

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

A National Broadband Plan for Our Future

GN Docket No. 09-51

Reply Comments of the Computer & Communications Industry Association

Edward J. Black
Catherine R. Sloan
Matthew Schruers
Daniel O'Connor
**COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION**
900 17th Street NW
Suite 1100
Washington, D.C. 20006
(202) 783-0070

John T. Nakahata
Brita D. Strandberg
Kelley A. Shields
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, D.C. 20036
(202) 730-1300

*Counsel to the Computer &
Communications Industry Association*

July 21, 2009

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

A National Broadband Plan for Our Future

GN Docket No. 09-51

**REPLY COMMENTS OF THE COMPUTER &
COMMUNICATIONS INDUSTRY ASSOCIATION**

I. Introduction

The Computer and Communications Industry Association (CCIA) herein responds to the initial comments filed in response to the Commission’s Notice of Inquiry in the above-captioned proceeding.¹ The comments thus far have provided the Commission with a wealth of diverse information and argument, and the Commission has wisely taken steps to ensure the broadest possible range of public comment and input. As it sorts through the existing record and the additional information and data to come, CCIA urges the Commission to remain carefully focused on its ambitious and critical goal of ensuring that all people of the United States have access to broadband capability.²

The Commission must recognize that its mandate is to improve access to broadband connections to the public Internet. It is this access that drives economic and educational opportunity, access to health services, civic participation, and community

¹ *A National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51, 24 FCC Rcd. 4342 (rel. April 8, 2009) (NOI).

² Federal Communications Commission, *The FCC and Broadband: The Next 230 Days* (July 2, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291879A1.pdf (“July 2 Presentation”).

development, and it is this resource that must be at the center of the Commission's National Broadband Plan. Similarly, the Commission must remain true to the statutory focus on access and its commitment to the public interest. Increasing broadband demand is a laudable goal, but it cannot be elevated above the need to ensure that broadband is available to all people of the United States. While there are many new and popular services that utilize broadband networks – for example, smartphones and digital video – the availability of those popular services in areas with broadband should not mask the unavailability of broadband in other areas.

The country needs a national broadband plan – now. Recovery funds will soon be distributed and the associated investments in the nation's broadband infrastructure are impending.³ Nevertheless, a number of commenters have offered suggestions that would take the Commission far afield, and embroil it in unnecessary controversy that will only delay action on the National Broadband Plan. The Commission need not resolve contentious issues such as cybersecurity or copyright policy in this proceeding simply because these issues have some purported relationship to broadband. Other elements of the federal government have the expertise and responsibility to address these issues and the FCC should, while coordinating with other government entities as needed, decline to expand its mandate beyond its already ambitious goal – devising a plan that will deliver more broadband to more Americans.

Part II of these comments describes how the Commission should focus its National Broadband Plan on providing access to an open Internet for consumers, small businesses and anchor institutions. Part III discusses the importance of the Commission

³ See *Notice of funds availability and solicitation of applications*, 74 Fed. Reg. 32,545 (July 8, 2009).

conducting comprehensive broadband mapping using data supplied directly from broadband providers. Part IV discusses the importance of dismantling bottlenecks that impede competitive and affordable broadband service and suggests targeted actions the Commission can undertake to encourage competitive markets. Part V discusses how the Commission can meet its statutory directive to create a utility maximization strategy through certain types of digital literacy efforts. Part VI discusses why the Commission should not require non-telecommunications providers to contribute to universal service. Part VII discusses why network security need not be compromised to attain network openness. Finally, Part VIII discusses why copyright protection consideration need not, and should not, be resolved in the National Broadband Plan.

II. The Commission Should Focus its National Broadband Plan on Broadband Access to the Public Internet for Consumers, Small Businesses, and Anchor Institutions.

CCIA agrees with the comments of David Isenberg, Robin Chase et al., that the Commission should focus on universal “broadband connections to the Internet”⁴ as the best means of “advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth and other national purposes.”⁵ Broadband infrastructure can be used for many dedicated functions, such as one-way video delivery, health monitoring, and corporate data transfers – all unrelated to the public Internet. But

⁴ Comments of David Isenberg, Robin Chase et al. at 1, GN Docket No. 09-51 (filed June 8, 2009) (“Isenberg Comments”).

