

**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
)	

**REPLY COMMENTS
OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

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SUMMARY

The Motion Picture Association of America, Inc. (“MPAA”) respectfully submits these reply comments to reinforce what its opening comments in this proceeding made clear: any rules that the Commission adopts to ensure the openness of the Internet must not apply to “activities such as the unlawful distribution of creative works, which has adverse consequences on the economy and the overall broadband ecosystem.” As the record in this proceeding has revealed, there is broad consensus both that the proliferation of stolen content on the Internet is a serious national problem that deserves extraordinary attention, and that the best way to address this hazard going forward would be for the FCC to foster a flexible environment in which content owners and Internet service providers (“ISPs”) have the ability to develop and utilize the best available tools and technologies to combat the scourge of online content theft.

In fact, the Commission’s vision of a ubiquitous broadband future, where consumers can access an exciting new world of digital options, will come to fruition *only if* the FCC focuses on innovation as its guiding precept for a robust, accessible and open broadband future. If the Commission directs its energies to fostering innovation, whether in the creation of new content, applications and delivery models, or in the development of new tools to ensure that the Internet remains a safe and secure environment, it can best position the nation to continue to develop and invest in a free and open Internet for consumers across the country.

In order to achieve these goals, any Commission decision emanating from this proceeding should:

- (i) expressly state 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;
- (ii) declare that ISPs’ right to engage in reasonable network management includes a right to use tools and technologies to address the flow of stolen content on their networks;

(iii) make clear that ISPs engaged in network management are entitled to a presumption that good faith efforts to manage networks to deal with online theft are reasonable; and

(iv) reject the ill-advised argument that ISPs' authority to employ reasonable network management policies to deter online content theft should depend on an advance judicial or regulatory determination of "lawfulness" prior to every use.

As President Obama recently explained, the United States must act to

"aggressively protect our intellectual property." The opening comments in this proceeding verify that there is widespread support for dealing with online content theft, which constitutes no less than an unparalleled assault on what the President called one of the nation's "greatest asset[s] . . . the innovation and the ingenuity and creativity of the American people." For this reason, a number of ISPs have reached the conclusion that the threats to the broadband ecosystem mandate a flexible approach that would permit broadband providers to take steps to prevent the unlawful transmission of content over their facilities.

Importantly, the Commission should bolster its tentative conclusion that reasonable network management appropriately would permit ISPs to "refuse to transmit copyrighted material if the transfer of that material would violate applicable laws." In particular, the FCC should make clear that service providers are entitled to a presumption that good faith efforts to address online content theft constitute reasonable network management. If the Commission expects reasonable network management to serve as the locus for protecting the Internet from the harms of theft and malicious activity, it should place the burden of proof in any complaint proceeding on the party alleging that a network management technique is unreasonable. This type of balanced approach would go a long way toward encouraging ISPs to use the best available technologies and policy approaches to combating online theft.

Ultimately, MPAA urges the Commission not to pre-determine whether any particular technology should be available in ISPs' and content owners' anti-piracy toolkits. The threats posed by content theft are too real, and the consequences too harmful, for the government arbitrarily to limit the range of potential solutions.

MPAA's opening comments also demonstrated that the Commission should tread cautiously with respect to any nondiscrimination requirement and should carefully tailor any such requirement to prevent demonstrably anti-competitive acts, while otherwise preserving the flexibility needed to spur the kind of investment and innovation that the Commission properly seeks to achieve. A careful approach to addressing demonstrably anti-competitive conduct, backstopped by adequate transparency and disclosure, would be far more appropriate at this stage than a premature ban on experimentation with different delivery approaches for online video. Given the utter lack of evidence disputing the Commission's recognition that new kinds of consumer-friendly digital distribution services "may require enhanced quality of service to work well," the FCC certainly should not foreclose the ability of content and application providers to enter into innovative agreements with ISPs that enhance consumer welfare and choice.

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**REPLY COMMENTS
OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

The Motion Picture Association of America, Inc. (“MPAA”), on behalf of its member studios, hereby respectfully submits these reply comments in response to the Commission’s Notice of Proposed Rulemaking, released October 22, 2009, relating to proposed rules to preserve a free and open Internet.¹

In its opening comments, MPAA embraced the Commission’s commitment to ensuring that the future of broadband in the United States is characterized by a robust and widely accessible Internet experience that features safety and security for consumers and content creators alike. MPAA agreed with the Commission’s tentative conclusion, set forth in the *Notice*, that “open Internet principles” do not apply to “activities such as the unlawful distribution of creative works, which has adverse consequences on the economy and the overall broadband ecosystem.”² MPAA urged the Commission to foster a flexible environment in which content owners and Internet

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) (the “*Notice*”).

² See *id.* at ¶ 139.

service providers (“ISPs”) have the ability to develop and utilize the best available tools and technologies to combat the scourge of online content theft.

