
**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

**Comments of
The Songwriters Guild of America**

The Songwriters Guild of America (“SGA”) submits these comments in response to the above-captioned Notice of Proposed Rulemaking that proposes to codify as new rules its existing four principles related to preserving the Open Internet while adding two new ones. SGA’s primary objection is to the new fifth principle (“nondiscrimination”) proposed to be codified by the Commission. SGA shares the Commission’s desire for a free and open Internet. However, while the nondiscrimination principle appears unobjectionable on the surface, it in fact would have serious adverse consequences for songwriters, other creators and copyright owners, and should be significantly revised or deleted. In short, the nondiscrimination principle: (1) addresses problems that are largely hypothetical, and (2) would enshrine actual practices that have led to the decimation of the music industry and the impending demise of the profession of American songwriting and music composition. For the reasons stated herein, SGA encourages the Commission to focus on the real issues – which include copyright piracy and bandwidth congestion -- and to avoid the distractions advanced by a small minority of interested parties with an economic stake in preserving the current piracy-infested Internet regime. SGA respectfully submits that, if the Commission changes course in the manner suggested by America’s songwriters, U.S. broadband consumers and the public interest will then be properly served.

The Songwriters Guild of America is the nation’s oldest and largest organization run exclusively by and for songwriters, with more than five thousand members nationwide and over seventy-five years of experience in advocacy for songwriters’ rights. It is a voluntary association comprised of songwriters, composers and the estates of deceased members. SGA provides a variety of services to its members, including contract advice, copyright renewal and termination filings, and royalty collection and auditing to ensure that they receive proper compensation for their creative efforts. SGA’s efforts on behalf of all U.S. songwriters include advocacy before regulatory agencies and the U.S. Congress, and participating in litigation of significance to the creators of the American music.

Summary of Comments.

The Internet as it exists today has resulted in the rampant looting of copyrighted works, a practice that has decimated the songwriter profession. The unregulated expansion of broadband, while providing additional opportunities for the legal digital distribution of music and other copyrighted works, will also facilitate further unlawful downloading and sharing of pirated music. Some responsible Internet Service Providers (“ISPs”) have recognized recently that quality of content will improve the competitiveness of their offerings to their current and potential customers, and have also recognized that network congestion problems and copyright piracy are frequently linked. Unfortunately, the Commission’s proposed nondiscrimination principle would eliminate the incentives that these ISPs have to invest in processes and technologies that will discourage copyright piracy, and may well seal the doom of the songwriting profession. Moreover, it will likely damage one of the most robust sectors of the U.S. economy – entertainment, media and intellectual property. Furthermore, the proposed “nondiscrimination” standard is inappropriately broad: the Commission only presents evidence of harm from potential anticompetitive behavior by network operators, and there is substantial evidence of harm to copyright owners if the Commission extends its reach from “anticompetition” to “nondiscrimination.” The Commission should significantly rework or eliminate the nondiscrimination principle because it is without factual or legal foundation and violates the Administrative Procedures Act. This aspect of the Proposed Rule is fundamentally flawed and contrary to the public interest.

I. The Problems with the Current Internet Regime

The current Internet delivery system is not tenable for creators and copyright owners. Millions of copyrighted songs and movies are downloaded illegally each hour from the Internet. As a result, copyright owners are not compensated for these downloads, many of which displace sale opportunities. This illegal activity has serious financial consequences for all content owners. However, it has a disproportionately harmful effect on songwriters, who rely substantially on the sale of musical works and have limited sources of alternative income (as opposed to artists who can supplement their income through concert ticket sales and merchandise).

Digital piracy has almost completely destroyed the profession of songwriting, and is slowly destroying the music industry. For example:

- According to the International Federation of Phonographic Industries (IFPI), in 2000, global recorded music sales were \$30 billion. By 2008, these same global sales had fallen precipitously to \$18.4 billion.¹ This eight-year period coincides

¹ According to the Bureau of Labor Statistics, in the U.S. there has been a 25% inflation rate between 2000 and 2008, so not only are songwriters receiving approximately only 60% of the revenues they received in 2000, but those reduced dollars today purchase 25% less than they did in 2000, available at http://www.ifpi.org/content/section_statistics/index.html; www.bls.gov.

with the rapid expansion of unlawful file sharing.