⁵ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009) (“ARRA”).

it is the availability of broadband connections to an open, public Internet that will be the catalyst to innovation and entrepreneurship across all sectors of the American economy.⁶

A number of network operators are attempting to shift the focus of this proceeding to lagging broadband adoption rates.⁷ Verizon even implies that it would be irresponsible of the Commission to focus on providing the infrastructure for broadband access to unserved and underserved areas, saying that while it is “easier to focus on ‘supply-side’ issues – such as areas lacking broadband service – such an approach ignores the most significant issues that prevent more Americans from adopting broadband.”⁸

CCIA supports measures to increase digital literacy and to encourage consumers to use broadband. But while it might fit with the business plans of major providers for the Commission to take steps to increase demand for particular broadband equipment and services,⁹ the Commission should not let the “demand side” of our national broadband challenge distract it from addressing the “supply side” – *i.e.*, availability of affordable

⁶ See Comments of the Computer & Communications Industry Association at 3, 27, GN Docket No. 09-51 (filed June 8, 2009) (“CCIA Comments”).

⁷ See, *e.g.*, Comments of Verizon and Verizon Wireless on a National Broadband Plan at 31-35, GN Docket No. 09-51 (filed June 8, 2009) (“Verizon Comments”); Comments of AT&T Inc. at 41-77, GN Docket No. 09-51 (filed June 8, 2009) (“AT&T Comments”); Comments of the United States Telecom Association at 25-39, GN Docket No. 09-51 (filed June 8, 2009).

⁸ Verizon Comments at 31.

⁹ See, *e.g.*, Comments of Intel Corporation at 10-11, GN Docket No. 09-51 (filed June 8, 2009) (supporting a trial program of “vouchers for []computers and/or broadband service”); Comments of the Telecommunications Industry Association at 6-7, GN Docket No. 09-51 (filed June 5, 2009) (recommending the Plan include “subsidies for laptops and other broadband-capable devices”); AT&T Comments at 50 (suggesting funding for programs to supply low-income households with equipment to access the Internet); Verizon Comments at 32-33 (saying the Plan should “consider ways of helping more Americans have the computers or other devices that they need in order to go online”).

broadband services. The ARRA directs the Commission to create a National Broadband Plan that “shall seek to ensure that all people of the United States have *access* to broadband capability.”¹⁰ Of course the Commission can and should include strategies to maximize adoption. Indeed, measures such as increasing the affordability of broadband equipment or service or (as CCIA discusses below in Part V) increasing digital literacy might be appropriate strategies for increasing broadband use in some areas, particularly urban areas.¹¹ But in areas where broadband service does not exist, there will be nothing for consumers to adopt. The focus of the statute is on broadband access, broadband deployment, and broadband infrastructure. The Commission should likewise focus on ensuring broadband *access* to the open, public Internet by all Americans.

III. The Commission Should Require Reliable and Complete Broadband Mapping.

Congress and the Commission have already committed to a National Broadband Plan that is data driven.¹² As CCIA discussed in its initial comments, it is essential to the Commission’s efforts in developing a National Broadband Plan that the Commission obtain detailed information about broadband availability and competition.¹³ Where data is truly proprietary and the release of data would undermine competition, the Commission would be right to keep data confidential. This is clearly the case if competitive special access carriers are required to submit data on the location of their

¹⁰ ARRA at § 6001(k)(2) (emphasis added).

¹¹ In this regard, CCIA points out the expected availability in 2010 of netbooks with Google Chrome OS software. Such availability could provide an effective means of getting affordable and easy-to-use wireless broadband devices with open Internet access in the hands of low-income households with limited computer literacy without tying those households to particular providers.

¹² See July 2 Presentation; ARRA.

