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 AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, AND SCREEN ACTORS GUILD

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Summary

The American Federation of Television and Radio Artists ("AFTRA"), Directors Guild of America ("DGA"), International Alliance of Theatrical Stage Employees ("IATSE"), and Screen Actors Guild ("SAG") (collectively the "Guilds and Unions") support the availability of broadband Internet access to all Americans in order to allow for the *lawful* flow of content; however, broadband policy will be incomplete as long as it fails to address theft of content via *unlawful* Internet distribution. Internet theft threatens grave harm to the output of our nation's creative industries, and to the artists and craftspeople who make up the membership of the Guilds and Unions. In this rulemaking, the FCC has an opportunity to greatly improve the odds for combating online theft of our members' work. The Commission should ensure that any rules it adopts will strengthen, not weaken, the rights of those who create this American resource.

The Guilds and Unions represent over 300,000 workers who create a multitude of diverse films, television programs, and sound recordings that are sought-after by consumers around the world. Protection of their lawful rights to earn a living from the sale and distribution of that content should be one of the principal goals of this proceeding.

In the NPRM, the FCC states that it seeks to balance the public interest in a "free and open Internet" with the interests of a free market and spurring innovation among Internet service providers ("ISPs"). The Guilds and Unions fear that the Commission may be overlooking the heart of what consumers want from a "free and open Internet" – *the content*. Stopping the unlawful distribution of content should be one of the goals of the Commission's broadband policy, and part of the definition of "reasonable network management." Any definition of "nondiscrimination" and "reasonable network management" that this Commission seeks to enforce should permit the ISPs to use all available tools in a competitively neutral manner to

detect and prevent the illegal downloading of copyrighted works. Just as reasonable network management practices today are employed to improve the quality of service to end-users (for example, to avoid excessive congestion, and to block viruses), they should be permitted to block other harmful distribution via the Internet – namely, content distributed in violation of copyright, depriving our members of jobs and compensation.

At the same time, recognizing the pitfalls of media consolidation, we believe that any Internet regulations must also safeguard the protection of consumer interests and the promotion of a competitive atmosphere as this new market continues to develop.

The FCC should facilitate the use of all available tools to combat online theft, while enacting appropriate safeguards to protect consumers. The FCC rules should encourage ISP notification of end-users who try to access copyright-infringing material. Following such notification, appropriate steps to block access to that content should be permitted. As long as these steps are implemented in an impartial manner, end-users should be able to view all lawfully distributed content of their choice.

A limited degree of transparency is appropriate. End-users should be informed of their rights, and FCC oversight should ensure that ISPs do not behave in an anti-competitive manner. But the rules should not require disclosure of specific tools or processes used to screen for stolen material. Excessive disclosure could undermine efforts to combat online theft.

As the Guilds and Unions representing the working face of our industry – people whose creativity and skills make possible the films, television programs and recorded music that are enjoyed by consumers around the world – we appreciate the Commission's awareness that our members' jobs, ability to support their families, and contributions to American economy and culture are at stake.

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The American Federation of Television and Radio Artists ("AFTRA"), Directors Guild of America ("DGA"), International Alliance of Theatrical Stage Employees ("IATSE"), and Screen Actors Guild ("SAG") (collectively the "Guilds and Unions") hereby jointly comment on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned dockets.

I. Background

A. Our Members Earn Their Livings From the Creation and *Lawful* Unimpeded Flow of Content That Consumers Around the World Want

AFTRA, DGA, IATSE and SAG collectively represent artists and craftspeople who create the movies, television programs, sound recordings and other forms of entertainment that people around the world love and demand. Together, our entertainment Guilds and Unions represent over 300,000 individual workers who depend upon the enforcement of this country's copyright laws – and the protection that affords against theft of their creative output – to earn their living. At stake are not just our members' jobs and well-being, but also the well-being of their families, and the hundreds of thousands of ancillary jobs in communities across the country where they live and work. The revenue that their work brings to this country from around the world is critical not just to these workers and this industry but to our national economy as a

whole. That is why the protection of these creative works must be a fundamental consideration in the Commission's deliberations in this proceeding.

To characterize our members' contribution in terms of dollars and cents or as mere "intellectual property" fails to capture what makes entertainment workers unique in the debate over Network Neutrality. Our members are indeed part of one of the most significant economic engines of the U.S. economy. But there is more to it than that. The creation of films, television programs and sound recordings would not occur without the personal investment of time, financial risk and – most importantly – the creativity, talent, and skill of our members. Like all creative endeavors, their success is hard to achieve and fragile to maintain. The digital age – through which consumers around the world have gained instant access to all kinds of "content" including the motion pictures, television programs and sound recordings our members make – has heightened that risk considerably. The question of how this Internet access is used, or abused, has major implications for our members.[1] How that question gets resolved by the Commission is, for us, the heart of this proceeding.