As the record in this proceeding makes clear, the Commission’s vision of a ubiquitous broadband future, where consumers can access an exciting new world of digital options, will come to fruition *only if* the Commission retains innovation as the touchstone principle for a truly open Internet. MPAA believes that the FCC’s overarching focus in this proceeding should be on fostering innovation, whether in the creation of new content, applications and delivery models, or in the development of new tools to ensure that the Internet remains a safe and secure environment. Keeping innovation as the linchpin of the vision for America’s broadband future would best position the Commission to achieve its ultimate goal – preserving a free and open Internet for consumers across the country.

Accordingly, any Commission decision emanating from this proceeding should:

- (i) expressly state 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;
- (ii) declare that ISPs’ right to engage in reasonable network management includes a right to use tools and technologies to address the flow of stolen content on their networks;
- (iii) make clear that ISPs engaged in network management are entitled to a presumption that good faith efforts to manage networks to deal with online theft are reasonable; and
- (iv) reject the ill-advised argument that ISPs’ authority to employ reasonable network management policies to deter online content theft should depend on an advance judicial or regulatory determination of “lawfulness” prior to every use.

The Commission also should pursue a light touch with respect to any regulation of nondiscrimination, relying on a tailored approach to addressing demonstrably anti-competitive conduct, backstopped by adequate transparency and disclosure, rather than a prophylactic ban on innovative business arrangements that could stifle consumers' ability to enjoy groundbreaking new content offerings and distribution models before they ever have a chance to develop.

I. THE *NOTICE'S* REASONABLE NETWORK MANAGEMENT STANDARD APPROPRIATELY INCORPORATES MEASURES TO ADDRESS ONLINE CONTENT THEFT

The *Notice* correctly took cognizance of the severe threat from online theft of content in the broadband ecosystem.³ Not only does unlawful activity on the Internet threaten a vital component of the American economy, it also undermines consumer confidence in the safety and security of the Internet. Thus, the *Notice* concluded that ISPs “may reasonably prevent the transfer of content that is unlawful”⁴ and proposed to define reasonable network management as practices employed by an ISP to (i) mitigate congestion and ensure quality of service; (ii) address unwanted or harmful traffic; (iii) prevent the transfer of unlawful traffic; and (iv) prevent the unlawful transfer of content.⁵ The *Notice* also appropriately proposed a catch-all for “other reasonable network management practices,” since innovation almost certainly will yield new and more effective ways for ISPs to deal with the dangers that imperil a robust broadband Internet.⁶

³ *See id.*

⁴ *Id.*

⁵ *See id.* at ¶ 135.

⁶ *Id.*

The opening comments in this proceeding confirm both that open Internet principles should not serve as a haven for illegal activity and that ISPs should be permitted to take reasonable action to prevent the transfer of stolen copyrighted content. The Commission should incorporate these concepts into any regulatory regime affecting the broadband environment.

A. The Record Reflects Broad Consensus That Content Owners and ISPs Need Flexibility to Deal With Illegal Activity on the Internet

As President Obama recently explained, the United States must act to “aggressively protect our intellectual property.”⁷ The opening comments in this proceeding verify that there is widespread support for dealing with online content theft, which constitutes no less than an unparalleled assault on what the President called one of the nation’s “greatest asset[s] . . . the innovation and the ingenuity and creativity of the American people.”⁸

Various parties reinforced what MPAA’s comments made clear: not only can protecting online content serve the specific goal of ensuring the vitality of the Internet, but efforts to reduce rampant theft of intellectual property also can play a crucial role in America’s economic recovery. AFTRA, *et al.*, for example, stressed that preventing online theft is essential to promoting the robust availability of diverse and high-quality online content.⁹ Content owners invest substantial amounts of money, time and talent to create the compelling, high value content that consumers have come to

⁷ President Barack Obama, *Remarks at the National Export Initiative* (Mar. 11, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference>.

⁸ *Id.*

⁹ *See* Comments of The American Federation of Television and Radio Artists, *et al.* (filed Jan. 14, 2010) (“AFTRA Comments”), at 2.

expect and demand. Thus, AFTRA, *et al.* explained, it is critically important to safeguard intellectual property rights.¹⁰ Online theft not only strips content owners of the ability to generate an economic return from their creative efforts, it also discourages investment in new, legal online ventures – thereby endangering the livelihoods of hundreds of thousands of Americans who work in the creative industries.¹¹

The comments of the Songwriters Guild of America (“SGA”) and the Recording Industry Association of America (“RIAA”) also reinforced the devastating impact that online theft has on American jobs. RIAA noted that this drastic reduction in revenue creates disincentives to the production of compelling content and jeopardizes the jobs of the many men and women who work tirelessly to deliver the high value music content that the world has come to appreciate.¹² SGA confirmed, moreover, that “[e]very major music publisher has laid off at least half, and sometimes all, of their professional songwriters in the ten years since piracy began to decimate the music industry.”¹³ Likewise, the AFL-CIO has noted the economic damage and job losses caused to the motion picture industry by online content theft.¹⁴

In short, the evidence before the Commission confirms that unless content owners and ISPs are allowed the flexibility to take action, online content theft will continue to cost the U.S. creative industries more and more billions of dollars in revenue

¹⁰ *See id.* at 6.