¹³ CCIA Comments at 24-25.

competitive offerings, as ILECs would seek to use this data to undermine competition. But where data is not legitimately proprietary and its release would advance competition, the Commission should not make it confidential. This is clearly the case for data on the location and price of mass market broadband offerings.¹⁴ This is particularly true in light of the Obama Administration’s policy directing that all agencies “take affirmative steps to make information public” rather than waiting for specific requests from the public to disclose information.¹⁵ And while, as CCIA has previously noted, providers should not be forced to divulge forward-looking business plans or truly proprietary data, the locations where providers can already provide mass market broadband service and where such service is not provided “shouldn’t be state secrets.”¹⁶

For similar reasons, the Commission should greet mapping efforts that are driven by large network operators with skepticism.¹⁷ The CCIA encourages the Commission to explore public/private mapping partnerships as a way of supplementing and cross-checking Commission data, but the Commission must require the industry to supply directly all data the Commission deems necessary to make informed policy decisions. In other words, the Commission should find ways to be sure that any public/private partnerships are tools of competition, not tools only of the largest network operators, and

¹⁴ Comments of BroadbandCensus.com in Response to the Notice of Inquiry at 13, GN Docket No. 09-51 (June 8, 2009) (“BroadbandCensus Comments”).

¹⁵ Barack Obama, Memorandum for the Heads of Executive Departments and Agencies on the Freedom of Information Act, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/. *See also* CCIA Comments at 24-25; BroadbandCensus Comments at 13.

¹⁶ CCIA Comments at 25.

¹⁷ *See, e.g.*, Verizon Comments at 125.

should reject efforts to use such partnerships as the primary vehicle to provide data about or identify areas in need of broadband access.¹⁸

The Telecommunications Act of 1996 (the “’96 Act”) was designed to promote competition in the “last mile” of local telecommunications networks. Effective mapping is increasingly critical to ensure that purpose is fulfilled. The Commission, in recent years, has encouraged competition by deregulating incumbent telephone and cable network operators, responding to arguments by each that it needed deregulation to maintain a “level playing field” with the other. Unfortunately, mass market competition has stalled at a telephone/cable facilities duopoly, even in large markets. Moreover, many business locations lack any alternative to telephone company special access connections.¹⁹ On the telephone side, industry consolidation and vertical integration have resulted in a situation where the two largest wireline broadband providers are also, by far, the two largest mobile wireless broadband providers, with unique abilities to bundle service packages and to obtain favorable deals on critical transport inputs from affiliated sources. Moreover, each of these two network giants has its own geographic footprint in which it does not compete with the other to lay fiber or provide last mile services, except in mobile wireless services. The third largest wireline telecommunications company, Qwest, has no major mobile broadband operation to match that of the largest two, but unaffiliated mobile broadband carriers such as Sprint, T-Mobile, Cellular South and US Cellular still must depend on Qwest for critical special access connections and middle-mile transport to the Internet. Against this backdrop, it is

¹⁸ See, e.g., AT&T Comments at 41-43.

¹⁹ See, e.g., www.nochokepoints.org (discussing special access choke points that businesses face).

absolutely essential that the Commission arm itself with information to ensure that existing market dynamics are sufficient to deliver the last-mile and other competition mandated by the '96 Act and intervene where competition is not sufficient to constrain rates or maintain service quality.

IV. The Commission Should Ensure that Markets Work to Deliver Competitive and Affordable Broadband.

It is a vital aspect of the National Broadband Plan to dismantle existing bottlenecks that impede the provision of competitive and affordable broadband service. The Commission should look to a lack of competition, along with high prices and inferior, low-speed service, as significant factors in determining whether a geographic area is “underserved.” The Commission should conduct such analysis not only for the broadband options of residential households and small businesses, but also for enterprise business customers of “big pipe” DS1, DS2, and Ethernet special access connections. These enterprise customers also face bottlenecks where a single provider can force them to pay high prices because in the vast majority of locations, they do not have a choice of facilities serving their buildings.²⁰ And critical services such as telemedicine rely on robust and reliable network access.²¹ For areas where meaningful competition does not exist, the Commission should consider targeted regulatory intervention, and should be open to a wide range of approaches, including government subsidies and wholesale capacity or network sharing requirements.²² CCIA also encourages the Commission to

²⁰ See, e.g., www.nochokepoints.org (discussing the difficulties special access choke points create for business customers and, in turn, the nation).