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[1] The threat posed by online theft is a top priority for the Guilds and Unions. *See, e.g.*, Brent Lang, *Entertainment Groups Praise Capitol Confab with Biden*, THE WRAP (Dec. 15, 2009), *available at:* http://www.thewrap.com/ind-column/entertainment-groups-praise-capitol-confab-biden-11831 (reporting on a recent meeting among representatives of the Guilds and Unions and top U.S. Executive Branch officials, including Vice President Biden, and noting the high priority placed on combating piracy); Directors Guild of America, *Taylor Hackford Elected DGA President*, DGA MONTHLY, at 4 (Sept. 2009) (reporting that Hackford's top legislative priority for the Guild would be protecting the work of its members in the new digital age from "Internet theft"); Dave McNary, *AFTRA In No Hurry To Merge*, VARIETY (Aug. 9, 2009) *available at:* http://www.variety.com/article/VR1118007077.html?categoryId=18&cs=1&nid=2248 (noting that the AFTRA convention unanimously passed a resolution urging the government to strengthen protection against intellectual property theft on the Internet); International Association of Theatrical Stage Employees, *IATSE Convention Re-elects Matthew D. Loeb International President*, Press Release (July 31, 2009) *available at*: http://www.iatse-intl.org/news/pr_073109.html (IATSE President Loeb stressed that digital piracy is one of two top issues for the union); IATSE 66th Quadrennial Convention Resolution No. 9, adopted July

From the outset, the Guilds and Unions have strongly supported the goal of making broadband access available to all Americans. Similarly, we believe that end-users should be allowed full access to all legal content that is distributed in a lawful manner. And, being well acquainted with the dangers of "media consolidation," we believe that while the Internet marketplace should be allowed to develop, it cannot be done in a monopolistic way. No entity should have a monopoly on content, or be allowed to impose a stranglehold on any aspect of the market.

Equally, we believe that with the need to protect against illegal activity on the Internet comes the responsibility that it be done in a way that does not abuse that power. Behaviors and outcomes that are not permissible with respect to the public should be clearly defined.

Our position on the need to address online theft does not conflict in any way with the Commission's goals of promoting broadband, innovation and investment in the telecom sector. We work in the innovation business. Our members are at the very intersection of art and technology, and they appreciate and utilize the innovation brought on by the digital age. We embrace the notion that the Internet has the potential to foster growth and increase employment in the motion picture, television, and music industries. But this will be true only if content is adequately protected. We offer these comments so the Commission will better understand what is at stake in this proceeding for those whose livelihoods depend on both the creation and the protection of content.

28, 2009 (on file with IATSE) (resolving to "take measures to lobby government, promote legislative and regulatory safeguards and partner with the industry at large in securing the motion picture business from piracy").

B. The Guilds and Unions Represent Diverse Artists and Craftspeople Who Are Dedicated To The Creative Arts

1. American Federation of Television and Radio Artists, AFL-CIO

AFTRA members are the people who entertain and inform America and work as actors, singers, journalists, dancers, announcers, comedians, disc jockeys and other performers in television, radio, cable, sound recordings, music videos, commercials, audiobooks, non-broadcast industrials, interactive games and all formats of digital media. Founded in 1937, AFTRA today provides its more than 70,000 members nationally a forum for bargaining strong wages, benefits and working conditions and the tools and upward mobility to pursue their careers with security and dignity. From new art forms to new technology, AFTRA members embrace change in their work and craft to enhance 21st century American culture and society.

2. Directors Guild of America

DGA was founded in 1936 to protect the economic and creative rights of Directors. Over the years, its membership has expanded to include the entire directorial team, including Unit Production Managers, Assistant Directors, Associate Directors, Stage Managers, and Production Associates. DGA's 14,000 members live and work throughout the U.S. and abroad, and are vital contributors to the production of feature films, television programs, documentary features, news and sports, commercials, and content made for the Internet and new media. DGA seeks to protect the legal, economic, and artistic rights of directorial teams, and advocates for their creative freedom.

3. International Alliance of Theatrical Stage Employees

IATSE is the labor union that represents technicians, artisans, and craftspersons in the entertainment industry, including live theater, motion picture and television production, and trade shows. IATSE was formed in 1893 and has over 110,000 members. Through its international

organization and its autonomous local unions, IATSE seeks to represent every worker employed in its crafts and to help them obtain the kind of wages, benefits, and working conditions they need for themselves and their families.

