits, Tasteless, Tobacco, Transgender, Travel, Unwholesome Activities, Usenet, Violence, [and] Weapons.” See <http://kids.getnetwise.org/tools/blockother>

This unprecedented level of user control on the Internet has a broad range of implications for public policy makers. In the context of governmental efforts to control access to sexual content, for example, courts around the country (starting with the Supreme Court in *Reno*) have repeatedly concluded that Internet users (and their parents) can protect themselves from undesired content without governmental intervention or censorship.¹⁴

In the context of the campaign finance laws, the greater user control over content on the Internet indicates that candidates, campaigns, and big money interests will be far less able to dominate the political conversation and squeeze out other voices. Because of the unique nature of the Internet, the Commission must be particularly careful in crafting any regulation of Internet speech to ensure that it does not chill the very speech that the campaign finance laws should be encouraging.

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We appreciate the opportunity to submit these additional comments to the Commission. In addition, if there remain technical questions about which either the Commissioners or FEC staff would like additional information, CDT would be glad to arrange for one or more technical presentations by technical experts from the academic community. We look forward to continuing to work with the Commission on the important issues raised in this rulemaking.

Respectfully Submitted,

/s/ John B. Morris, Jr.

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¹⁴ See, e.g., *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (New Mexico); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) (Virginia); *American Booksellers Foundation v. Dean*, 342 F.3d 86 (2d Cir. 2003) (Vermont); *Cyberspace Communications, Inc. v. Engler*, No. 99-2064, 2000 WL 176992 (6th Cir. 2000), aff'd 55 F. Supp. 2d 737 (E.D. Mich. 1999) (Michigan); *ACLU v. Goddard*, Civ. 00-0505 TUC-AM (D.Ariz. Aug. 11, 2004) (Arizona); *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York).