²¹ See letter from Elizabeth Cowboy, Medical Director, eCare-ICU, Via Christi Health Systems, to Chairman Julius Genachowski, Federal Communications Commission, GN Docket No. 09-51 (July 1, 2009).

²² See CCIA Comments at 4.

evaluate whether previous deregulatory decisions have resulted in the competitive outcome they were intended to facilitate and to revisit those decisions where necessary.

CCIA suggests the Commission take the following additional steps to encourage the development of competitive markets for broadband and its critical inputs.

First, CCIA supports the suggestion of the National Telecommunications Cooperative Association (NTCA) that transport providers' rates for special access in the middle-mile should be cost-based and non-discriminatory, particularly where actual competitive choices are lacking.²³ This is critical to making deployment of broadband to rural areas – as well as adoption of broadband in rural areas – affordable.

Second, CCIA encourages the Commission to remain open to all methods of delivering broadband, particularly to underserved and unserved populations. There are a myriad of broadband technologies available today, and no single technology is best suited to serve every consumer or small business in every location at every price. As innovators continue to address the growing need for broadband, they will find even more ways for users to connect. The Commission should not adopt a preference for any particular technology, but rather should ensure that its plan incorporates any technology that can improve broadband access.

Third, the Commission should adjust its special access regime to recognize that the use of CLEC wire center collocations as a predictor of special access competition has failed because meaningful competition has not materialized.²⁴ The National Broadband

²³ Comments of the National Telecommunications Cooperative Association at 36-40, GN Docket No. 09-51 (June 8, 2009).

²⁴ See, e.g., Comments of CBeyond, Inc., Integra Telecom, Inc., One Communications Corp., and TW Telecom Inc. at 6, GN Docket No. 09-51 (filed June 8, 2009) (“CBeyond Comments”). See also Comments of Level 3 Communications, LLC at

Plan should recognize that, going forward, the Commission will need to measure actual market competition rather than relying on inaccurate proxies that have little relation to actual competition.

Fourth, as discussed by CBeyond et al, the Commission should revise the competition and consumer welfare analysis in its UNE interconnection forbearance proceedings.²⁵ Such revisions can ensure that the statutory goals of forbearance are met, and that forbearance is available only where consistent with the public interest and market realities. This is particularly critical with respect to UNE unbundling, as it offers a crucial path to competition against large network operators.

Fifth, the Commission should maximize competition by increasing the available spectrum and removing obstacles to deployment and service. To maximize competition in the wireless market, the Commission should (1) maximize the efficiency of spectrum use, which will increase the ability to reach hard-to-serve areas and to provide mobile broadband services,²⁶ and (2) ensure that carriers can achieve reasonably priced automatic roaming. Currently, the Commission’s “home market exclusion” to its roaming rules permits a competitor to deny a request for automatic roaming in some situations. For example, if a competitive wireless provider cannot build out its own facilities in a market in which it is licensed, perhaps because of all-too-commonly-reported delays involving tower siting or pole attachments, a large carrier could deny the

13 (GN Docket No. 09-51) (discussing the need to use the Plan and government funds to “seed a competitive ‘middle-mile’ market” and noting that it is “acceptable to require carriers who receive federal funds for the construction costs of middle-mile networks to have an affirmative obligation to negotiate interconnection with any requesting carrier.”).

²⁵ CBeyond Comments at 10-11.

²⁶ CCIA Comments at 22.

competitive provider's request for automatic roaming in that market. Both the delays in tower siting and pole attachments and the potential for the largest carriers to exclude their competitors in some areas by denying automatic roaming interfere with a competitive and robust national broadband market. The Commission should act in its existing dockets on these issues to end limits and unreasonable delays on tower siting²⁷ and restrictions on pole attachments,²⁸ and to modify the home market exclusion so the largest carriers cannot exclude their competitors in certain areas.²⁹

V. CCIA Endorses Efforts to Increase Digital Literacy.

To meet the Commission's statutory directive to create a strategy for utility maximization, CCIA supports legislation that would provide free computer training for adults at community colleges. Representative John Larson has introduced H.R. 2060, which would authorize grants to community colleges to improve the accessibility of their computer labs and to provide training both to students and to members of the public to improve their computer literacy skills.³⁰ Such a program would provide a valuable complement to the Commission's actions to enable universal broadband access and adoption. Comparably, the Commission could encourage NTIA to award BTOP grants that would provide similar public access and training at broadband anchor institutions.