4. Screen Actors Guild

SAG is the nation's largest labor union representing working actors. Established in 1933, SAG has a rich history in the American labor movement, from standing up to studios to break long-term engagement contracts in the 1940s, to fighting for artists' rights amid the digital revolution sweeping the entertainment industry in the 21st century. With 20 branches nationwide, SAG represents over 120,000 actors who work in film and digital motion pictures, television programs, commercials, video games, industrial shows, Internet, and all new media formats. SAG exists to enhance actors' working conditions, compensation, and benefits and to serve as a powerful unified voice on behalf of artists' rights.

C. U.S. Jobs and Livelihoods Depend On Stopping Internet Theft

Some would like to portray the debate over Internet theft as one in which a few wealthy celebrities and powerful corporations are concerned about "giving away" their "product" because they are greedy and cannot change with the times to create new business models. The hundreds of thousands of people we represent are the testament to the falsity of that proposition. Online theft is not a "victimless crime." To put it bluntly, theft costs jobs.

1. Motion Pictures and Television

The motion picture and television business relies heavily on "downstream" revenue from the exploitation of our product in secondary markets, after initial distribution on television or in a movie theatre. Downstream revenue sources include foreign distribution, DVD sales, and repeated airings on free cable or premium pay television. These revenue sources not only drive

investment in the motion picture and television industry, but they directly fund our members' residual compensation and pension and healthcare plans, as discussed in Section I.C.3., below. Never was this reliance on downstream revenue more significant than it is today – 75% of a motion picture's revenues come from markets after the initial theatrical release, and more than 50% of scripted television revenues are generated after the first run.

While our members who work in motion pictures and television are integral and irreplaceable contributors to the creative process, and while the works in which they participate could not come into being without them, audiovisual works cannot exist without significant financial investments. This financial risk is compounded by the *long-term* nature of the return on these creative works.

Given the importance of downstream revenue to financial success, if there is a decrease in this revenue, people will be more reluctant to invest in new work, and the result will be fewer jobs in the audiovisual arts. Not only are current jobs affected by online theft, but online theft has long-term implications for *future* creators.[2] The motion picture business is structured to make the creation of audiovisual works possible. Employment in the motion picture and

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[2] While the magnitude of the problem of online theft is difficult to estimate, there is no doubt that it is growing. *See, e.g.*, Michael Hiltzik, *Casual Purchase of a Counterfeit DVD Shines Light on Piracy*, L.A. TIMES, Jan. 4, 2010, *available at:* http://www.latimes.com/business/la-fi-hiltzik4-2010jan04,0,3438848.column ("The movie industry's distribution infrastructure is eroding worldwide because selling legitimate DVDs in some countries no longer pays" and "[i]llicit downloading of content from the Internet is even beginning to cut into the audience for pirated hard copies"). *See also* Posting of Dave Itzkoff to The Carpetbagger: The Awards Season Blog of The New York Times, *"Avatar" Commandeers Film Piracy Record*, *available at*: http://carpetbagger.blogs.nytimes.com/2010/01/05/avatar-commandeers-film-piracy-record (Jan. 5, 2010, 12:07 EST) (noting that the recently released film *Avatar* has become the fastest-pirated movie yet); Alexi Mostrous, *Downloaders Defy Avatar 3D Barrier*, THE TIMES, Jan. 5, 2010, *available at:* http://business.timesonline.co.uk/tol/business/industry_sectors/media/article6976081.ece (reporting that *Avatar* was illegally downloaded 500,000 times in the first two days of its release, and 980,000 times in the first week).

television industry is never guaranteed; workers go from production to production, from employer to employer. For most, employment is intermittent and the job search is continual, often with long periods in between projects. During those periods, our motion picture artists, performers, and craftspeople must write new material, develop new works, audition, and fine-tune their craft while sustaining themselves and their families. This is a creative calling with a great deal of inherent financial uncertainty. If our members cannot rely on payment for the work they have completed, then they cannot weather these periods to create new works. When theft costs jobs, its long-term societal impacts are the diminishment of creation and innovation, and the ultimate loss of both a powerful export and a powerful driver of culture that speaks for our nation.

2. Sound Recordings

The music industry has sustained itself for decades on the fundamental model of investment in and the sale of sound recordings. It is axiomatic that a shortage of investment revenue to fund new recordings will result in the loss of thousands of jobs essential to the successful distribution and sale of new music. In the music industry, the primary source of income earned by royalty artists is royalties accrued through the sale and distribution of sound recordings. Furthermore, background vocalists derive an important part of their income from residuals calculated from the sale and licensing of copyrighted works. Protecting copyrighted music is necessary to ensure that recording artists are able to support themselves financially.

