

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

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

TO: THE COMMISSION

**REPLY COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION,
BROADCAST MUSIC, INC., NASHVILLE SONGWRITERS ASSOCIATION
INTERNATIONAL, CHURCH MUSIC PUBLISHERS ASSOCIATION, AMERICAN
SOCIETY OF COMPOSERS AUTHORS AND PUBLISHERS, AND SESAC, INC.**

AMERICAN SOCIETY OF COMPOSERS AUTHORS AND PUBLISHERS

John A. LoFrumento
Chief Executive Officer
Joan M. McGivern
General Counsel & Sr. Vice President
American Society of Composers, Authors & Publishers
One Lincoln Plaza
New York, NY 10023
(212) 621-6200

BROADCAST MUSIC, INC.

Del Bryant
President and CEO
Marvin L. Berenson
Senior Vice President and General Counsel
Joseph J. DiMona

Vice President, Legal Affairs
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019
(212) 830-3847

Counsel:

Howard M. Liberman
Drinker, Biddle & Reath LLP
1500 K Street, NW
Suite 1100
Washington, DC 20005
(202) 842-8800

CHURCH MUSIC PUBLISHERS ASSOCIATION

Steve Shorney

President

CHURCH MUSIC PUBLISHERS ASSOCIATION-ACTION FUND, Inc.

Elwyn Raymer

President & CEO

881 Lakemont Drive

Nashville, TN 37220

(615) 377-9132

COUNSEL:

J. Rush Hicks

Law Firm of J. Rush Hicks

49 Music Square West

Suite 503

Nashville, TN 37203

(615) 329-9455

NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL

Barton Herbison

Executive Director

Nashville Songwriters Association International

1710 Roy Acuff Place

Nashville, TN 37203

(615) 256-3354

NATIONAL MUSIC PUBLISHERS' ASSOCIATION

David M. Israelite

President and Chief Executive Officer

Berkley Etheridge Schwarz

Senior Vice President and Counsel

National Music Publishers' Association
101 Constitution Ave., NW
Suite 705 East
Washington, DC 20001
(202) 742-4375

SESAC, INC.
Pat Collins
President and Chief Operating Officer
SESAC, Inc.
55 Music Square East
Nashville, TN 37203
(615) 320-0055
Counsel:
John C. Beiter
Zumwalt, Almon & Hayes PLLC
1014 16th Avenue South
Nashville, TN 37212
615) 850-2291

April 26, 2010

Table of Contents

INTRODUCTION AND SUMMARY

I. THE IMPORTANCE OF COPYRIGHT LAW TO SONGWRITERS, MUSIC PUBLISHERS AND THE MUSIC INDUSTRY IN GENERAL	3
A. Copyright and the Songwriting Industry	3
B. The Role of Music Publishers and PROs	3
C. Types of Licenses Issued	4
D. Compulsory License Rate Setting and the Copyright Royalty Board	4
E. The Harry Fox Agency	5
II. BECAUSE DIGITAL THEFT OF MUSIC IS A HUGE AND GROWING PROBLEM THAT THREATENS THE VERY ESSENCE OF THE MUSIC INDUSTRY, SONGWRITERS, MUSIC PUBLISHERS AND PROS HAVE A CRITICAL STAKE IN THE NET NEUTRALITY DEBATE	5
III. THE FCC'S CONCEPTUAL DISTINCTION BETWEEN LAWFUL AND UNLAWFUL CONTENT, WHILE NOTEWORTHY, MUST BE ENFORCEABLE IN ORDER TO BE MEANINGFUL IN PRACTICE	6
IV. THE FCC SHOULD AUTHORIZE INTERNET SERVICE PROVIDERS TO UTILIZE ALL REASONABLE NETWORK MANAGEMENT PRACTICES TO REDUCE THE UNAUTHORIZED COPYING, PUBLIC DISPLAY, DISTRIBUTION AND PUBLIC PERFORMANCE OF COPYRIGHTED WORKS	9
V. REASONABLE NETWORK MANAGEMENT SHOULD INCLUDE "GRADUATED RESPONSE" SYSTEMS	12
CONCLUSION	13

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

TO: THE COMMISSION

**REPLY COMMENTS OF THE NATIONAL MUSIC PUBLISHERS’ ASSOCIATION, BROADCAST
MUSIC, INC., NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, CHURCH MUSIC
PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF COMPOSERS AUTHORS AND PUBLISHERS
AND SESAC, INC.**