¹¹ *See id.* at 3.

¹² *See Comments of The Recording Industry Association of America* (filed Jan. 14, 2010) (“*RIAA Comments*”), at 7.

¹³ *Comments of The Songwriters Guild of America* (filed Jan. 14, 2010) (“*SGA Comments*”), at 3.

¹⁴ *See Statement, AFL-CIO Executive Council, Piracy is a Danger to Entertainment Professionals* (Mar. 2, 2010), <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec03032010h.cfm>.

each year, while further jeopardizing the jobs of hundreds of thousands more American workers. These economic harms will redound to consumers, who will pay a price as well if content owners have ever-fewer resources to devote to the creation of new works and the number of legal online distributors is diminished.

For these reasons, a number of ISPs have reached the conclusion that the threats to the broadband ecosystem mandate a flexible approach that would permit broadband providers to take steps to prevent the unlawful transmission of content over their facilities. The National Cable & Telecommunications Association (“NCTA”), representing cable ISPs, explained that “in offering Internet service to their subscribers, cable operators and other ISPs have never been required or expected to participate in the transmission of material . . . where they have reason to believe that such material may be unlawful. In particular, cable operators – whose business has always depended on and respected the rights of copyright owners and copyrighted works – should not be restricted in taking steps to prevent the transmission on its facilities of unlawfully pirated material.”¹⁵ AT&T also noted that an “important but often overlooked benefit of . . . robust network security practices is that keeping harmful traffic out of a network in the first place can significantly reduce network congestion by conserving network resources for traffic from legitimate sources.”¹⁶

Protecting copyrighted content is important in its own right, but it is just one of the benefits of fostering a culture of law, order and respect on the Internet. As Verizon made clear in its comments, the Commission should not permit the Internet to

¹⁵ Comments of the National Cable & Telecommunications Association (filed Jan. 14, 2010) (“*NCTA Comments*”), at 31.

¹⁶ Comments of AT&T, Inc. (filed Jan. 14, 2010) (“*AT&T Comments*”), at 75-76.

become a crime-ridden environment, overrun and exploited by those seeking to do harm.¹⁷ In order to further the goal of ubiquitous broadband adoption in the United States, consumers must feel safe and secure that, in using the Internet, they and their families will not be exposed to rampant viruses, malware, phishing, identity theft and financial fraud. As Secretary of State Hillary Clinton recently observed, making the online environment safe is a critical national priority: “Our ability to bank online, use electronic commerce, and safeguard billions of dollars in intellectual property are all at stake if we cannot rely on the security of our information networks.”¹⁸

Ultimately, the Commission should expressly confirm 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. Given the serious and growing threats from all malicious online activity, the Commission also should seek to promote a regulatory atmosphere that promotes innovative and creative solutions to all of these very real problems. As MPAA explained in its opening comments, the tools, methods and technologies available to combat theft and other online threats today are unlikely to work against the threats of tomorrow. In an environment as dynamic as the Internet, the Commission should not pre-determine whether any particular technology should be available in content owners’ and ISPs’ anti-theft toolkits. Rather, the FCC should leave the door open to innovation, so that private industry can commit the resources, conduct

¹⁷ See Comments of Verizon and Verizon Wireless (filed Jan. 14, 2010) (“*Verizon Comments*”), Attachment E, at 5 (“With the rapid growth of the Internet and broadband communications more generally, hackers and other attackers are aggressively engaged in launching increasingly challenging threats against consumers and enterprise users, networks, and the Internet itself.”); see also *RIAA Comments*, at 2.

¹⁸ Secretary of State Hillary Rodham Clinton, *Remarks on Internet Freedom* (Jan. 21, 2010), <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

the research and develop the next-generation tools that will provide a smooth and safe online experience for consumers while also protecting the enormous public and private investment in our nation's broadband networks.

B. Good Faith Measures to Address Unlawful Transfers of Online Content Should Presumptively Be Considered Reasonable Network Management

The reasonable network management standard proposed by the Commission appropriately would provide ISPs with the right to “refuse to transmit copyrighted material if the transfer of that material would violate applicable laws.”¹⁹ To bolster this approach, the FCC should make clear that ISPs are entitled to a presumption that good faith efforts to address online content theft constitute reasonable network management. As Time Warner Cable noted in its opening comments, in the absence of guidance from the Commission, ISPs – fearful of government reproach – may be reluctant to take action against copyright theft.²⁰ Thus, if the Commission expects reasonable network management to serve as the locus for protecting the Internet from the harms of theft and malicious activity, it should place the burden of proof in any complaint proceeding on the party alleging that a network management technique is unreasonable.²¹

Moreover, the FCC should endorse reasonable uses of technology to prevent stolen copyrighted works from being transmitted on broadband networks. As discussed below, MPAA is not asking the Commission to sanction the use of any specific

¹⁹ *Notice*, ¶ 139. Indeed, as the *Notice* recognizes, Commission precedent already permits “providers, consistent with federal policy, [to] block . . . transmissions that violate copyright law.” *Id.*

²⁰ Comments of Time Warner Cable, Inc. (filed Jan. 14, 2010) (“*Time Warner Cable Comments*”), at 32.