- According to the Bureau of Labor Statistics, songwriter income dropped 32% between 2003 and 2006 alone (for the lucky few who still had jobs).
- Every major music publisher has laid off at least half, and sometimes all, of their professional songwriters in the ten years since piracy began to decimate the music industry.²

Critically, there is substantial evidence that peer-to-peer trafficking of stolen copyrighted works over broadband networks is a key culprit:

- 70% of the volume of traffic on broadband networks is Peer to Peer (P2P) file sharing generated by just 5% of the networks' users, and an astonishing 90% or more of such traffic represents unlawful stealing of copyrighted works.³

The unfortunate reality of the current digital world is that online piracy of music is rampant and undeniable. Such piracy has deeply and materially harmed the songwriter community, but it also threatens overall U.S. economy; the economic fate of U.S. copyright industries is critical to U.S. economic success, both domestically and in the global marketplace. For example:

- The intellectual property (IP) generated by U.S. companies is critical to America's prosperity and leadership in the global economy. America's IP-intensive industries employ nearly 18 million workers, account for more than 50% of all U.S. exports, and represent 40% of the country's growth.⁴
- U.S. GDP in 2003 was \$11.0 trillion. By 2007, U.S. GDP (in current dollars) had risen to \$13.8 trillion. In the same year (2007), the "value-added" to U.S. GDP by the "core" copyright industries reached \$889.1 billion or 6.44% of the U.S. economy, and the value added to U.S. GDP by the "total" copyright industries rose to \$1.52 trillion (\$1,525.11 billion) or 11.05% of U.S. GDP.⁵
- Jobs in IP-intensive industries are expected to grow faster over the next decade than the national average.⁶ In 2003, the total copyright industries employed 11,205,700 people, and these workers comprised 8.62% of total U.S. employment. By 2007, total copyright industry employment rose by 504,900 to

² Rick Carnes, *Appeasing Piracy: Net Neutrality Proposals Would Hinder Anti-Piracy Efforts* (Billboard, October 31, 2009).

³ See Comments of NBC Universal, Inc., *In the Matter of Broadband Industry Practices*, FCC WC Docket No. 07-52, Feb. 13, 2008 at 2 (citing various sources).

⁴ U.S. Chamber of Commerce. *Protecting Intellectual Property*, available at <http://www.uschamber.com/IP.htm>.

⁵ Copyright Industries in the U.S. Economy: The 2003-2007 Report, by Stephen E. Siwek of Economists Incorporated, prepared for the International Intellectual Property Alliance (IIPA), June 2009, available at <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>.

⁶ Robert J. Shapiro and Nam D. Pham, *Economic Effects of Intellectual Property-Intensive Manufacturing in the United States* (World Growth, July 2007), 5-6.

11,710,600 workers. In 2007, workers in the total copyright industries comprised 8.51% of all U.S. employees, down slightly from 8.62% in 2003.⁷

- The American motion picture industry carries a positive balance of trade around the world and a \$13.6 billion trade surplus.⁸
- Total digital and physical recording revenues in the U.S. in 2008 were \$10.3 billion.⁹

In observance of its public interest mandate, the Commission must be mindful of the significant evidence presented here and in other filings that the nondiscrimination principle of the current regulatory proposal would injure this critical engine of the U.S. economy, and could be the final nail in the coffin for creators of an icon of our country's culture – the great American songbook.

II. The Opportunity for Marketplace Solutions.

A. *Joint Interests of ISPs and Creators.*

Most copyright infringers rely on broadband networks to download the illicit material and then further distribute it. The current situation -- which permits a small percentage of looters to usurp the vast majority of a communication network's bandwidth for the primary purpose of committing illegal acts, all for a flat fee per month in most cases -- is simply unacceptable. ISPs are therefore in a unique position to recognize illicit works and to prevent them from reaching the customer, and to enable new ways for delivering lawful content over the Internet.