The National Music Publishers’ Association (“NMPA”), on behalf of its over 2,500 large and small music publisher members, Broadcast Music, Inc. (“BMI”) on behalf of over 400,000 affiliated songwriters and publishers, the American Society of Composers, Authors and Publishers (“ASCAP”) on behalf of its over 380,000 songwriter and publisher members, the Nashville Songwriters Association International (“NSAI”), on behalf of its songwriter members, the Church Music Publishers Association (“CMPA”), on behalf of its 54 United States and international member publishers, and SESAC, Inc. (“SESAC”), on behalf of its thousands of affiliated songwriters, composers and music publishers, hereby respectfully submit these Reply Comments in connection with the Commission’s October 22, 2009, Notice of Proposed Rulemaking in the above-captioned proceeding (hereinafter “Open Internet NPRM”).¹

¹ See *In re Preserving the Open Internet: Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93 (Notice of Proposed Rulemaking) (rel. Oct. 22, 2009).

By Order released April 7, 2010 (DA 10-607), the Wireline Competition Bureau extended the due date for reply comments in this proceeding to April 26, 2010. Thus, these reply comments are timely filed. The reason for this extension of time was to enable interested parties to evaluate and consider the legal implications of the April 6, 2010 decision of the U.S. Court of Appeals for the D.C. Circuit in *Comcast Corp. v. FCC*. The parties to the present Reply Comments express no position at this time regarding the implications of the recent Court of Appeals decision or what the Commission's response should be. These Reply Comments are being submitted to advance the dialogue on the issues the Commission is exploring in this proceeding.

INTRODUCTION AND SUMMARY

Founded in 1917, the National Music Publishers' Association (NMPA) is the trade association representing American music publishers and their songwriting partners. The NMPA's mandate is to protect and advance the interests of music publishers and songwriters in matters relating to the domestic and global protection of music copyrights. Additionally, founded in 1926, the Church Music Publishers Association (CMPA) is an organization of publishers of Christian and religious music who promote worldwide copyright protection and education.

BMI, a music performing rights licensing organization ("PRO"), submitted initial comments in this proceeding on January 14, 2010. ASCAP and SESAC did not file initial comments. However, ASCAP, the oldest U.S. performing rights organization formed as a membership association in 1914, and SESAC, established in 1930, both maintain the same interest in protecting the rights of their respective songwriter, composer and publisher members. Like BMI, ASCAP and SESAC represent their members and affiliates in legislative and regulatory efforts to ensure a strong U.S. copyright regime for the benefit of creators. Our interest in this proceeding is for that very reason – to ensure that our members' copyright interests are well protected in the digital age, so that they can continue to create the music that forms the basis of our nation's cultural heritage.

In our judgment, the Commission's final rules on Preserving the Open Internet and Broadband Industry Practices should make clear that Internet Service Providers ("ISPs") can exercise reasonable management practices to address abuses on their networks. ISPs must have the ability to establish not only a system of warnings but also a penalty regime for violators in order to ensure that a reasonable deterrent to unlawful activity exists. Further, forthcoming regulations should not prohibit the development of new technologies to combat digital theft. Final rules on net neutrality must ensure that ISPs have the flexibility to employ the best available technologies and methods to combat the illegal transmission and distribution of copyrighted works in the future. Without these measures, expanded broadband penetration

may actually increase the scope of digital piracy and diminish the quality of content on the Internet for the vast majority of users.

I. THE IMPORTANCE OF COPYRIGHT LAW TO SONGWRITERS, MUSIC PUBLISHERS AND THE MUSIC INDUSTRY IN GENERAL

Article 1, Section 8 of the Constitution of the United States states: "Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The U.S. Copyright Act grants exclusive rights to copyright authors or owners to reproduce, make derivative works, distribute, and publicly perform and display their works.

To understand the importance of ensuring that any final open internet rules draw an unequivocal distinction between lawful and unlawful content and allow ISPs to adopt any and all reasonable means to combat the transfer of the latter, we offer this brief background on copyright law as it relates to songwriters, performing right organizations, music publishers and the music industry in general.

A. Copyright and the Songwriting Industry

Every recorded song contains two copyrights. The first, a copyright in musical composition, includes the notes and lyrics of the song and is the songwriter's copyright. The second, a copyright in sound recording, includes the Recording Artist's recorded version of the song. Importantly, even if the recording artist *is* the songwriter, two copyrights are created – one for the sound recording and one for the musical composition.

