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**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

Reply Comments of Arts+Labs¹

In reply to filings submitted in response to the Notice of Proposed Rulemaking on preserving a free and open Internet, Arts+Labs offers the following comments. Arts+Labs is an alliance of the technology, content and creative communities that aims to build an inclusive digital society by encouraging cross-industry collaboration and cooperative relationships among all Internet participants in order to enhance Internet infrastructure, security, and content. In our vision, a thriving digital society includes a vibrant, safe, and open digital marketplace as well as a common set of principles to help it grow.

As the time grows closer for a Commission decision on proposed rules to preserve an Open Internet, Arts+Labs is pleased that serious participants in the policy arena are narrowing their differences on the key issues. While a handful of the most ardent advocates remain wedded to an “all or nothing” posture, those individuals and organizations that actively participate in the Internet ecosystem, invest in the infrastructure, develop the content, create and maintain websites, operate the search engines, write the software, and manufacture the equipment recognize that the time is coming closer to resolve the debate and put in place a reasonable framework that will enable all of us to move forward with certainty about the rules.

Our reading of comments filed with the Commission and other public statements reveals consensus support that the existing four wireline principles that have long guided the Commission’s commitment to an open Internet based on a clear set of user rights also should continue to guide industry behavior. We also see strong support for a new “transparency” principle that ensures that Internet users know what they are paying for and can be confident that they are receiving the promised goods and services. For our part, we believe that meaningful transparency would provide strong support for the user protections embodied in the existing principles and would also deter harmful discrimination in the future.

We find growing support for robust “network management” that enables network operators to address threats to the network, respond effectively to congestion, combat spam and viruses, and confront a growing range of cybersecurity threats. For operators, the ability to manage their networks will enable them to move forward with cost-effective investment that enables them to enhance quality and not just frantically add bandwidth that enables them to run in place with exploding consumer demand. For consumers, effective network management translates into a better online experience with fewer delays and disruptions especially for the expanding universe of latency-sensitive activities like streaming video and VoIP phone calling.

While there remains some disagreement over how best to define “reasonable network management,” Arts+Labs believes that the basis exists for final agreement. It is also clear that the Internet community as a whole is moving away from the counterproductive notion of “dumb networks” in favor of infrastructure that takes advantage of technology to enhance network “intelligence” and deliver safer, more secure and less congested networks. For example, speaking at the Mobile World Conference in Barcelona, Google CEO Eric Schmidt explicitly rejected the idea of dumb networks and said that advanced networks are needed to deal with issues such as security,

¹ Arts + Labs members include ASCAP, AT&T, Autitude, Blue Pixel, BMI, Cisco, JibJab, Microsoft, NBC Universal, the Songwriters Guild of America, Verizon, and Viacom

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dynamic signaling and load balancing. “It’s important for operators to be able to deal with too much capacity and misuse of the networks...,” he added.²

And, even on the most contentious issue, a proposed non-discrimination rule, we see an increasingly nuanced debate and a growing recognition that there are acceptable choices other than “all or nothing.” As we address further below, a growing cross section of parties participating in the debate, including the Department of Justice, has recognized that discrimination can be pro-competitive and beneficial to consumers.

This developing convergence of views indicates a recognition that the Internet requires a framework to help protect its inhabitants, just as any civilized society needs standards that define the rights and responsibilities of its participants. But we do not believe that this structure must consist of a cumbersome regime of new regulation promulgated by the federal government. Indeed, the continued evolution in this debate, as it relates to network management and discrimination, serves to highlight the risk of adopting prescriptive rules that will likely constrain the development of the Internet in ways we cannot predict.

There is clearly a role for the government, specifically the FCC. But the market itself is helping to define boundaries and behaviors that work for participants in the digital society of the Internet. It’s important to give space to market forces to help produce outcomes that will work for everyone in the ecosystem.