Fortunately, some ISPs have acknowledged the problem and are considering actions to respond to it. Indeed, there have been statements in recent years that indicate an interest on the part of some ISPs to address the practices of a small set of broadband users that have caused such profound damage to songwriters and other creators.¹⁰

The interests of responsible ISPs and copyright owners overlap in this respect: ISPs have an interest in avoiding bandwidth congestion and in attracting the best content possible for the benefit of their customers; and copyright owners have an interest in ensuring that piracy is minimized and legitimate sources of copyrighted works are promoted. One

⁷ Copyright Industries in the U.S. Economy: The 2003-2007 Report, by Stephen E. Siwek of Economists Incorporated, prepared for the International Intellectual Property Alliance (IIPA), June 2009, available at <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>.

⁸ Motion Picture Association of America: *The Economic Impact of the Motion Picture & Television Industry on the United States*, April 2009, available at <http://www.mpaa.org/EconReportLo.pdf>.

⁹ Recording Industry Association: *2008 Year-End Shipment Statistics*, available at <http://76.74.24.142/D5664E44-B9F7-69E0-5ABD-B605F2EB6EF2.pdf>.

¹⁰ Lowell McAdam, CEO of Verizon Wireless: Finding Common Ground on an Open Internet, available at <http://googlepublicpolicy.blogspot.com/2009/10/finding-common-ground-on-open-internet.html> (October 21, 2009); James Cicconi, Senior Executive Vice President, External and Legislative Affairs, AT&T Letter to Julius Genachowski, Chairman FCC re: Preserving the Open Internet, GN Docket No. 191 (December 15, 2009).

alliance organized with this dual interest in mind is Arts + Labs, and SGA is an active member of this coalition of creators, content owners, and Internet service and technology companies to fund mutual free-market solutions to the problems we jointly face.

B. New Technologies Must Be Promoted, Not Discouraged.

While steps to combat network congestion and copyright piracy are in their early stages, they are nonetheless developing. It is therefore critical that the Commission take no actions at this time that would discourage or prevent ISPs and other companies from investing in technologies and practices that would reduce copyright piracy and allow network operators to provide better services for accessing lawful content over the Internet. The general problem of how the Proposed Rule could discourage necessary investments in network infrastructure was made clear in a recent communication to the Commission from AT&T:

[A] strict nondiscrimination standard could inadvertently limit the availability of creative and innovative services that consumers may want to purchase. Worse still, a strict nondiscrimination rule would completely ban *voluntary* commercial agreements for the paid provision of certain value-added broadband services which would needlessly deprive market participants, including content providers, from willingly obtaining services that could improve consumers' Internet experiences. Thus, such a ban could harm innovation and potentially delay critical infrastructure investment by prohibiting services that prove to be neither anti-consumer nor anti-competitive.¹¹

In addition, there are technologies and processes under consideration and testing at the moment that could improve the fight against digital piracy of music and other copyrighted works. These items include:

- **Fingerprinting and watermarking applications:** these operating-system or application-level solutions in essence look for copyrighted content, and when such content is encountered, seek authentication and authority to use the material from the source before allowing the material to flow;
- **Central registry databases:** related to content filtering, this approach acts as a database of copyrighted works and authorized distributors, against which individual transmissions can be compared to ensure that the files proposed for further transmission are not pirated;
- **Commercial exploration of these technologies include:** programs utilized by user-generated content websites to avoid copyright piracy, such as Audible

¹¹ James Cicconi, Senior Executive Vice President, External and Legislative Affairs, AT&T Letter to Julius Genachowski, Chairman FCC re: *Preserving the Open Internet*, GN Docket No. 191 (December 15, 2009).

Magic,¹² and services being developed to monetize and legitimize a greater proportion of P2P traffic, such as SNOCAP.¹³

There is no question that each of these functions or technologies needs further refinement to ensure that they are reliable, accurate and trustworthy and do not frustrate the large number of Internet users who do not engage in digital piracy. Nonetheless, codification of the proposed nondiscrimination principle would discourage further private investment in them, and would be directly adverse to the interests of all creators and copyright owners in reducing Internet piracy.