Ironically, although the Internet has become a vital sales and distribution platform for music, online theft of sound recordings has made it increasingly difficult for recording artists to make a living. Unlawful downloading, file sharing and digital theft constitute a direct attack on the legitimate sale and distribution of copyrighted material upon which recording artists and background vocalists rely. The rampant online theft of copyrighted material devastates the livelihoods of

recording artists, and adversely affects their ability to earn health and retirement benefits. It results in a real and material impact on artists' ability to support their families and to sustain and invest in their careers. Adequate compensation provides recording artists with the means to continue working and to create new work, thereby promoting innovation in the arts. While technological innovation is important, it must not be supported at the expense of artistic innovation and creation.

3. Downstream Revenue and Lawful Sales Generate Substantial Residuals and Royalties For Our Members.

The intermittent work patterns (*i.e.,* freelance nature) of the motion picture and television business, and the integral contribution of our members who work in motion pictures, have been a way of life for over 60 years. Similarly, in sound recordings, many artists struggle for years before they are able to support themselves by making music. As an acknowledgement of these realities, the individual artists and craftspeople *share directly* in the revenue that their work generates, in many cases long after its initial release.

This income typically takes two forms: First, a motion picture, television or recording artist derives compensation from a residual or royalty. *Currently, downstream revenues from the reuse of feature films and television programs and lawful sales of sound recordings generate $1.4 billion annually in essential residuals and royalties for our members.*

In 2008:

- For AFTRA recording artists, 90% of income derived from sound recordings was directly linked to royalties from physical CD sales and paid digital downloads;
- DGA members derived 18% of their compensation from residual payments;[3] and
- SAG members who worked under the feature film and television contract derived 43% of their compensation from residuals.[4]

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[3] Residual payments also fund most of the Basic Pension Plan. See next page.

[4] Reported initial compensation earnings are subject to caps.

Second, residuals and royalties also play a significant role in funding the health and pension plans that benefit all of our members. These benefits provide a guaranteed safety net for our members, and are part of our industry's long-established and collectively bargained agreements. In 2008, residuals derived from the sale of Features to Free TV and/or Features and Free TV to supplemental markets (Pay TV, DVD, viewing on airplanes, etc.) funded:

- 70% of DGA's Basic Pension Plan;
- 65% of the MPI Health Plan (for IATSE Members); and
- 36% of SAG's Health and Pension Plan.

In addition to the concern for our members' loss of their livelihoods, the Commission should be concerned about the effect of online theft on the future creative output of this country. The Commission has acknowledged the importance of fostering a "diversity of media voices" and maximizing the "quantity and quality of Internet content."[5] Preventing online theft is essential to promoting the robust availability to consumers of diverse and high-quality content. As the prospects for downstream revenues diminish, motion picture investors likely will continue to fund only "blockbuster" movies with a high likelihood of success in theatrical release, but financing will be constrained for more diverse films that typically draw a greater percentage of their revenue from post-theatrical distribution.[6] This is not merely a fear for the future. Our members are already experiencing this effect.

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[5] NPRM ¶¶ 62, 69.

[6] *See* Hiltzik, *supra*, note 2 (noting that the cost of piracy of motion pictures is greatest for independent film producers, who rely more heavily on foreign distribution of their films than the large U.S. studios, and who have been getting only "a fraction of what they used to" from foreign distributors because piracy has dramatically diminished their revenue expectations).

This trend has the potential not only to erode jobs and earnings in our industry, but also to deprive consumers, including end-users of high-quality content that reflects a diversity of viewpoints. One need only look to the music industry to understand how a successful content-based business model can be substantially eroded by a failure to effectively

We are hopeful that the Commission shares this perspective. As noted in the NPRM, the development of net neutrality regulations should promote, not frustrate, the protection of U.S. intellectual property interests in content sought by consumers on the Internet.[7] This is a matter of deep conviction and great economic and creative import for our members and everyone who earns a living in our business. Online theft is not a victimless crime that only robs media conglomerates in "Robin Hood" fashion. Each time a motion picture, television program or sound recording is stolen, the revenue that would flow to benefit those workers is lost. Those affected overwhelmingly are the individuals, mainly middle class, whose names are not known to the public but whose jobs are in the long scrolls that appear at the end of a motion picture or in the fine print inside a CD. In the words of director Milos Forman, "These people badly need their paychecks, the residual payments and their health and pension plans coverage. Stealing from these people is not at all a noble undertaking."[8]

We believe that the Commission must address this situation in the present so that the future of the Internet as a vehicle for innovation, creation, ingenuity and job growth can be realized—instead of it being the undoing of a vital domestic industry. FCC rules should foster, not inhibit, the detection and prevention of online theft.

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regulate online theft. *See, e.g.*, Bono, Op-Ed., *Ten for the Next Ten*, N.Y. TIMES, Jan. 3, 2010, at WK10.