B. The Role of Music Publishers and PROs

A music publisher works with songwriters to market and promote their songs, resulting in exposure of songs to the public and generating income. Music publishers "pitch" songs to record labels, movie and television producers and others who use music, then license the right to use the song and collect fees for the usage. Those fees are then split with the songwriter(s). A performing rights organization ("PRO") is a collective licensing organization that licenses the public performing right to a large catalog of musical works to myriad users throughout the country (and globally through reciprocal licensing agreements with foreign societies). See 17 U.S.C. Sec. 101 (definition of "performing rights society"). The three U.S. PROs are BMI, ASCAP and SESAC.

C. Types of Licenses Issued

Music Publishers issue three main types of licenses on behalf of their songwriter clients. The first type of license offered by publishers is the reproduction (mechanical) license, which involve music distributed in physical and digital form. The second type is the synchronization license, which involves the reproduction right to music used in film, television, commercials, music videos and the like. The third license type is the folio license, which is issued by publishers for music published in written form as lyrics and music notation either as bound music folios or online lyric and tablature websites. The songwriters and publishers, however, generally rely on the PROs to grant public performance licenses. Considering the millions of music performances annually made via radio and television transmissions (terrestrial, cable and satellite), via Internet and mobile wireless transmissions, and in live venues and other places of business, it would be inefficient for a publisher to directly license each public performance. Therefore, the publishers and songwriters rely on the PROs to grant blanket licenses that cover their entire repertoires of many millions of songs in exchange for a royalty fee. Publishers, however, do at times enter into direct licenses with users as well.

D. Compulsory License Rate Setting and the Copyright Royalty Board

The reproduction (or mechanical) right is governed by a compulsory licensing system found in Section 115 of the U.S. Copyright Act, which allows anyone who wants to make use of a musical work lawfully released by the copyright owner to obtain a license to reproduce and distribute phonorecords of the work. This license is available in exchange for paying a royalty set by statute, as long as the terms and conditions of Section 115 are followed. The royalty rate paid to the songwriter under a compulsory license is set by a government agency within the Library of Congress called the Copyright Royalty Board (CRB). The first rate for a mechanical compulsory license – two cents per song – was initially set by Congress in 1909. Remarkably, this rate did not change for almost 70 years, until 1976 when Congress added a rate-adjustment mechanism for the statutory rate. Since that time, the statutory rate has increased only a few pennies and today stands at 9.1 cents per song, for physical and digital product. Additionally, in a groundbreaking October 2008 ruling, the CRB adopted a settlement agreement establishing the rates for Interactive Streaming, which includes subscription services and ephemeral copies. The CRB also established for the first time a rate of 24 cents for each ringtone subject to the Section 115 mechanical license. Furthermore, music publishers were granted the right to seek a 1.5 percent late fee, calculated monthly.

E. The Harry Fox Agency

The Section 115 compulsory license is issued by the Copyright Office. Very few people, however, secure compulsory licenses through the Copyright Office because of perceived onerous requirements such as monthly accounting. Instead, many users secure mechanical licenses through the Harry Fox Agency, which, among other benefits, only requires quarterly accountings. More importantly, because the Harry Fox license uses the CRB rate as a benchmark, the CRB process remains very important.

II. BECAUSE DIGITAL THEFT OF MUSIC IS A HUGE AND GROWING PROBLEM THAT THREATENS THE VERY ESSENCE OF THE MUSIC INDUSTRY, SONGWRITERS, MUSIC PUBLISHERS AND PROS HAVE A CRITICAL STAKE IN THE NET NEUTRALITY DEBATE

Despite the extensive copyright regime for songwriters and music publishers, digital theft is rampant. Millions of copyrighted songs have been and continue to be downloaded illegally from the Internet. Every illegal download or stream means that a copyright owner is denied compensation for his or her creative work. This theft is no different in concept than the burglary of a home, the pirating of a master art work or shoplifting from a local store. Each such activity is unlawful.