There has been much controversy over the notion of “deep packet inspection” (“DPI”) as a potential tool to combat the digital piracy of copyrighted works. Like many other organizations, SGA has carefully considered the abstract potential for abuse if an ISP (or other entity) were to engage in unfettered deep packet inspection. These concerns strike us, however, as just that: abstract. Consumers would presumably object to widespread DPI, and therefore ISPs would be wary of such a practice from a purely commercial perspective. Nonetheless, certain DPI practices may be quite reasonable as to a limited subset of some network users. Arguably, the use of anti-virus software involves DPI, and no one finds the practice objectionable in that context. Likewise, if an ISP were to discover that a certain user or website, for example, was utilizing enormous amounts of bandwidth and had been the source of transmissions resulting in a significant number of lawful notice-and-takedown requests from copyright owners permitted by Congress under the Digital Millennium Copyright Act (“DMCA”), then use of DPI techniques *as to that user or website* would appear justified and reasonable. Unfortunately, the proposed nondiscrimination principle is worded so broadly that even this limited response would be either discouraged or prohibited and possibly at odds with the DMCA. The result of such a regulatory regime would be directly adverse to songwriters and other creators, and should be avoided by the Commission. Unfortunately, just such a result is likely if the proposal were codified, as we explain further in the following section.

III. The Problems with Proposed Nondiscrimination Principle

The Commission proposes to codify the following language: “Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.”¹⁴ The Commission elaborates by stating that, “We understand the term 'nondiscriminatory' to mean that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband

¹² More information can be found at the company website:
<http://www.audiblemagic.com/company/about.asp>.

¹³ See the testimony of SNOCAP Chief Operating Officer Ali Aydar before the U.S. Senate Committee on the Judiciary, September 28, 2005.

¹⁴ In the Matter of: Preserving the Open Internet, GN Docket No. 09-191, Notice of Proposed Rulemaking (Oct. 22, 2009) (hereinafter “Proposed Rule”) at ¶ 41.

Internet access service provider”¹⁵ While this proposal sounds reasonable on the surface, this language suffers from significant practical and legal problems, and should not be codified, for the reasons that follow.

A. Practical Problems with the Nondiscrimination Principle.

The principal concern of SGA is that the proposed nondiscrimination principle would lock the Internet into its current form – where continuous access to stolen works is the norm – and would prevent ISPs from developing technology to combat piracy and to enable new methods for accessing lawful content over the Internet. SGA is certainly open to regulation that would benefit copyright users, such as an affirmative rule requiring use of some of the technologies described above (e.g., fingerprinting, watermarking, etc.) to protect copyrighted work in the network environment. In the absence of the Commission regulating in such a manner, however, SGA strongly recommends that the Commission refrain from adopting a new nondiscrimination rule, which would actually prevent the private market from cooperatively exploring the types of technologies and services described above. It is unreasonable to ask network providers or other private parties to innovate in an environment of legal ambiguity or uncertainty, not to mention one that may actually result in legal liability. There is an indisputable problem with Internet piracy, which even the Commission acknowledges exists. See e.g., Proposed Rule at ¶ 139. SGA respectfully suggests that the Commission focus on an **actual** problem – the looting of copyrighted works on the Internet – and ensure that its regulatory actions (at least) do not frustrate private efforts to solve it.

Unfortunately, the Commission cannot simultaneously accommodate legitimate concerns about the piracy of copyrighted works while advancing a new, untested principle of network nondiscrimination – no matter how it nuances or conditions the term “nondiscrimination.” SGA has spoken with numerous private parties that are sympathetic to addressing the problem of Internet copyright infringement. All parties have stated that the current proposal would discourage or prevent them from investing in Internet anti-piracy solutions, because the rule begins with the presumption that network management or “smart networks” are inherently suspect.

The Proposed Rule compounds the ambiguity because it makes the nondiscrimination principle “subject to *reasonable network management*,” because that term is inherently vague. What investor would be willing to place a bet on in a technology that it *thinks* constitutes “reasonable network management,” but which the FCC or a federal court subsequently decides is not? The answer is, “no investor” would be willing to risk capital on such a venture, with the result being that creators and content owners will continue to lose vast portions of their business to piracy -- and songwriting as a viable profession in this country will continue its downward spiral.