²⁷ See Petition for Declaratory Ruling by CTIA – The Wireless Association to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165 (filed July 11, 2008).

²⁸ See *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, WC Docket No. 07-245, RM-11293 and RM-11303, 22 FCC Rcd. 20,195 (2007).

²⁹ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 05-265, 22 FCC Rcd 15817 (2007).

³⁰ See H.R. 2060, 111th Cong. (2009).

VI. The Commission Cannot Require Non-Telecommunications Providers to Contribute to the Universal Service Fund.

The Commission should reject NTCA’s suggestion that content or applications providers that sell neither telecommunications nor telecommunications services should contribute to the Fund.³¹ The Commission has no authority to impose such an obligation.³² Even if it did, doing so would distort the purpose of the Universal Service Fund beyond all recognition. Universal Service is fundamentally network focused, and entities that provide neither telecommunications services nor telecommunications facilities are simply outside of its scope.

VII. The Commission Can Ensure Network Security without Sacrificing Network Openness.

AT&T and Verizon argue that network operators need autonomy and control to manage their networks to respond to national crises and cyber attacks.³³ As CCIA indicated in its initial comments, cybersecurity is an important consideration and the Commission should coordinate with other executive branch agencies to deal with this in the National Broadband Plan. However, the largest telephone companies should not be able to use these important issues as a shield against any restriction on their use of information obtained through intrusive technologies like deep packet inspection (DPI) or any requirements that Internet access be nondiscriminatory. Privacy and security of personal and business communications are not trivial matters.

³¹ See NTCA Comments at 3, 19-21.

³² See 47 U.S.C. § 254(d).

³³ See AT&T Comments at 67-69 (describing need for flexibility in network management to respond to a pandemic); Verizon Comments at 45-53 (describing cyber attacks and asserting that that network managers and Internet providers need “considerable flexibility” to respond to such attacks).

Verizon, for example, implies there are only two options – one where it is able to respond to cyber attacks and the other where Commission regulation has tied its hands to the point where it cannot effectively respond to cyber attacks.³⁴ This is a false choice. There is a difference between using a technique such as DPI to ensure the integrity or security of data, which is legitimate use, and using it to target a particular service, application, content or technology, or to track users and “read” their online communications for commercial gain. Distinguishing permissible and impermissible uses is a common feature of Commission privacy regulation, such as its CPNI rules. The Commission should reject any suggestion that it cannot distinguish between the two, and should likewise protect user privacy and Internet openness by requiring providers to make full and clear disclosures of their practices to their customers.

Similarly, the Commission need not tie its National Broadband Plan to resolution of contentious issues such as how best to ensure our national security and cybersecurity. The Commission is uniquely able and uniquely responsible for developing a National Broadband Plan, while other elements of the government have primary jurisdiction and expertise for national security and cybersecurity. The Commission should, of course, coordinate on issues of cybersecurity with the White House Chief Information Officer and Chief Technology Officer and the Secretary of Homeland Security. And any National Broadband Plan must have the flexibility to meet new legal requirements or security needs. But the National Broadband Plan must, first and foremost, address universal access to broadband Internet connections.

³⁴ Verizon Comments at 52.

VIII. The Various Copyright Protection Proposals Before the Commission Should Not Divert Attention From Ensuring Universal Broadband Access.

Various commenters, including assorted entertainment interests, respond to the Commission's inquiry into the effect of copyright considerations on the National Broadband Plan³⁵ by suggesting that the Plan should include monitoring or filtering of copyrighted content in any definition of "reasonable network management."³⁶ The Commission need not delve into particular agendas with respect to intellectual property law. These requests may be disregarded because they are not germane to the Notice of Inquiry, speculate about unproven technology, and are based on unsound economic analysis.