Indeed, we are struck by the perspective of Richard Whitt, Washington Telecom and Media Counsel for Google, who observed just a year ago that the “dynamism and unpredictability of the marketplace” argues for policymaker restraint. “The first principle really should be for the policymaker to take great caution. To tinker, not tamper,” Whitt said last March. He also noted that regulation was not the only route to net neutrality, but that self-regulation organizations and standards might achieve the same ends.³

Consistent with our skepticism about prescriptive rules and our preference for an ecosystem that responds organically to evolution in both technology and the marketplace, Arts+Labs remains unconvinced that a non-discrimination rule is necessary. But we also believe that it is possible to draft language that addresses the concerns of those who believe that a rule is necessary to protect user rights and also preserves the ability of network operators to offer a range of customized services that will enhance the effectiveness of Web applications and services and improve user experience.

As we said in our comments of January 11, 2010:

“We oppose the proposed non-discrimination rule because we believe it will limit the development of valuable new business models and discourage Internet investment and innovation. Indeed, we believe that service offerings that enable enhanced content delivery and performance will benefit Internet users by providing expanded choice and a better online experience. However, should the Commission determine that a non-discrimination rule is appropriate, *we strongly believe that any rule should be connected to the user experience and predicated on some showing of harm.* A flat ban on discrimination without regard to harm would ignore the plain fact that in the context of Internet engineering and design, some discrimination is good and some is bad. As a public policy matter, the appropriate consideration is the impact on users.”

We are pleased that a growing and diverse number of significant Internet participants – some who have long supported a non-discrimination principle and some who have opposed it – are moving toward a similar conclusion.

² Eric Schmidt Remarks, Mobile World Conference in Barcelona, February 16, 2010 PC Magazine, <http://www.pcmag.com/article2/0,2817,2359752,00.asp>

³ Richard Whitt remarks, Emerging Communications Conference in San Francisco, March 5, 2009; http://www.circleid.com/posts/tinkering_without_tampering_convergence_and_communications_policy/

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Consider some of the comments entered into the formal record of this proceeding or in separate public remarks:

- *NARUC “continues to support the right of all Internet users... to have access to and the use of the Internet that is unrestricted as to viewpoint and that is provided without unreasonable discrimination as to lawful choice of content.” – National Association of Regulatory Utility Commissioners⁴*
- *“The FCC should be guided by the following considerations ... Limit action to conduct that is either anti-competitive or substantially harmful to consumers as defined by the Communications Act.” – Information Industry Technology Council⁵*
- *“Google and Verizon agree that the focus of any nondiscrimination rule should be to prevent harm to users or to competition.... Particular practices could be acceptable or unacceptable discrimination, depending on their effect on competition and on users.”-- Google and Verizon joint letter⁶*
- *“Amazon respectfully suggests that the FCC’s proposed rules be extended to allow broadband Internet access service providers to favor some content so long as no harm is done to other content.”— Amazon.com⁷*
- *“The rulemaking process should ensure that all Americans are able to access lawful content of their choice as well as use any application service or device so long as it doesn’t harm the network. It also will provide peace of mind to users and developers by prohibiting unreasonable and anticompetitive discrimination that would adversely affect users’ experience and choice.”⁸ –Senator Olympia J. Snowe*
- *“By focusing on unreasonable and anti-competitive discrimination, the Commission can enable innovation to occur at all levels of the Internet but still maintain the ability to respond on a case-by-case basis to allegations of unreasonable and anticompetitive conduct that materially harms consumers.” – AT&T⁹*

Closing the final gaps between the parties will no doubt require difficult work to define phrases such as “harm,” “unreasonable,” and “anti-competitive.” Still, a growing number of key parties have now signaled their belief in a middle ground that can protect consumers while also enabling network providers and other Internet participants to introduce innovative new services. In so doing, they have embraced common core goals – preserving users’ rights and protecting them from harm. Arts+Labs urges the Commission to build on this foundation and work with these commentators and others who are prepared to meet in the middle to shape a balanced fifth principle that focuses on protecting consumers, competition, and innovation alike. We envision a principle to guide the behavior of all members of the ecosystem and allows differentiated services that advance the Internet, while barring actions that harm Internet users or enable anti-competitive behavior.

