

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Broadband Industry Practices) **WC Docket No. 07-52**
)
NOTICE OF INQUIRY)

COMMENT OF

MOTION PICTURE ASSOCIATION OF AMERICA (MPAA)

INTRODUCTION

This comment is in response to the above-captioned Notice of Inquiry (NOI) released by the Federal Communications Commission (FCC) on April 16, 2007.¹

The purpose of the inquiry is to “enhance [the FCC’s] understanding of the nature of the market for broadband and related services,” and particularly its understanding of how consumers are affected by the policies of broadband providers and “whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers.”

INTEREST OF MPAA

MPAA is a trade association representing six of the world's largest producers and distributors of theatrical motion pictures, home videos and television

¹ In the Matter of Broadband Industry Practices, WC Docket No. 07-52, Notice of Inquiry, FF 07-31 (Rel. Apr. 16, 2007).

programming.² Much of the content produced by MPAA member companies is distributed over the Internet under license to legal content delivery services, and MPAA member content is also illegally distributed over the Internet in alarming quantities.

This NOI is the latest in a long-standing debate over the desirability and shape of any government intervention that might be necessary to protect the public interest in accessible, competitive digital communications over the Internet, a debate frequently referred to by the short-hand term “Net Neutrality.” MPAA has not taken a formal position on the abstract principle of whether the Internet should be regulated to insure “Net Neutrality.”³ However, as the debate persists, it is increasingly clear that MPAA members, other creators of content, and the content-consuming public could be seriously and adversely affected by unintended consequences of Net Neutrality regulations if these do not properly reflect the needs of content producers and consumers.

The purpose of this comment is to highlight some of the concerns of content creators, distributors and consumers that deserve the Commission’s attention. Specifically, MPAA urges that, to the extent the FCC implements any regulations or policy solutions regarding Net Neutrality, that those solutions allow broadband

² MPAA members are Buena Vista Pictures Distribution (The Walt Disney Company), Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP and Warner Bros. Entertainment Inc.

³ This restraint is in part due to the difficulty of understanding exactly what is meant by the term; different participants start from different premises, and there is no agreed-upon set of definitions.

providers to manage their networks to protect intellectual property in order to best serve the interests of content creators and the content-consuming public.

THE FCC'S FOUR PRINCIPLES

In 2005, the FCC adopted a Policy Statement setting forth four principles designed to guide agency decision-making in order “to foster creation, adoption and use of Internet broadband content, applications, services, and attachments, and to ensure that customers benefit from the innovation that accompanies competition.”⁴ Each of the four principles was prefaced by the words “To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet,” and added that “consumers are entitled” to:

- + access the lawful Internet content of their choice.
- + run applications and use services of their choice, subject to the needs of law enforcement.
- + connect their choice of legal devices that do not harm the network.
- + competition among network providers, application and service providers, and content providers.

These principles have received wide approbation. Arguments concern their sufficiency and application, not their basic validity.

⁴ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement, 20 FCC Rcd 14986 (2005).

PROTECTION OF INTELLECTUAL PROPERTY

It is generally agreed that protection of intellectual property is vital to the maintenance of a vibrant culture of creativity.⁵ Within that ambit of agreement exists much disagreement about details, such as the proper distinctions between ideas and expression, or the scope of fair use, or the appropriate term of copyright. But the importance of the core doctrine that intellectual property must be protected is not in serious dispute.

The necessary protection has always been provided in at least two ways. One is technological difficulty. If the state of technology is such that only someone with a printing press can copy a book economically, or that huge capital investment is necessary to duplicate a vinyl record or a CD or a movie, significant barriers to the appropriation of creative works exist.

The second mechanism of protection is legal – copyright law, and the institutions and enforcement mechanisms that accompany it.

Obviously, these two modes of protection interact. Legal doctrines are crafted and institutions and enforcement mechanisms are created according to the technological realities of the time. The computer/Internet revolution has drastically changed the balance of copyright protection, by making many things technically possible that were not achievable even a dozen years ago. Technology

⁵ Dissent from this proposition comes primarily from those who proclaim themselves “dot.Communist” and their affiliates. See, e.g., Eben Moglen, *The dot.Communist Manifesto* (Jan. 2003) <http://emoglen.law.columbia.edu/publications/dcm.html>.

has exponentially expanded the creation of unique content and the availability of content on the Internet. This has spurred economic growth, as well as advances in entertainment, education, healthcare, business, and countless other fields.

However, technology also has enabled counterproductive growth in illegitimate, infringing activities with respect to copyrighted content, which, if unchecked, stand to threaten the continued vibrancy and growth of the Internet and the resulting consumer benefits.

New legal doctrines must be created to deal with the wave of technological changes, as, for example, the Digital Millennium Copyright Act of 1998 which has made a significant contribution to both technological innovation and the availability of legal content over the Internet. But it is also increasingly clear that the protection of intellectual property must take technological form, and must in some fashion work in conjunction with the Internet. It is also clear that these technologies are crucial to the protection of content generally, including user communications and user-generated content, not just to the protection of copyrighted products of the entertainment industry.