7 NPRM ¶ 16.

8 Milos Forman, Directors Guild of America, Keynote Remarks at the CISAC World Copyright Summit (June 10, 2009), *available at:*. http://www.bmi.com/images/news/2009/wcs_-_milos_forman_speech_-final_ok_-_6-10-09.pdf.

II. Discussion

The Commission proposes to clarify the rights and responsibilities of Internet service providers ("ISPs") and end-users through defined terms such as nondiscrimination, transparency, and reasonable network management. As requested in the NPRM, the Guilds and Unions offer these comments in response to specific questions posed by the Commission in Section IV of the NPRM.

A. This Proceeding Offers An Opportunity for the Commission to Make a Critical Difference In the Fight Against Online Theft

The Commission seeks comment on whether to adopt net neutrality rules, and how to balance preserving an open, safe, and secure Internet, protecting the business needs of ISPs, and promoting broader public interests like innovation, investment, research and development, competition, consumer protection, speech, and democratic engagement.[9] Defending U.S. jobs by combating online theft also should be one of the Commission's top priorities.

Promoting reasonable steps to prevent Internet theft would serve all of the Commission's goals. A diverse array of high-quality, innovative content has been one of the key drivers of Internet demand to date, and will be essential to the universal broadband adoption sought by the Commission. The rampant distribution of unlawful content over the Internet harms the artistic endeavors of those who create content for a living. The theft of online content not only diminishes the artist's ability to be compensated for his or her creation, but also deprives the artist of the ability to control how his or her work is distributed and experienced by the public. Moreover, the proliferation of stolen content does nothing to enhance the end-user experience, protect the legitimate business needs of ISPs, or promote any other public interest such as free speech, democratic engagement, law enforcement or investment in the nation's infrastructure.

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[9] NPRM ¶ 50.

Online piracy is theft of property for which there is already a market, property that otherwise could be purchased at a legitimate market-driven price, fairly compensating our motion picture and musical artists, performers and craftspeople for their labor and ingenuity.

The Commission proposes that "reasonable network management" should permit ISPs to block "harmful" traffic.[10] Pirated content is not merely harmful to the economy, as the Commission recognizes,[11] but also can be devastating to those whose careers are devoted to the creation of the underlying works. The proliferation of stolen copies of copyrighted works directly impacts the jobs and livelihood of those who worked to create those works, for the reasons discussed above. It also is responsible for significant congestion on the Internet, which harms all end-users.[12] It is therefore essential that ISPs be engaged in the effort to combat such theft. As such, if the Commission adopts net neutrality rules, such rules should be drafted so as not to prohibit ISPs from taking reasonable, content-neutral steps to detect and prevent the distribution of pirated works. We propose a specific set of steps in Section E., below.

Those who do not believe action is needed to protect copyrighted works allege that ISPs might block lawful content as well as stolen works. They would rather allow all content to be transmitted, regardless of copyright, and resolve copyright violations through lawsuits for damages against the thieves.[13] Make no mistake, the Guilds and Unions support the widest possible access to content for end-users, so long as it does not violate intellectual property rights.

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10 *Id.* ¶ 138.

11 *Id.* ¶ 139.

12 Scott Cleland, *Lessons from Sweden's Illegal File-Sharing Crackdown*, THE PRECURSOR BLOG, April 9, 2009, *available at:* http://precursorblog.com/content/lessons-swedens-illegal-file-sharing-crackdown (discussing a new Swedish law cracking down on illegal file-sharing, which led to an immediate reduction in daily Internet traffic in Sweden by more than 40%).

13 *See, e.g., Ex Parte* Letter from Markham C. Erickson on behalf of the Open Internet Coalition, *et al,* to Marlene H. Dortch in Dockets 09-191 and 07-52, dated Dec. 16, 2009.

However, the Internet allows for such rapid and widespread distribution of content, often with anonymity for those engaged in illegal distribution, who may be located anywhere in the world, that it presents a substantial threat to private parties' ability to effectively enforce their intellectual property rights. Our legal system simply has not kept pace with this type of crime. After-the-fact prosecution, by itself, has proven woefully inadequate in the sound recording industry.[14] Internet thieves are difficult to find and prosecute, as they often operate under aliases or beyond the reach of governments who are willing to effectively enforce copyright laws. Furthermore, even if these thieves are apprehended and prosecuted, the stolen content already will have been disseminated to innumerable end-users throughout the world, resulting in our members' loss of earnings, and impacting their retirement and healthcare benefits. Therefore, reasonable network management should include screening for and potentially blocking illegally distributed material in a neutral manner, as set forth below.