²¹ Comcast highlighted the critical importance of a presumption that good faith anti-theft practices are reasonable. See Comments of Comcast Corp. (filed Jan. 14, 2010) (“*Comcast Comments*”), at 51; 58, n.204.

technology; the FCC's primary focus should be to avoid the imposition of any rules that would deter the innovation and flexibility that will be needed to enable ISPs to adopt new technological solutions as they become available and as needs change. History is a useful guide here. Several years ago, the unrestrained availability of infringing content on user-generated sites, such as You Tube, was a serious and growing problem. Filtering technology evolved as a means of addressing that problem. Although decried by some at first as inappropriately intrusive, such filtering technologies have proven to be effective in dealing with content theft without causing consumer harms.

Today, the value of the use of filtering technology in this context is well accepted. Indeed, at a recent Commission broadband workshop, Public Knowledge endorsed the filtering systems employed by user-generated content sites, such as You Tube. As Public Knowledge President Gigi Sohn made clear: “[W]e’re fine with You Tube’s filtering system.”²²

The important lessons here are that innovators, unless deterred, will invent technological solutions to address online content theft and that such measures can be employed in a manner that enhances consumer welfare. Yet there are some who continue to argue, in unsustainable alarmist terms, that the FCC should impose just such restraint on innovative uses of technology to address the country’s acknowledged content theft problem. To cite one example, they urge the Commission to interdict the evolution of packet inspection for content protection purposes,²³ notwithstanding that this technology

²² Federal Communications Commission, National Broadband Plan Workshop, The Role of Content in the Broadband Ecosystem, Transcript (Sept. 17, 2009), at 115 (Testimony of Gigi Sohn).

²³ See, e.g., Comments of Open Internet Coalition (filed Jan. 14, 2010) (“*Open Internet Coalition Comments*”), at 66-67.

already plays a vital role in providing information used by ISPs to establish appropriate levels of quality of service for time sensitive protocols, as well as in protecting consumers from a variety of potential harms by providing security against viruses, spam, spyware or network service attacks (without undermining legitimate privacy interests). Such critics offer no cogent explanation of why the promise of these types of technological measures should not be available to meet the goal of deterring content theft. Freezing the incentives to innovate solutions to curb the dissemination of infringing content simply makes no sense. To the contrary, the FCC should do everything it can to stimulate this type of innovation.

In short, a presumption of reasonableness for good faith steps taken to prevent the distribution of stolen works online would go a long way toward encouraging ISPs to use the best available technologies and policy approaches to combating online theft. Reasonableness, of course, will depend on the use of a given tool or technique in a specific set of facts or circumstances. As NCTA indicated, there undoubtedly will be times when an ISP is forced to make a judgment call about how to handle content – whether unlawful stolen copyrighted works, spam or apparent child pornography.²⁴ Complainants should have a right to seek FCC intervention in the rare instance in which they could demonstrate that an ISP acts in bad faith. However, any regime that places the burden on ISPs to justify their every action in the face of a complaint, or that subjects an operator to liability despite the exercise of discretion in good faith, would perversely

²⁴ See *NCTA Comments*, at 31 (“‘Reasonable steps’ to prevent the unlawful transmission of unlawful content could conceivably affect content that turns out, after court review, to be deemed lawful. If the steps taken by an ISP are a bona fide, good faith attempt to target unlawful material, the ISP should not be liable merely because some of the affected content turns out to be lawful.”).

incentivize providers to abdicate all responsibility for ensuring the safety and security of the Internet. The consequence would be a dramatically bad outcome for consumers.

Indeed, the inability of anyone to know today what the next generation of technologies can accomplish is precisely why it is so important for the Commission to foster an environment in which innovation itself is permitted to flourish. A flexible framework would allow technology developers to innovate and expand upon today's network management tools and techniques, which would lead to even more effective tools in the future.²⁵ Even comments submitted by Google, which asked the FCC not to mandate the use of any particular technology, urged the Commission to “not prohibit the development of future voluntary cooperative efforts” between content owners and other participants in the digital environment.²⁶

Accordingly, as part of any decision in this proceeding, the Commission should declare that ISPs' right to engage in reasonable network management includes a right to use tools and technologies to address the flow of stolen content on their networks. The FCC also should make clear that ISPs engaged in network management are entitled to a presumption that good faith efforts to manage networks to deal with online theft are reasonable. As the Commission made clear in the *Notice*: “[W]e do not presume to know now everything that providers may need to do to provide robust, safe, and secure Internet access to their subscribers, much less everything they may need to do as technologies and

²⁵ See *Open Internet Coalition Comments*, at 47-48 (“support[ing] a flexible framework that can survive advances in technology and changes in Internet usage” and recommending that the FCC “adopt a flexible, nuanced approach that allows broadband Internet access providers to have flexibility to manage congestion and protect their networks”).