Financial losses from the online theft of music are enormous:

- Data collected by the International Federation of Phonographic Industries (“IFPI”) shows that worldwide, more than 40 billion songs were illegally downloaded via file sharing in just 2008, which translates into a global online music piracy rate of more than 95%.²
- IFPI data also shows that global recorded music sales dropped precipitously from \$30 billion in 2000 to \$18.4 billion in 2008.³
- An analysis by the Institute for Policy Innovation concludes that global music piracy causes \$12.5 billion of economic losses every year, 71,060 U.S. jobs lost, a loss of \$2.7 billion in workers' earnings, and a loss of \$422 million in tax revenues, \$291 million in personal income tax and \$131 million in lost corporate income and production taxes.⁴

² IFPI, “Digital Music Report 2009,” at 22, available at http://www.ifpi.org/content/section_resources/dmr2009.html.

³ Id.

⁴ www.ipi.org.

- According to the Bureau of Labor Statistics, songwriter mechanical royalty income dropped 32% between 2003 and 2006.
- Every major music publisher has laid off significant numbers of professional songwriters during the past decade.⁵

Thus, the unauthorized transmission of copyrighted works, including illegal peer-to-peer (P2P) file sharing of copyrighted musical works, continues to grow at an unprecedented level. Because this digital theft, particularly P2P file sharing, swallows up large amounts of Internet bandwidth, it undermines the goal of expanding availability of broadband services. To safeguard the sanctity of copyrighted works and ensure the increased availability of broadband services, government regulators and legislators must, in turn, substantially increase their efforts to combat digital theft.

III. THE FCC'S CONCEPTUAL DISTINCTION BETWEEN LAWFUL AND UNLAWFUL CONTENT, WHILE NOTEWORTHY, MUST BE ENFORCEABLE IN ORDER TO BE MEANINGFUL IN PRACTICE

In the Notice of Proposed Rulemaking (NPRM), the FCC draws an important and necessary conceptual distinction between lawful and unlawful content, appearing to recognize that that net neutrality should not somehow facilitate the transfer of illegal content. The unauthorized distribution of copyrighted works plainly qualifies as such an illegal transfer. To be meaningful in practice, however, the FCC must also clearly and unambiguously ensure that the distinction between lawful and unlawful content can and will be enforceable, as outlined in Section 4 *infra*. Net neutrality cannot serve as a vehicle to maintain – or, even worse, expand – opportunities for activity that is illegal, such as the digital theft of copyrighted works.

The NPRM seeks to codify the following “Open Internet Principles” by declaring that, subject to “reasonable network management,” a provider of broadband Internet access may not:

- Prevent any of its users from sending or receiving the lawful content of the user’s choice over the Internet;
- Prevent any of its users from running the lawful applications or using the lawful services of the user’s choice;
- Prevent any of its users from connecting to and using on its network the user’s choice of lawful devices that do not harm the network; or

⁵ Rick Carnes, *Appeasing Piracy: Net Neutrality Proposals Would Hinder Anti-Piracy Efforts* (Billboard, October 31, 2009).

- Deprive any of its users of the user’s entitlement to competition among network providers, application providers, service providers and content providers.⁶

The draft rules would also codify additional principles of nondiscrimination and transparency:

- The draft *nondiscrimination principle* would require that, subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications and services in a nondiscriminatory manner.⁷
- The draft transparency principle would require that, subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application and service providers to enjoy the protections specified in the rulemaking.⁸

The NPRM seeks comment on draft rules that would subject all six principles to reasonable network management. Under the draft rules, reasonable network management would include reasonable practices employed by a provider of broadband Internet access service:

- To reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns;
- To address traffic that is unwanted by users or harmful;
- To prevent the transfer of unlawful content, such as child pornography; and
- ***To prevent the unlawful transfer of content, such as to prevent copyright infringement.*** (emphasis added)⁹

Significantly, on this latter point, the NPRM states:

⁶ Open Internet NPRM, ¶192.

⁷ Id. at ¶ 104.

⁸ Id. at ¶ 119.

⁹ Id. at ¶¶ 137-139 (emphasis added).

“...[I]t is important to emphasize that open Internet principles apply only to lawful transfers of content. They do not, for example, apply to activities such as the unlawful distribution of copyrighted works, which has adverse consequences on the economy and the overall broadband ecosystem. In order for network openness obligations and appropriate enforcement of copyright laws to co-exist, it appears reasonable for a broadband Internet service access provider to refuse to transmit copyrighted material if the transfer of that material would violate applicable laws.”¹⁰