It is further of no meaning, and is likely at odds with the DMCA, that the Proposed Rule applies the nondiscrimination principle only to “lawful content,” because this legal

¹⁵ Id. at ¶ 106.

distinction is simply hortatory.¹⁶ It makes little sense to condition something on it being “legal” – a concept that implies prior adjudication -- when one cannot tell if the content is legal or not. A common sense definition of “lawful content” would mean that the content and its distribution does not violate the exclusive rights available to copyright owners granted by Congress under the Constitution. How can a network operator determine whether certain transmitted material is legal (and subject to nondiscrimination) or illegal (and therefore not) if the Commission renders unavailable in the marketplace the technologies or practical means necessary to make this key determination, short of the expense of a lawsuit? The practical truth is that a vast majority of P2P material is pirated, but some of it is not. Under the Proposed Rule, copyright pirates could transmit small amounts of works in the public domain alongside of massive amounts of infringed works, and a network operator would be prevented from “discriminating” against this law-breaker -- potentially even at the behest of a copyright owner exercising his or her rights under the DMCA. In other words, insertion of the term “lawful” in the Proposed Rule does nothing to eradicate the *de facto* safe harbor for copyright pirates created by the proposed nondiscrimination principle.

B. Legal Problems with the Nondiscrimination Principle.

The Commission’s use of the term “nondiscrimination” itself lacks sufficient legal foundation. The Commission explains in ¶ 107 of the Proposed Rule its concern over the control that networks exercise over the final few miles of connectivity between the Internet and a customer, and uses this concern as the primary justification for its nondiscrimination principle. No evidence is provided by the Commission that any specific discriminatory misconduct is presently occurring based on this concern. Rather, this concern is based on the Commission’s assumption that there is a lack of competition among broadband service operators for certain consumers, resulting in captive markets of consumers and the ability for ISPs to abuse their market power in these situation. This set of facts however is clearly addressed by federal antitrust statutes and nearly 100 years of case law on the topic. Indeed much of the authority cited by the Commission for the nondiscrimination principle is found in publications addressing antitrust topics.¹⁷ Why is it necessary to utilize the overly broad term “nondiscrimination” in this context, when it is sufficient to rely instead on the apparently more applicable term “anticompetitive” and its well-understood case law? This critical question appears to be at the heart of the filing made by the Justice Department in this proceeding, which encouraged the Commission to proceed with caution in regulating in this area.¹⁸

Furthermore, the Commission has not advanced sufficient information to support its use of the “nondiscrimination” standard, particularly given that the only evidence it presents demonstrates that the sole applicable standard would be the “anticompetitive” standard.¹⁹

¹⁶ While the Proposed Rule emphasizes several times that it only applies to “lawful content” on the Internet, at no point does the FCC define the term nor does it propose how ISPs should distinguish between legal and illegal content.

¹⁷ See, e.g., the references to the “market power” question in footnote 226 of the Proposed Rule.

¹⁸ See, *Ex Parte* Submission of the U.S. Department of Justice re: *Economic Issues in Broadband Competition, A National Broadband Plan for Our Future*, GN Docket No. 09-51 (January 4, 2010).

¹⁹ Proposed Rule ¶¶ 106-109 (2009).

There is no significant evidence that “nondiscrimination” principles are required, and significant contrary evidence that antitrust laws along with FCC oversight in accordance with the existing four principles, is sufficient to guard against any potential harms(which remain speculative at best). As such, the Commission has not advanced “substantial evidence” to justify its proposed regulatory action under the nondiscrimination principle, and any further regulatory action on its part under the nondiscrimination standard would constitute “arbitrary and capricious” agency action, and thus would be invalid under the Administrative Procedures Act (“APA”). 5 U.S.C. 706(2).

The Commission has chosen the wrong legal standard to employ in the nondiscrimination principle, and has failed to support this choice with the substantial evidence necessary for it to develop a rulemaking that can pass muster under the APA. The Commission cannot proceed to a final rule using the “nondiscrimination” principle in this aspect of its Open Internet policy.

CONCLUSION.

For the above-cited reasons, the Commission should significantly revise or delete the proposed nondiscrimination principle in this rulemaking.

Respectfully submitted,



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