²⁶ Comments of Google Inc. (filed Jan. 14, 2010), at 73.

usage patterns change in the future.”²⁷ The Commission’s evaluation of reasonable network management should continue to permit and encourage service providers to “experiment and innovate as user needs change.”²⁸ Ultimately, as noted below, transparency concepts can serve to protect consumers while allowing the Commission to monitor and intervene as appropriate.

C. Criticisms of Reasonable Network Management as an Anti-Theft Tool Are Unavailing

Although there is no question that the theft of creative works online is a pernicious problem that causes great harm to consumers and content creators alike, several commenters used their opening submissions in this proceeding to suggest that the Commission restrict the use of reasonable network management as a tool to combat the harms caused by malicious activity. These commenters incongruously contend that ISPs should, in effect, be prevented from addressing rampant online theft.²⁹ They argue that because some network management tools capable of dealing with online content theft also theoretically could be used to negatively impact lawful transfers of content, the Commission should prohibit ISPs from taking any action.

The fact that a tool intended to stop unlawful conduct could be put to ill use is not an argument for prohibiting the use of the tool; it is an argument for

²⁷ *Notice*, ¶ 140.

²⁸ *Id.*

²⁹ *See, e.g.*, Joint Comments of Computer and Communications Industry Association, *et al.* (filed Jan. 14, 2010) (“*Joint Comments*”), at 2; Comments of Public Interest Commenters (filed Jan. 14, 2010) (“*Public Interest Comments*”), at 53-63; *Open Internet Coalition Comments*, at 58.

sanctioning the bad actors.³⁰ As described above, the reasonable network management standard together with the transparency concepts proposed by the Commission would give the agency ample ability to address the instances, if any, in which a tool or technique might be used in bad faith to harm consumers or impede competition. But absent those circumstances, the FCC should reject commenters' suggestions³¹ that ISPs be forced to simply stand idly by as broadband networks are ravaged by unlawful online conduct, including rampant theft.

More fundamentally, these commenters' ill-considered invitation to neuter the concept of reasonable network management would undermine the key innovation goals that should be driving the Commission's policymaking. As MPAA has explained, the threats facing the online environment are not only real, they are growing and evolving as bad actors constantly adapt their methods in an effort to evade law enforcement and network management. Indeed, in the short time that broadband penetration has made the online delivery of long-form audiovisual content feasible, theft of this content has rapidly evolved and taken on new and different forms. Whereas at the advent of the Internet, infringement primarily occurred via private networks, today thieves take advantage of a wide variety of advances, from peer-to-peer technologies to streaming sites to linking sites.³² Thus, MPAA advocates a flexible regulatory environment in which the

³⁰ See, e.g., *In re A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of the Motion Picture Association of America, Inc. in Response to the Workshop on the Role of Content in the Broadband Ecosystem (dated Oct. 30, 2009), at 25.

³¹ See *Joint Comments*, at 2; *Public Interest Comments*, at 53-63; *Open Internet Coalition Comments*, at 58.

³² In the late 1990s, infringing content primarily was traded via small private online networks (e.g., IRC, Usenet). With the introduction of peer-to-peer technologies, online content theft largely moved first to centralized peer-to-peer protocols, such as Napster, and then to de-centralized technologies such as Grokster and BitTorrent. Today the online market has further fragmented and content thieves have
(cont'd)

Commission permits industry to develop a multi-pronged approach to addressing these issues.

Commenters who focus on the potential negative features of specific tools are, at this stage, merely attempting to distract the Commission from the real point that MPAA and others have emphasized: future tools must be developed to meet future threats, and a flexible approach to network management can ensure that the ingenuity of private industry will lead to new technologies and tools capable of meeting the next generation of challenges.³³ Given the rapidity with which technology changes occur, the Commission should focus on ensuring that content creators and ISPs have the flexibility to work together to take advantage of new and evolving opportunities.

Equally important, the Commission should reject arguments advanced by commenters³⁴ who suggested that ISPs' authority to employ reasonable network management policies to deter online content theft should depend on an advance judicial or regulatory determination of "lawfulness" prior to every use. First and foremost, these suggestions misconstrue copyright law, which provides the framework for ISPs, content owners and the public to distinguish lawful from unlawful transfers of content. In addition, in a nation governed by the rule of law, it would constitute a fundamental

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taken advantage of new online technologies, with streaming sites (*e.g.*, Megavideo, Supernovatube) and cyberlockers (*e.g.*, ZShare, Megaupload) representing a growing share of unlawful conduct. Moreover, a supporting application has arisen in the form of "linking sites" (*e.g.*, Watch-Movies-Online.tv, TVShack.net), which are legitimate-looking sites that index stolen content online, and generate sometimes substantial revenue via advertising and/or subscriptions.

³³ See, *e.g.*, *NCTA Comments*, at 27-28 ("Any rules adopted by the Commission need to ensure that ISPs have broad flexibility to experiment with and find the network management techniques that keep pace with [technology] changes and ensure a good Internet experience for their customers.").