Arts+Labs is prepared to join in this effort and to support a common sense approach that leaves open a clear path to continued investment and innovation in America’s broadband networks. As we observed in our initial comments in this proceeding, our goal is an Internet that remains open to innovation by all participants,

⁴ National Association of Regulatory Utility Commissioners, “Resolution on Open Access to the Internet,” adopted February 17, 2010 <http://www.naruc.org/Resolutions/Resolution%20on%20Net%20Neutrality.pdf>

⁵ The Information Technology Industry Council, “High Tech to File Comments with the FCC Urging a Balanced Approach to Broadband Rulemaking,” January 14, 2010, <http://www.itic.org/news/2010/01/14/press-releases/high-tech-to-file-comments-with-the-fcc-urging-a-balanced-approach-to-broadband-rulemaking/>

⁶ Google and Verizon joint submission to FCC on Preserving the Open Internet, January 14, 2010

⁷ Amazon.com comments to the FCC on Preserving the Open Internet, January 14, 2010

⁸ Letter from Sen. Olympia J. Snowe (R-ME) to FCC Chairman Julius Genachowski, October 22, 2009

⁹ Letter from James W. Cicconi, Senior Executive Vice President-External and Legislative Affairs, AT&T to FCC Chairman Julius Genachowski, December 15, 2009

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experimentation, new business models, and collaborations that cross industry lines. We urge the FCC to support that vision.

In addition to the growing recognition that a discrimination principle or rule must be limited by a harm concept, there is also an emerging view that enforcement should take account of the rapidly changing environment of the Internet. Not only are technological changes occurring at a breathtaking pace, but the business models surrounding the delivery of content also are in their infancy and changing rapidly. Thus, we believe that the enforcement process should include a significant advisory role for industry participants. Indeed, we would urge industry to establish voluntary forums to offer expert advice and recommendations to government agencies on an ongoing basis, not just in the context of rulemaking or enforcement. Such a process – as suggested by the Verizon-Google joint letter – would help ensure the logical alignment of consumer protection, market rules, and technology as the Internet evolves.

The Commission also should recognize and support Internet users' rights to take effective action to protect their property from unauthorized use. As the Commission has consistently held, the protected rights enumerated in the existing four principles and incorporated into the proposed rules apply only to lawful activity. That core principle must not be diluted by rules that interfere with the ability of creators and providers of content to prevent illegal copying and distribution of copyrighted material. Nor should the Commission enact any rules that hamper content creators' ability to compete with illegal offerings by taking advantage of differentiated services or engaging in other collaborations to provide users with higher quality and legal online content.

Specifically, we urge the Commission to stand behind its proposal that reasonable network management would include "reasonable practices employed by a provider of broadband Internet access service to prevent the transfer of unlawful content; or prevent the unlawful transfer of content." In our view, nothing is more basic than the right of an operator of any network to prevent the illegal use of its facilities. Indeed, we believe the right to fight illegal activity is part and parcel of the general right of network operators to protect the network from harm.

A small number of commentators have derided the Commission's proposed language as a giant "loophole" that would undermine its efforts to preserve an open Internet. We argue the opposite – that exposing networks to illegal activity itself undermines openness by potentially degrading network operations and compromising user experience. As Chairman Genachowski has correctly observed: "The enforcement of copyright and other laws and the obligations of network openness can and must co-exist."¹⁰ Similarly, directors, performers, and theatrical professionals and crew personnel have observed in a joint filing by their unions and guilds: "nondiscrimination should not be a shield for stolen content."¹¹

We do not endorse any particular remedy or set of remedies to the challenge of digital theft. But we strongly believe that Internet participants require the flexibility to test a range of protection strategies and technologies to confront digital thieves and make it more difficult to copy and distribute illegal content. At a minimum, the Commission should not interfere with creators' ability to protect their property. Ideally, the Commission would do more – not just standing out of the way, but affirmatively using its authority to take on the thieves and join wholeheartedly in the fight against illegal activity on the Internet.

Respectfully submitted,

Michael McCurry
Mark McKinnon Co-chairs, Arts+Labs

¹⁰ Julius Genachowski, "Preserving A Free and Open Internet," September 21, 2009, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293568A1.pdf

¹¹ Comments to the FCC by the American Federation of Television and Radio Artists, Directors Guild of America, International Alliance of Theatrical Stage Employees, and Screen Actors Guild on Preserving the Open Internet, January 14, 2010