First, discussions regarding monitoring users and filtering content are not germane to the National Broadband Plan. If a provider restricts access to unlawful content – for example, at the request of law enforcement officials – the Internet Policy Statement (the "Statement") is not implicated.³⁷ If, however, a provider implements technology that filters lawful content, the Statement is implicated. Broadband providers can therefore experiment with content protection schemes consistent with the Statement without requiring special dispensation. No amount of generalized assertions about the importance of content protection, however, should permit broadband providers to violate

³⁵ Notice at ¶ 55.

³⁶ *See, e.g.*, Joint Comments of American Federation of Television and Radio Artists AFL-CIO, et al. at 9-10, GN Docket No. 09-51, (filed June 8, 2009); Filing by Arts+Labs In Response to FCC Notice of Inquiry "A National Broadband Plan for Our Future" at 6, GN Docket No. 09-51 (filed June 8, 2009); Filing of the Songwriters Guild of Am. (SWG) at 2-3, GN Docket No. 09-51, (filed June 8, 2009); Comments of the Entertainment Software Association (ESA) at 4, GN Docket No. 09-51 (filed June 8, 2009); Comments of The Walt Disney Company at 2, GN Docket No. 09-51 (filed June 8, 2009)

³⁷ *See* Internet Policy Statement, FCC No. 05-151 (rel. Sept. 23, 2005).

the Statement by restricting lawful uses of content. Moreover, experience counsels against crafting communications policy around narrow content distribution issues.³⁸ It is not necessary to add another episode to the unsuccessful history of squeezing intellectual property-shaped pegs into communications policy-shaped holes.

Second, the National Broadband Plan need not resolve whether content filtering strategies require absolutism, as the issue is largely speculative: scant evidence has been put before the Commission. Even assuming that broadband providers had free access to the intimate level of personal detail necessary to police users' communications for infringing content, in most cases a broadband provider could not determine whether the content was infringing. It would be unclear whether the content is copyrightable, whether it was copyrighted, whether a given use of it was fair or otherwise non-infringing, or whether the infringing use was one *desired* by the rights-holder.³⁹ Nor should the Statement's limited application to lawful content be read, by negative implication, to deputize network operators to police users' communications, adjudicate their lawfulness, and censor any content deemed inappropriate.⁴⁰ In the unlikely event that the Commission deems this issue worthy of discussion, it should explain that the

³⁸ See e.g., *American Library Ass'n v. FCC*, 401 F.3d 489 (D.C. Cir. 2005).

³⁹ See, e.g., Ben Kuchera, *EA's new motto: please pirate our games... er, storefronts*, *Ars Technica*, June 23, 2009, available at <http://arstechnica.com/gaming/news/2009/06/eas-new-motto-please-pirate-our-games-er-storefronts.ars> (last visited July 6, 2009).

⁴⁰ Congress has previously indicated a preference for user privacy over allowing broadband service providers to exploit access to intimate information in order to enforce private rights. See 17 U.S.C. § 512(m)(1) (copyright safe harbor provisions for service providers should not be construed to require monitor users or affirmatively investigate user behavior).

interstices of the Statement do not bestow the authority of Article III courts upon broadband providers.

Third, while there is no doubt that infringement of intellectual property rights may have economic consequences, the “data” proffered by various commenters is of little probative value. Media investigations into the source of other content-industry statistics have found little or no basis for these numbers, dismissing them as “fiction.”⁴¹ Objective analyses indicate that rights-holder-funded research has drastically overestimated counterfeiting and piracy costs, such as a 2007 study by the Organization for Economic Co-operation and Development (OECD) which demonstrated that industry estimates overstated reality by a factor of three.⁴² This is not a new trend; at least as early as the mid-1990s, Administration officials reportedly acknowledged rights-holder industries’ “varying degree of commitment to accuracy.”⁴³ Several comments cite either to an undisclosed study whose inflated findings were revised downward under criticism,⁴⁴ or to

⁴¹ See David Kravets, *Fiction or Fiction: 750,000 American Jobs Lost to IP Piracy*, Wired Mag., Oct. 3, 2008, available at <http://www.wired.com/threatlevel/2008/10/fiction-or-fict/>; see also Julian Sanchez, *750,000 lost jobs? The dodgy digits behind the war on piracy*, Ars Technica, Oct. 7, 2008, available at <http://arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars>.