³⁴ See, *e.g.*, *Public Interest Comments*, at 53-63; *Joint Comments*, at 7-8; *Open Internet Coalition Comments*, at 57.

departure from the norm to require a determination of lawfulness prior to every individual action that takes place in the Internet environment. The Commission already has concluded that “providers, consistent with federal policy, [may] block . . . transmissions that violate copyright law.”³⁵ Transparency concepts, as well as mechanisms for redress in the rare instance of a complaint, can address any potential concerns about the use of any given network management tool. But the Commission should reject the contention that its rules should require an ISP to seek judicial or regulatory sign-off prior to engaging in reasonable network management.

Moreover, any rule requiring an advance determination of “lawfulness” would be so unwieldy as to be entirely unavailing as a practical solution to the types of theft that occur in the dynamic Internet environment. As AFTRA, *et al.* pointed out, for example, broadband’s power also contributes to its peril.³⁶ It is the very speed with which the Internet allows for reproducing and distributing content (coupled with its anonymity and ubiquity) that presents such a substantial threat to creative industries’ ability to protect their intellectual property rights online.³⁷ With so many files being distributed so rapidly, it simply would be impracticable, and inconsistent with the Copyright Act, to require a judicial or regulatory determination about the “lawfulness” of every Internet file before an ISP can take steps to manage its network.

MPAA continues to strongly believe that determinations about addressing infringing content through reasonable network management practices must be made in

³⁵ *Notice*, at ¶ 139.

³⁶ *See AFTRA Comments*, at 13.

³⁷ *See id.*

the first instance by content owners and ISPs (subject to reasonable provisions for consumers to seek redress). If technologies and tools to combat theft were permitted for use only *after* an affirmative third party finding (whether judicial, regulatory or otherwise) that a particular file is “unlawful,” reasonable network management effectively would provide no protection against online content theft. Content owners and ISPs would be left in the untenable position of attempting to deal with the transmission of unlawful content through after-the-fact prosecutions or civil suits on an individualized, case-by-case basis. That, in turn, would effectively nullify the supposed benefit that reasonable network management is intended to provide in the fight against unlawful online activity.

Indeed, AFTRA, *et al.* demonstrated in their comments that, as a tool against online intellectual property infringement, after-the-fact prosecution has proven woefully inadequate.³⁸ In light of the vast amount of stolen content rapidly flowing over the Internet, it simply would be infeasible to expect any meaningful reduction in unlawful activity if ISPs were relegated to serving as passive observers with no ability or incentive to address the threats in their midst.³⁹

In short, MPAA urges the Commission not to pre-determine whether any particular technology should be available in ISPs’ and content owners’ anti-piracy

³⁸ *See id.* at 13. *See also AT&T Comments*, at 217 (“effective efforts to police intellectual property rights cannot rely solely on ex-post responses to individual, already-adjudicated violations”).

³⁹ Any regime in which reasonable network management is unavailable absent an advance judicial or regulatory determination as to “lawfulness” also would undermine ISPs’ ability to use network management to deal with the congestion plaguing their networks as the result of bandwidth-hogging stolen property. As MPAA pointed out in its initial comments, online content theft creates vast amounts of unlawful traffic that currently clogs the Internet and degrades service to law-abiding consumers. While determining the precise amount of bandwidth attributable to unlawful content is difficult, various studies, reports and expert analyses lead to a reasonable conclusion that upwards to 50% or more of bandwidth is consumed by the illegal trafficking in copyrighted content. *See Comments of the Motion Picture Association of America, Inc.* (filed Jan. 14, 2010), at 9.

toolkits. The threats posed by content theft are too real, and the consequences too harmful, for the government arbitrarily to limit the range of potential solutions. Given that today's piracy threats are large and growing, and since these threats could undermine broadband's promise, the Commission should not eviscerate the effectiveness of reasonable network management by limiting its use in combating the vast sea of illegal content currently swamping the Internet.

II. ANY APPROACH TO NONDISCRIMINATION SHOULD BE TAILORED TO ENHANCE COMPETITION WHILE PROMOTING INNOVATION AND ADVANCING CONSUMER WELFARE

A. The Nascent Marketplace for the Distribution of Online Video Warrants a Light Regulatory Approach to Nondiscrimination

MPAA's opening comments demonstrated that the Commission should tread cautiously with respect to any nondiscrimination requirement and should carefully tailor any such requirement to prevent demonstrably anti-competitive acts, while otherwise preserving the flexibility needed to spur the kind of investment and innovation that the Commission properly seeks to achieve. The record in this proceeding supports MPAA's position: If the Internet is to remain a laboratory for innovation and, in turn, a driver of pioneering new choices for consumers, the Commission should proceed with caution and permit continued experimentation with different delivery approaches for online video distribution.