This is consistent with previous statements by FCC Chair Genachowski, who testified at his nomination hearing before the Senate Commerce Committee that “[i]t is vital that illegal conduct be curtailed on the Internet. I do not interpret the goals of new neutrality as preventing network operators from taking reasonable steps to block unlawful content.”¹¹ Similarly, in a speech at the Brookings Institution, Chairman Genachowski said: “[O]pen Internet principles apply only to lawful content, services and applications – not to activities like unlawful distribution of copyrighted works, which has serious economic consequences. The enforcement of copyright and other laws and the obligations of network openness can and must co-exist.”¹² Finally, in comments opening the October rulemaking proceeding, Chairman Genachowski reiterated this distinction: “Open Internet rules should apply to lawful content, applications and services. They are not a shield for copyright infringement, spam or other violations of the law. They must honor the protection of users’ privacy. And they must be consistent with public safety as well as homeland and national security.”¹³

Several comments already filed with the Commission underscore the importance of ensuring that any new rules on Net Neutrality do not legally protect illegal traffic. For example, the Songwriters Guild of America encouraged the Commission to “focus on the real issues – which include copyright piracy and bandwidth congestion.”¹⁴ The American Federation of Television and Radio Artists (AFTRA), the Directors Guild of America (DGA), the International Alliance of Theatrical Stage Employees (IATSE) and the Screen Actors Guild (SAG) all supported:

¹⁰ Id. at ¶ 139.

¹¹ Statement of Julius Genachowski before the U.S. Senate Committee on Commerce, Science and Transportation, June 16, 2009.

¹² *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity*, Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, The Brookings Institution (Sept. 21, 2009).

¹³ Statement of Chairman Julius Genachowski, Open Internet NPRM, October 22, 2009, at 4.

¹⁴ Comments of the Songwriters Guild of America, Open Internet NPRM.

“[T]he 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 the 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.”¹⁵

Thus, the “Open Internet Principles” that undergird net neutrality, including the principle of non-discrimination, should apply only to the lawful transfer of content. They should not apply to copyrighted works distributed without proper authorization.

IV. THE FCC SHOULD AUTHORIZE INTERNET SERVICE PROVIDERS TO UTILIZE NETWORK MANAGEMENT PRACTICES TO REDUCE THE UNAUTHORIZED COPYING, PUBLIC DISPLAY, DISTRIBUTION AND PUBLIC PERFORMANCE OF COPYRIGHTED WORKS

ISPs are uniquely positioned to combat digital theft of copyrighted works. Because they control the channels, or pipes, through which such digital theft occurs, only ISPs can address such theft at the source. Additionally, they have direct relationships with the infringing subscribers. Thus, without robust ISP participation, effective prevention and enforcement may not be possible. Accordingly, the U.S. government should explicitly recognize the role ISPs play in combating piracy and should encourage ISPs to fight digital theft of copyrighted works.

Indeed, in any final rules it adopts, the Commission should authorize ISPs to utilize all network management practices to address abuses of their networks and reduce the unauthorized copying, public display, distribution and public performance of copyrighted works. Such authorization should include clear, unambiguous guidance to ISPs to utilize the best available tools and techniques to prevent and combat digital theft. Without such clear guidance, ISPs may be understandably reluctant to utilize such tools and techniques because they fear violating the principle of non-discrimination or other net neutrality principles issued by the Commission.

¹⁵ Comments of The American Federation of Television and Radio Artists (AFTRA), the Directors Guild of America (DGA), the International Alliance of Theatrical Stage Employees (IATSE) and the Screen Actors Guild (SAG), Open Internet NPRM, January 14, 2010, at i (emphasis in original).

Several commentators urged the Commission to give ISPs the freedom to block illegal traffic at the network management level:

- BMI urged the Commission not to adopt “any non-discrimination rules for Internet Service Providers that have the effect of preventing them from assisting copyright owners to monitor and police the rampant infringement of music copyrights on the Internet.”¹⁶
- Similarly, the Motion Picture Association of America (MPAA) urged the FCC “to make clear that ISPs are not only permitted, but encouraged, to work with content owners to employ the best available tools and technologies to combat online content theft.”¹⁷
- Along these same lines, the Recording Industry Association of America (RIAA), wrote: “It is...critically important that ISPs have reasonable tools at their disposal to address the unauthorized exploitation of copyrighted works, which frustrate the viability of lawful forms of online commerce, waste network resources, crowd out legitimate applications and harm our culture.”¹⁸
- The Entertainment Software Association wrote: “We support the FCC’s efforts to address anti-piracy concerns through appropriate language in the proposed rule and related commentary. In particular, we support defining “reasonable network management” in a way that explicitly permits broadband Internet access service providers to prevent the unlawful transfer of content.”¹⁹

By contrast, several commenters have urged the Commission to reject or preclude any rule that would indicate that copyright enforcement is within the ambit of “reasonable network management.” Their positions are unsupported, would undermine the very policy framework underpinning the rulemaking and should be rejected. For example:

- The Electronic Frontier Foundation (“EFF”) frets in its comments that an “exception for copyright enforcement could threaten to swallow the six principles.” EFF Comments at

¹⁶ Comments of BMI, Open Internet NPRM, January 14, 2010, at 1.