The Guilds and Unions laud the goal of preserving a "free and open Internet"[15] insofar as it permits end-users to access the content of their choice *lawfully*. The Commission's four Internet principles were based on that presumption.[16] Therefore, any rules the Commission may adopt should be premised on this critical distinction: Content that is lawfully distributed should

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14 Hiltzik, *supra* note 4.

15 *See* NPRM ¶¶ 88-89.

16 *See* 20 FCC Rcd 14987 (2005) ("*Internet Policy Statement*"). The Commission's four Internet principles currently enjoy uncertain legal status. *See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008), *pet. for rev. filed*, *Comcast Corp. v. FCC*, Case No. 08-1291 (D.C. Cir.).

be available to all end-users, but there should be no "Internet freedom" for unlawful distribution of content.

As the Internet continues to grow, it is likely that there will be many new interfaces that serve as the primary link between the end-user and Internet content. We believe that the Commission should continue to examine the role and obligations of these interfaces to prevent the distribution of unlawful content over time.[17]

B. Nondiscrimination Should Not Be A Shield For Stolen Content, But Consumers Should Be Protected From Abuses

The Commission seeks comment on a rule that would effectively require ISPs to treat all lawfully distributed content in a neutral manner.[18] Such a rule could be beneficial in preventing ISPs from engaging in anti-competitive behavior, particularly if that rule (1) requires ISPs to provide their users with access to all lawfully distributed content on reasonably non-discriminatory terms, (2) prohibits ISPs from favoring their own content over the content of an unaffiliated provider,[19] and (3) prohibits ISPs from prioritizing the content of one unaffiliated provider over that of another, without a competitively neutral justification. Where ISPs (or others) have disincentives to allow the free flow of content in the market, due to consolidation or agreement, the Commission should investigate such problems. However, any nondiscrimination requirement should permit "reasonable network management," a term which should encompass the ability to impartially screen for illegally distributed content.[20]

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17 *See, e.g.*, Adam Raff, *Search, But You May Not Find*, N.Y. TIMES, Dec. 27, 2009, at A27 ("The F.C.C. needs to look beyond network neutrality and include 'search neutrality': the principle that search engines should have no editorial policies other than that their results be comprehensive, impartial and based solely on relevance.").

18 NPRM ¶117.

19 *See id.* ¶ 107.

20 *See id.* ¶ 139.

Network operators, application providers, and others involved in Internet access and distribution of content currently screen for various lawful purposes (for example, spam, viruses, malware, child pornography), and this type of "discrimination" or prioritization in their delivery of certain types of content may successfully block illegal content and enhance the end-user experience.[21] Any new FCC rules should explicitly endorse screening for illegally distributed material, delaying or degrading the transmission of such material, and ultimately blocking access to it altogether if a user (after receiving sufficient notice) persists in trying to obtain such material. The Commission should not adopt a nondiscrimination rule that fails to make this critical distinction between lawful and unlawful access to content. The rules should authorize only lawful access to copyright-protected works.

Any tools that are utilized to curb illegal activity should be identified as such, and the Commission should retain authority to prescribe protections against misuse. While the Guilds and Unions are greatly concerned about the detection of unlawfully distributed content, we also believe that any rules the Commission proposes to adopt should protect end-users from potential abuse of the tools that may be employed in the name of "reasonable network management." The Commission should take steps to ensure that network management is used neither to stifle competition nor to violate end-users' privacy or freedom of expression, as discussed in Section D.1., below.

The NPRM seeks comment on a nondiscrimination rule that would not prevent ISPs from offering metered services, or charging end-users different prices for different offerings.[22] We

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21 *See, e.g., id.* ¶ 57.

22 *See id.* ¶ 106.

support the Commission's proposed approach.[23] Charging end-users more if they use more bandwidth can facilitate managing congestion on the Internet, and thereby improve the end-user experience. To that extent, it should not be prohibited. However, lawful discrimination should have a purpose that is reasonably related to improving the end-user experience or preventing the unlawful, unwanted or harmful distribution of content.

C. Transparency May Be Beneficial To End-Users But Should Not Be a Gift to Thieves[24]

The Commission proposes to adopt a "transparency" requirement to benefit consumers,[25] but it should be wary of such a requirement becoming a tool for online thieves. The Commission should not require any entity to publicly reveal the details of its methods for identifying and blocking stolen content.

The NPRM states that the Commission seeks to strike a balance among the competing goals of protecting and empowering consumers, allowing the efficient operation of the market, and minimizing the burden placed upon ISPs.[26] The Guilds and Unions agree that it is important for consumers to be adequately informed about the ISPs' terms of use, policies and practices. Consumers should understand, for example, if they are being denied access to certain content because it has been stolen, and they should be informed of what recourse they might have in this and similar circumstances. However, the Commission must strike a balance between keeping end-users informed and preventing theft of content. Therefore, while the Guilds and Unions support empowering consumers by making them aware of their rights and the ISPs' policies, too much transparency – such as requiring ISPs to disclose what tools they use and their internal

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23 *Id.* App. A § 8.13.