Many are at work on the problem, looking at technologies such as digital watermarking,⁶ deep packet inspection,⁷ acoustic fingerprinting,⁸ filtering and others.⁹ But no one can predict at this early stage how these technologies will

⁶ <http://www.watermarkingworld.org/>

⁷ <http://www.networkworld.com/details/6299.html?def>

⁸ http://en.wikipedia.org/wiki/Acoustic_fingerprint

⁹ <http://www.drmwatch.com/>

develop. There is one certainty, however. Whatever the FCC decides to do about “Net Neutrality,” it is crucial that the action not inhibit the development and deployment of these new technologies, or inhibit the ability of content producers, distributors and Internet Service Providers to make arrangements to harness technology to solve problems involving quality of service; security; traffic shaping; bandwidth hogging; caching; jitter/latency; and other factors.

It is equally clear that urging the need for Internet policy to consider these issues is not a novel proposition. Contrary to a myth that is often promoted, the Internet *never* consisted of a series of dumb pipes with all the intelligence at the edges:¹⁰

The TCP/IP specification . . . was never dumb. IP packets, the data “envelopes” that carry pieces of actual content, reserve space in the “envelopes” that helps to identify how network devices should process those packets. . . . the original TCP/IP standards “treat[ed] high precedence traffic as more important than other traffic” and defined informational flags for prioritization of packets traveling on TCP/IP networks. The standards document outlined the process for automatically enforcing one of several separately defined policies including minimizing delays in transmission, maximizing throughput, and maximizing reliability. Expanded by subsequent Internet Engineering Task Force (IETF) standards documents, the “smart” traffic filtering and prioritization system predated Saltzer’s “dumb” design suggestion by several years. [Footnotes omitted.]

THE INTERNET AND FREE RIDING

One of the negative aspects of the Internet is that many of the business models it has spawned are based on free riding. Unauthorized P2P movie/music trafficking is a triple example, as it depends on free riding on the work of the creators of the

¹⁰ Douglas A. Hass, “The Never-Was-Neutral Net and Why Informed End Users Can End the Net Neutrality Debates,” 22 *Berkeley Technology Law Journal* No. 4 (2007) (SSRN Version), pp. 8-9. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=957373 [Hereafter “Hass.”]

content, on the legitimate consumers who pay for the content and thus enable its creation, and on the ability of heavy users of bandwidth to take advantage of the light users.¹¹

Other examples abound, though few are as egregious as P2P. As noted by Nicholas Carr, former *Harvard Business Review* Executive Editor:¹²

Web 2.0's economic system has turned out to be, in effect if not intent, a system of exploitation rather than a system of emancipation. By putting the means of production into the hands of the masses but withholding from those same masses any ownership over the product of their work, Web 2.0 provides an incredibly efficient mechanism to harvest the economic value of the free labor provided by the very, very many and concentrate it into the hands of the very, very few.

Unauthorized P2P file sharing of video and audio content presents consumers with a classic Prisoners Dilemma problem: each individual is better off if he can download for free while other consumers pay to support creativity. But if all follow this incentive, then all suffer from the resulting dearth of content. The production of creative and unique content that has so benefited consumers and spurred the growth of the Internet will inevitably be stifled if illegal P2P file trafficking is not addressed. Consumers and content owners share the same vital

¹¹ See generally *A Report to the United States Patent and Trademark Office from the Office of International Relations*, Prepared by Thomas Sydnor II, John Knight & Lee A. Hollaar, Nov. 2006, version 1.1.
http://www.uspto.gov/web/offices/dcom/olia/copyright/oir_report_on_inadvertent_sharing_v1012.pdf

See also Brett Glass, in Dave Farber, “[IP] More on P2P Fuels Global Bandwidth Binge,” April 15, 2005, <http://www.interesting-people.org/archives/interesting-people/200504/msg00131.html>[NB:CHK WITH FARBER/GLASS BEFORE FINAL]Brett Glass <brett@lariat.org

¹² Nicholas Carr, “Web 2.0 Ier Than Thou,” *RoughType*, Oct. 23, 2006
http://www.roughtype.com/archives/2006/10/web_20ier_than.php

interest in creating institutional and technological mechanisms to protect copyrighted content and ensure its continuing development.¹³

Any policy efforts relating to Net Neutrality must promote the protection of intellectual property. It is crucial that FCC policies not interfere with the efforts of broadband companies and content providers of all kinds to solve problems of free riding.

CONCLUSION

As stated at the outset, MPAA members have no formal position on Net Neutrality as an abstract proposition. Our primary interest here is to strongly urge the FCC to recognize the importance of content to the whole Internet enterprise, a proposition that seems implicit in the Four Principles already adopted, but that requires greater focus and emphasis in the current Net Neutrality debate.

It cannot be assumed that content will be produced without reference to the policies that govern the Internet. In its short life, the Internet has already shown that it provides ample opportunity for scammers, sharpshooters and sociopaths. Policies that are neutral as among e-mail, spam, viruses, social networking, frauds, lawful auctions, thefts, legitimate content transmissions and piracy would create an Internet Gresham's Law, wherein the bad would systematically destroy the good, and the overall value of the Internet to consumers would be greatly

¹³ See *Brief of Amicus Curiae The Progress & Freedom Foundation in Support of the Petitioners, Metro Goldwyn Mayer Studios v. Grokster Ltd.*, 545 U.S. 913 (2005), <http://www.pff.org/issues-pubs/books/filings/050124groksteramicus.pdf>.

reduced. It would be Pyrrhic indeed to adopt a set of principles asserting that consumers have a right to a cornucopia of excellent content, but fail to provide an environment in which such content can actually exist.

RESPECTFULLY SUBMITTED,

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