¹⁷ Comments of the Motion Picture Association of America, Inc., Open Internet NPRM, January 14, 2010, at ii.

¹⁸ Comments of the Recording Industry Association of America, Open Internet NPRM, January 14, 2010, at 2.

¹⁹ Comments of the Entertainment Software Association, Open Internet NPRM, at 1-2.

16. This “chicken little” hyperbole should not deter the Commission from permitting ISPs to use reasonable methods to block the debilitating flood of piracy over broadband networks. EFF’s concern seems to be that an ISP would use an infringement blocking program as a surreptitious method to exact preferable transmission agreements from lawful content providers. This is unwarranted speculation on the part of EFF. The Commission should act to protect copyright industries from the vast harm they are experiencing from digital theft. Of course, the Commission can later evaluate ISPs’ efforts at network management to control piracy if necessary to determine whether abuses have occurred.

- The EFF also contends that network management is unnecessary because the DMCA adequately provides copyright remedies for ISPs. The courts are now dealing with those “safe harbor” provisions and the record shows that ISPs have taken inappropriately narrow views of their obligations under the safe harbors. While those cases wind their way through courts, it is imperative that the Commission does not tacitly or inadvertently aid the pirates to evade the law by legally blocking ISPs’ ability to respond to digital theft. In this context it is worth pointing out that one of the conditions of eligibility for a safe harbor is that an ISP “accommodates and does not interfere with standard technical measures” to protect copyright in the online environment. 17 U.S.C. Sec. 512(i)(1)(b). Congress clearly understood in 1998 that ISPs should play a major role in assisting copyright owners to deal with this gargantuan problem.
- Google echoes the EFF position when it asks the Commission not to recognize the validity of copyright enforcement in the broadband sphere because of the availability of the DMCA safe harbors. Google Comments at 73 (the “Commission should not interfere with the existing copyright legal framework, including the role of online intermediaries as determined by the [DMCA]”). Google cites the supposed “delicate balance” found in the DMCA, a balance which unfortunately has been skewed by ISPs in the past ten years through their reluctance to use readily available technologies to police infringements on their services such as “monitoring, filtering and other services.” Google’s suggestions that the Commission refrain from recognizing an ISP’s anti-piracy role should be rejected because it is harmful to the Commission’s ultimate goals of promoting the availability of high quality lawful content online.

In sum, we are not asking the Commission to police copyright infringement or interfere with copyright law in any way. However, we do ask that the Commission not place restrictions on

ISP system management that will inadvertently do the contrary: create a safe haven for pirates who are decimating the creative communities now.

V. REASONABLE NETWORK MANAGEMENT SHOULD INCLUDE “GRADUATED RESPONSE” SYSTEMS

Reasonable network management should allow ISPs to implement “graduated response” systems as a means of reducing digital theft of copyrighted work through illegal peer-to-peer file sharing. Graduated response programs incorporate a series of increasingly-heightened standards as the number of copyright violations increase. In the absence of such graduated response programs, those who continue to engage in unlawful behavior have no incentive to change such behavior.

Graduated response systems are a fair, effective, low cost and proportionate means of addressing digital theft while preserving individual liberties. They allow ISPs, upon receiving convincing proof of copyright infringement from the rightsholder, to educate the account holder of the infringing IP address of the infringements and the consequences of continuing infringement, and authorize the use of more severe sanctions for failures to cure ongoing infringement.