24 *Id.* ¶¶ 118-132.

25 *Id.* ¶ 118.

26 *Id.*

processes for detecting and blocking illegal content – would actually empower the criminals, to the detriment of "Internet freedom" and to the detriment of U.S. jobs in the creative content industries.

Any transparency rule the Commission promulgates therefore should be limited to requiring ISPs to inform end-users of their practices and policies that affect the end-user experience.[27] For example, ISPs should be required to note if they routinely screen files for illegally downloaded content, if they will warn end-users when they suspect illegal downloading, and if they will either block stolen content or degrade the end-user's service if stolen content is detected. Further, the FCC may find it appropriate to review, on a confidential basis, the tools the ISPs use to ensure that they do not violate end-user privacy and are not being used for competitive advantage. The Commission should ensure that ISPs do not abuse the network management tools at their disposal. The Guilds and Unions believe that this type of limited transparency requirement will help protect content providers' copyrighted works while maintaining an open Internet environment, allaying end-users' privacy concerns, and ensuring that Internet content is lawfully accessible to end-users.

D. Preventing Illegal Distribution of Content Is Integral To Reasonable Network Management

At the heart of the Commission's proposed net neutrality rules is the term "reasonable network management," as yet undefined.[28] The Commission seeks comment on how this term should be defined, and how it should be used in relation to the affirmative obligations that are

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[27] In this context, the Guilds and Unions agree with the Commission's proposal to adopt "high-level rules specifying impermissible practices" and keeping regulation "light-handed." *Id.* ¶ 49.

[28] *Id.* ¶¶ 135-141.

proposed under these rules.[29] The Guilds and Unions generally support a "reasonable network management" qualifier for any net neutrality rules the Commission adopts, and preventing online theft should be incorporated into the definition of reasonable network management – protecting copyrighted works should be considered presumptively reasonable. As the Commission has noted, federal rules should promote, not frustrate, the protection of U.S. intellectual property interests.[30]

The FCC should permit ISPs to use reasonable network management to prevent the dissemination of harmful material and reduce Internet congestion, thereby improving the quality of service to end-users.[31] The NPRM recognizes the importance of reasonable network management for preventing the unlawful transfer of content,[32] but fails to adequately define "reasonable network management." Open Internet principles are intended to apply only to *lawful* transfers of content.[33] The NPRM states that "it *appears reasonable* for a broadband Internet access service provider to refuse to transmit copyrighted material if the transfer of that material would violate applicable laws."[34] The Guilds and Unions believe that a stronger statement from the Commission is necessary.

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29 In particular, the Commission seeks comment "on the specific wording of the proposed definition of reasonable network management" and "on who should bear the burden of proof" on the issue of whether particular network management practices meet the Commission's definition. *Id.* ¶ 141.

30 *Id.* ¶ 16.

31 *See, e.g., id.* ¶ 138.

32 *See, e.g., id.* ¶¶ 135, 139.

33 *Id.* ¶ 139.

34 *Id.* (emphasis added).

1. Reasonable Network Management Should Be Defined To Expressly Encourage Detection and Prevention Of Online Theft

If the Commission is serious about encouraging ISPs to cooperate in the detection and prevention of online theft, its net neutrality rules should facilitate, not discourage, ISPs who refuse to transmit content that is being unlawfully distributed over the Internet. Ambiguity in the rules will only deter ISPs from action, for fear of prosecution and civil liability. Therefore, the definition of reasonable network management should expressly permit, at the very least, screening for illegal activity and notifying the end-user whenever the ISP suspects he or she is trying to access illegally distributed content. In addition, in certain cases it might also include delaying or denying service to an end-user that persists in accessing illegally distributed content, or blocking the end-user's access to the source of illegally distributed content, after appropriate notification.[35] Under this approach, lawful defenses to infringement claims, such as "fair use," would not be affected, and end-users would have an opportunity to challenge infringement claims before service would be curtailed. Moreover, all screening and communications of end-user Internet usage should be subject to compliance with existing laws protecting consumer privacy.[36]

Further, ISPs cooperating in the detection of online theft, and taking reasonable steps to block illegal distribution of copyright-protected material, should be rewarded. Such cooperation should be entitled to a presumption of reasonableness as a network management practice. This presumption would create a strong incentive for ISPs to use all reasonably available tools to assist in the detection and prevention of online theft, similar in purpose to the safe harbor

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[35] Sometimes, blocking an end-user from downloading a specific file may not suffice. As commercial distributors of pirated material use streaming video and cyber-lockers for paid access to stolen works, reasonable network management may include blocking all access to a known web address for pirated material (after reasonable notice).