No commenter has offered substantial evidence disputing the Commission's recognition that new kinds of consumer-friendly digital distribution

services “may require enhanced quality of service to work well.”⁴⁰ As MPAA’s opening comments showed, content creators and ISPs may need to enter into quality-of-service agreements to enable consumers to enjoy innovative forms of digital entertainment without delay, disruption or interference. No one knows precisely what delivery models may emerge for online digital content distribution, or how those models might address congestion that occurs over the so-called last mile portions of the Internet where ISPs connect directly to consumers’ homes and businesses. Consequently, the types of competition concerns expressed in the *Notice* may warrant an entirely different analysis.

This presents precisely the kind of situation where the Commission has recognized the need for a light regulatory touch. As the *Notice* acknowledges, “it has long been U.S. policy to promote an Internet that is both open and unregulated. This approach is reflected in more than two decades of FCC decisions.”⁴¹ The *Notice* reflects the Commission’s sensible recognition of the limited ability of any central regulator successfully to anticipate future developments in an ecosystem as dynamic and complex as the Internet.⁴² Regulatory restraint would be particularly appropriate here, because there is a very real danger that a broad nondiscrimination requirement could choke off innovation and have unintended harmful consequences for emerging legitimate online

⁴⁰ *Notice*, ¶ 108.

⁴¹ *Id.* at ¶ 47.

⁴² *See e.g., id.* at ¶ 140 (“[W]e do not presume to know everything that providers may need to do to provide robust, safe, and secure Internet access to their subscribers, much less everything they may need to do as technologies and usage patterns change in the future.”).

video distribution businesses. Such an impact would defeat the very policy objectives cited in the *Notice* – the public interest, consumer welfare and competition.⁴³

A policy of regulatory restraint would allow the Commission to deal with allegations of anti-competitive conduct, but without stifling innovation or freezing out new delivery models before they even have a chance to develop. In the event that demonstrable harms to competition emerge from different delivery approaches, the Commission could “consider particular circumstances case by case,”⁴⁴ as proposed in the *Notice*, rather than through a broader rule adopted at the outset when the potential unintended effects of regulation are unknowable.

This tailored approach would offer the best policy for encouraging the development of nascent online video distribution businesses. As the Commission pointed out in the *Notice*, discrimination is a particular concern where ISPs are vertically integrated because they may have an incentive to favor their own (or affiliated) services, applications or content.⁴⁵ The MPAA agrees that any type of related anti-competitive behavior is a concern. The record before the Commission, however, does not contain any evidence, let alone substantial evidence, of market abuse or failure with respect to quality-of-service agreements between unaffiliated ISPs and content or application providers. The absence of this type of evidence is hardly surprising since, as far as MPAA is aware, there are not yet any commercial arrangements for last-mile enhanced

⁴³ *See id.* at ¶¶ 50-55.

⁴⁴ *Id.* at ¶ 89.

⁴⁵ *See Notice*, ¶ 72.

quality of access for online video distribution, let alone any evidence of consumer harm from such arrangements.

Moreover, allowing breathing room for innovative delivery arrangements is essential for the Commission to achieve its goal of ensuring that the Internet is replete with lawful choices for online content that meet consumers' legitimate expectations. Video content, in particular, is especially sensitive to latency, and evidence confirms that consumers reject content offered with an inferior viewing experience. According to one recent study, more than 81 percent of all online video viewers navigate away from a video stream if they encounter a video clip rebuffering.⁴⁶ The study "took a close look at 192 million video streams over the course of 14 days to figure out how much rebuffers matter."⁴⁷

It also bears noting that the majority of Internet video streaming to date has been standard definition. High definition content, which better meets consumer expectations, requires more bandwidth and is therefore more susceptible to network congestion and quality of service disruptions. This is even more true for 3D and interactive content and the future holds the promise for even higher resolutions and bandwidth requirements. Thus, for the distribution of these new formats to develop into legitimate, consumer-friendly businesses online, the content must be presented to

⁴⁶ *See 4 Out of 5 Viewers Leave If a Stream Buffers Once*, The GigaOM Network (posted Dec. 10, 2009) (citing study by Tubemogul) (available at www.newteevee.com/2009/12/10/4-out-of-5-viewers-leave-if-a-stream-buffers-once) (last visited April 7, 2010)).

⁴⁷ *Id.* Far from being a temporary phenomenon, service disruptions could become more frequent in the future as more and more people consume increasing amounts of online video content. Time Warner Cable's comments noted that Internet video increased from 12 percent of global consumer Internet traffic in 2006 to 22 percent in 2007, and said it is forecast to account for more than 60 percent of all consumer Internet traffic by 2013. *See Time Warner Cable Comments*, at 14 (internal citations omitted).

consumers as part of a compelling, high speed, low latency viewing experience. Providing consumers with that experience requires that requisite arrangements be made between content providers and ISPs and such arrangements should not be proscribed. Put simply, access to content alone may not be sufficient to satisfy consumer expectations.

For all of these reasons, the Commission should carefully tailor any nondiscrimination requirement and should not foreclose the ability of content and application providers to enter into quality-of-service agreements with ISPs which will, in the end, enhance the consumer welfare and choice the Commission seeks to achieve.