⁴² See Hugh Williamson, *Forgery Trade losses ‘under \$200bn’*, Fin. Times, May 7, 2007, available at http://www.ft.com/cms/s/0/acbd064c-fcb9-11db-9971-000b5df10621.html?nclick_check=1.

⁴³ Peter Drahos & John Braithwaite, *Information Feudalism* 98 (2002).

⁴⁴ Compare Am. Fed’n of Television and Radio Artists, et al. at 4, fn.5 (citing LEK Consulting study) with MPAA revises study on movie piracy, Jan. 23, 2008, L.A. Times, available at <http://articles.latimes.com/2008/jan/23/business/fi-download23> (last viewed July 7, 2009); see also Carrie Russell, *MPAA Admits Piracy Study Flawed*, Copyright Advisory Network available at <http://librarycopyright.net/wordpress/?p=75> (last visited June 25, 2009). The contents of the offending study apparently have been withheld from the public notwithstanding a Congressional request for the methodology and data. Compare *The Analog Hole*:

studies that depended upon this discredited research.⁴⁵ Commenters also misuse data by invoking numbers that include physical, offline infringement with respect to Internet downloading,⁴⁶ and by citing global data to support their claims about a strictly domestic policy issue.⁴⁷ Moreover, these studies suffer from methodological shortcomings such as including lawful activities in estimates of unlawful behavior,⁴⁸ and using poorly delineated definitions that lack legal basis.⁴⁹

Can Congress Protect Copyright and Promote Innovation? Before the Senate Comm. on the Judiciary, 109th Cong. 15-16 (2006) with Gigi Sohn, Congress Should Demand MPAA Data on the Cost of Piracy, Jan. 23, 2008 available at <http://www.publicknowledge.org/node/1363>.

⁴⁵ See Arts+Labs at 4, fn.5,6; Am. Fed’n of Television and Radio Artists, et al. at 7, fn.12 (citing LECG Study at 10 and IPI Study at 2,8, en.14,18,both of which rely upon MPAA study prepared by LEK).

⁴⁶ See IPI Study at 6 (noting use of physical piracy numbers in creation of study); see also LECG Study Appx. E.1 (making use of revenue loss estimates that include both piracy and counterfeiting).

⁴⁷ See LECG Study, Appx. tpls. B.2, B.3, and E.1; IPI Study at 5-10 (cited by commenters noted *supra* note 45). The probative value of these studies aside, global figures far outweigh U.S. figures, and are not relevant to the shaping of a *National Broadband Plan*. Proponents would apparently have U.S. users forfeit communications privacy to stem a problem, which by proponents’ own data, is disproportionately a foreign one.

⁴⁸ See LECG Study, Appx. tpls. B.2, B.3, and E.1 (extending scope of research to all “unauthorized” activity). *But see Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984) (“Even unauthorized uses of a copyrighted work are not necessarily infringing.”).

⁴⁹ See *id.* See also LECG Study Appx. A (defining both ‘piracy’ and ‘counterfeit’ as unauthorized reproduction); IPI Study at i (confusing IP infringement with ‘theft’). This legal inaccuracy permeates into comments themselves. For example, while some comments cite Executive Branch rhetoric and judicial dicta equating infringement with theft, a majority of the Supreme Court has held “interference with copyright does not easily equate with theft . . . [because] infringement implicates a more complex set of property interests than does run-of-the-mill theft”. *Dowling v. United States*, 473 U.S. 207, 217 (1985).

IX. Conclusion

CCIA encourages the Commission to remain carefully focused on its ambitious and critical goal of ensuring that all people of the United States have access to broadband capability. Broadband access to an open, public Internet is essential to the economic innovation and educational opportunity that will transform and revitalize the American economy. CCIA urges the Commission to act swiftly and decisively to ensure that all Americans have access to open and affordable broadband connections.

Edward J. Black
Catherine R. Sloan
Matthew Schruers
Daniel O'Connor
**COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION**
900 17th Street NW
Suite 1100
Washington, D.C. 20006
(202) 783-0070

John T. Nakahata
Brita D. Strandberg
Kelley A. Shields
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, D.C. 20036
(202) 730-1300

*Counsel to the Computer &
Communications Industry Association*

July 21, 2009