[36] *See* NPRM ¶ 142.

provided to entities complying with U.S. copyright laws, as described further below. Such a presumption would provide greater clarity as to what constitutes "reasonable network management." It also would encourage ISPs to actively engage in the fight against this harmful behavior, and to continue to invest in and develop innovative tools for detecting and preventing online theft.

2. Reasonable Network Management Should Be Consistent With Existing Copyright Law

In enacting the U.S. copyright laws, Congress established a clear federal policy to protect the compensation earned by those who create copyrighted works. Put simply, with limited exceptions, anyone who exploits copyrighted material must pay the creative artists and craftspeople to whom royalties and residuals are owed.[37] These laws contain both incentives for compliance, and punishments for failure to comply with this principle. As such, they offer a useful model for FCC policies.

For example, an online service provider may incur secondary liability for contributory or vicarious copyright infringement by knowingly distributing infringing material for profit, or if the provider could take simple measures to block the material and fails to do so.[38] However, Section 512(c) of the DMCA creates limited immunity from secondary liability for copyright

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[37] For example, our collective bargaining agreements require motion picture producers to make residual payments to writers, directors and actors, and to obtain agreement from distributors to assume that obligation in certain circumstances. Under the Digital Millennium Copyright Act ("DMCA"), the producers' obligations to pay residuals under a collective bargaining agreement may be transferred by law to distributors if the latter knew or had reason to know that the motion picture was produced subject to a collective bargaining agreement, or in the event a court order confirms an arbitration award under the collective bargaining agreement that the producer cannot satisfy within 90 days. *See* 28 U.S.C. § 4001.

[38] *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (one infringes vicariously "by profiting from direct infringement while declining to exercise a right to stop or limit it").

infringement by online service providers through a "safe harbor" provision. To qualify, a provider must meet certain technical criteria, adopt and implement a policy to terminate accounts of end-users who are repeat infringers, and not interfere with copyright owners' measures to protect their copyrighted material.[39] For certain providers that host websites featuring third-party content, the online service provider must adopt and implement a notice and takedown procedure: upon receiving notice from a copyright owner of infringing material, the online service provider must give notice to the end-user and allow the user to challenge the claim that the material infringes copyright (if no successful challenge is brought, the material must be taken down).[40] The service provider has a strong incentive to follow the notice and takedown procedures in order to limit its potential liability.

The FCC rules similarly could encourage ISPs to notify end-users who are trying to access illegally distributed material. After appropriate notice, an end-user could be denied access to infringing content. The FCC rules could affirmatively reward those in the distribution chain who take reasonable steps to block unlawful distribution of copyrighted content, following notice. Specifically, a presumption of "reasonable network management" should apply when ISPs identify stolen content and take reasonable steps to block its transmission. If structured along these lines, the FCC's rules would be consistent with federal copyright policy.

3. Reasonable Network Management Should Specify Outcomes That Are Not Allowed, But Should Be Flexible Enough To Allow For Technological Change

Given the constantly and rapidly changing nature of the Internet, the definition of reasonable network management should not condone or prohibit specific methods or technologies, but should provide clear guidance as to impermissible outcomes of network

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39 17 U.S.C. § 512(c).

40 *See* 17 U.S.C. §§ 512(c)(3), 512(g)(1).

management activities. Thus, consumers should be confident that ISPs will not abuse the network management tools at their disposal, and ISPs should know that anti-competitive behavior will not be tolerated. Further, ISPs should be required to disclose concrete outcomes to end-users (for example, "We block access to materials distributed in violation of copyright, which is theft; if you are downloading stolen materials, you will receive a notification from us; if you continue to attempt to access such materials, your service may be degraded, and we may deny you access"). However, the ISPs' specific tools and methods for detecting and blocking protected material should neither be prescribed by the FCC nor required to be publicly disclosed, lest they provide a roadmap for further piracy, as discussed above.

III. Conclusion

The Commission acknowledges in the NPRM that the theft of online content is a serious problem for our economy and for consumers, but has not clearly indicated how it intends to address this growing menace. Unless the Commission takes meaningful steps to incorporate combating online theft into broadband industry practices, this proceeding will have been a lost opportunity to ensure that the Internet is a source of job growth, not job loss. With hundreds of thousands of our members' jobs in mind, the Commission should ensure that policies it promulgates to preserve the "free and open Internet" do so by strengthening the distinction between lawful and unlawful distribution of content, and encouraging all appropriate steps to keep the Internet from becoming a haven for illegal activity such as the unlawful transmission of our members' audiovisual works and sounds recordings.

Respectfully submitted,

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