Others agree that graduated response systems are appropriate. The RIAA wrote: “Unlawful use of the Internet to traffic in unauthorized copies of copyrighted works, including music and music videos, frustrates both legitimate efforts to bring such entertainment content to consumers online and the ability of law-abiding Internet users to use networks to their fullest potential.”²⁰ The RIAA went on to say that the FCC should “explicitly support, encourage and endorse ISP efforts to fight piracy. These efforts should include, but not be limited to, adopting reasonable network management practices that reduce the unauthorized copying and exploitation of copyrighted works and encourage users to engage in legitimate business transactions for music.”²¹ The MPAA made a similar point: “Service providers also should be encouraged to work with content owners to implement consumer education programs that can help law-abiding Internet users find legitimate sources for online creative works, while simultaneously warning repeat infringers that they risk consequences if they continue to violate the law.”²²

²⁰ RIAA Comment Letter at 2.

²¹ Id. at 2-3.

²² MPAA Comment Letter at ii.

Furthermore, consideration should be given to granting ISPs protection from the Principle of Non-Discrimination to enforce rules of use and terms of service that prohibit copyright infringement. Such protection would acknowledge that ISPs must have the ability to determine, without fear of liability, whether certain transmitted material is legal (and subject to nondiscrimination) or illegal (and therefore not).

Importantly, adoption of a graduated response system – and, for that matter, any and all other tools that ISPs have adopted or adopt in the future – would not in any way foreclose or otherwise affect the longstanding rights of copyright holders to seek damages for infringement of their protected works. Graduated response systems and other tools to prevent the unauthorized distribution of copyrighted works are appropriate enforcement mechanisms for ISPs. The rights afforded to copyright holders, including ISPs when they are also copyright owners, are entirely different. They are already enforceable by law and would not be diminished in any way as a result of ISPs adopting graduated response systems or other similar tools.

CONCLUSION

The principle of non-discrimination should be sufficiently narrow that it does not discourage or foreclose the development of new technologies to combat digital theft. The Commission should give ISPs sufficient flexibility to tailor customer service arrangements to maximize the ability of ISPs to prevent or substantially reduce the incidence of unlawful content distribution.

Final rules on net neutrality should ensure that technology to combat digital theft of copyrighted works can evolve and be utilized by ISPs in the future. The Commission should expressly provide flexibility to ISPs to adapt their network management practices over time in order to incorporate new technologies and methods for combating the transmission and distribution of unlawful content in the future.

[Signatures on next page]

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS AUTHORS
AND PUBLISHERS

By: /s/ John A. LoFrumento
John A. LoFrumento
Chief Executive Officer
Joan M. McGivern
General Counsel & Sr. Vice President
American Society of Composers, Authors &
Publishers
One Lincoln Plaza
New York, NY 10023
(212) 621-6200

BROADCAST MUSIC, INC.

By: /s/ Del Bryant
Del Bryant
President & CEO
Marvin L. Berenson
Senior Vice President and General Counsel
Joseph J. DiMona
Vice President, Legal Affairs
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019
(212) 830-3847
Counsel:
Howard M. Liberman
Drinker, Biddle & Reath LLP
1500 K Street, NW
Suite 1100
Washington, DC 20005
(202) 842-8800

CHURCH MUSIC PUBLISHERS ASSOCIATION

By: /s/ Steve Shorney
Steve Shorney
President

CHURCH MUSIC PUBLISHERS ASSOCIATION-ACTION
FUND, Inc.

By: /s/ Elwyn Raymer
Elwyn Raymer
President & CEO
881 Lakemont Drive
Nashville, TN 37220
(615) 377-9132

COUNSEL:

J. Rush Hicks
Law Firm of J. Rush Hicks
49 Music Square West
Suite 503
Nashville, TN 37203
(615) 329-9455

NASHVILLE SONGWRITERS ASSOCIATION
INTERNATIONAL

By: /s/ Barton Herbison
Barton Herbison
Executive Director
Nashville Songwriters Association International
1710 Roy Acuff Place
Nashville, TN 37203
(615) 256-3354

NATIONAL MUSIC PUBLISHERS' ASSOCIATION

By: /s/ David M. Israelite
David M. Israelite
President and Chief Executive Officer
Berkley Etheridge Schwarz
Senior Vice President and Counsel
National Music Publishers' Association
101 Constitution Ave., NW
Suite 705 East
Washington, DC 20001
(202) 742-4375

SESAC, INC.

By: /s/ Pat Collins
Pat Collins
President and Chief Operating Officer
SESAC, Inc.

55 Music Square East
Nashville, TN 37203
(615) 320-0055

Counsel:
John C. Beiter
Zumwalt, Almon & Hayes PLLC
1014 16th Avenue South
Nashville, TN 37212
(615) 850-2291

DC01/ 2486265.1