B. Ensuring Appropriate Transparency and Information Disclosure Can Ameliorate Any Concerns About Innovative Business Models' Impact on Consumer Expectations

In contrast, MPAA submits that appropriate transparency and disclosure by ISPs could readily satisfy the FCC's objective in this proceeding without thwarting the development of new models for the delivery of online content.⁴⁸

In particular, if ISPs provide consumers with clear and concise information advising them of network management tools that might impact their online experience, consumers can make a meaningful choice about the pros and cons of choosing a particular ISP as their service provider. As the *Notice* suggested, "transparency" can "protect and empower consumers to maximize the efficient operation of relevant markets by ensuring that all interested parties have access to necessary information"⁴⁹

⁴⁸ See *Notice*, ¶¶ 118-32. MPAA supports the Commission's recognition that a transparency principle should not entail the disclosure of proprietary or confidential business information and should be tailored to avoid any "competition concerns." *Id.* at ¶ 130.

⁴⁹ *Id.* at ¶ 118.

Focusing on ISP transparency and disclosure appears to enjoy substantial support among leading broadband access service providers.⁵⁰ In fact, a number of ISPs have stated that they already make disclosures to consumers as part of their competitive efforts in the marketplace.⁵¹ By ensuring that network management practices would be publicly visible, the concept of transparency would facilitate the Commission’s case-by-case enforcement efforts should any particular network management tool warrant scrutiny. This focus also would align the U.S. approach with emerging policy positions taken by the European Union, which is eschewing “extreme regulation that could stifle innovation” and instead choosing “a more measured approach that emphasizes transparency.”⁵²

⁵⁰ See, e.g., *AT&T Comments*, at 189 (“AT&T supports a principle favoring increased transparency about *customer-usage limitations* as *consumers* will experience them Under this principle, a broadband network operator can and should tell consumers, at an appropriate level of detail, about any material restrictions or limitations on their broadband Internet service so that they can make informed choices about which providers and service plans best meet their needs.”) (emphasis in original); *Verizon Comments*, at 131 (“[T]he Commission should facilitate the development of industry standards, self-regulatory codes, and best practices to promote transparency – practices that should apply to all providers throughout the Internet ecosystem, including providers of networks, applications, and devices. Such transparency will allow consumers to decide what practices, services, or devices best suit their needs – and the ones to which they object – and allow for policing of anticonsumer practices through public scrutiny, the possibility of reputational harm, and the risk of additional regulation.”); Comments of Qwest Communications International Inc. (filed Jan. 14, 2010), at 3 (“Qwest also supports more transparency with regard to customer information.”).

⁵¹ See, e.g., *Time Warner Cable Comments*, at 98-99 (“TWC supports and practices transparency TWC already provides clear and conspicuous disclosures to consumers regarding its acceptable use policies and the impact of its network management practices, and it will continue to do so as its business practices evolve TWC’s practices are far from unique—a fact that is underscored by the record recently compiled in the Commission’s inquiry concerning disclosure practices generally. The threat of consumer backlash along with the protections provided by existing consumer protection laws create strong incentives to provide complete and accurate disclosures regarding network management practices.”); *Comcast Comments*, at 45 (“Comcast has some of the most detailed disclosures available from any ISP, and it is a competitive imperative to continue to keep customers informed about our [high speed Internet] service. As the [Notice] acknowledges, other broadband ISPs have followed suit and enhanced their disclosure of their network management practices.”).

⁵² See John W. Mayo, Marius Schwartz, Bruce Owen, Robert Shapiro, Lawrence J. White and Glenn Woroch, *How to Regulate the Internet Tap*, *The New York Times*, April 20, 2010 (urging the FCC to “look at the European model and focus on a policy built on transparency” rather than “versions of net neutrality regulation that would severely restrict firms’ business models . . .”).

Providing consumers with information about ISPs' network management practices also would ensure that individual users are aware of operator policies with respect to preventing the transmission of stolen materials on the Internet. While ISPs should have sufficient flexibility to avoid the compelled disclosure of details that would permit criminals or hackers to counter or exploit weaknesses in efforts to manage network traffic, consumers still could be given adequate information so that no one need be surprised by the reasonable steps that ISPs might take to address content theft (or other malicious activity, such as spam, child pornography, malware, spyware, and identity theft, for that matter).

Finally, transparency would allow the Commission and the general public to consider specific network management activities as they evolve and based on how they are employed in context. This approach to Commission oversight, based on real world experience, is best suited to promote innovation and flexibility going forward.

III. CONCLUSION

In sum, as the record in this proceeding makes clear, the future success of broadband in this country will depend upon a regulatory environment in which innovation is permitted and encouraged to flourish. Whether in the form of exciting new content and applications options for consumers, or increasingly sophisticated tools and methods to manage Internet networks against theft and malicious activity, the FCC should rely on innovation to drive its vision of robust and accessible broadband.

There is widespread consensus about the threats to broadband from online content theft, and there is also agreement among a broad array of industry participants that reasonable network management techniques can and should play a productive role in stemming the tide of unlawful online activity. The Commission should ensure that,

