

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

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

**COMMENTS OF JON HENKE  
PRESIDENT, DIGITAL SOCIETY**

In response to the FCC’s Notice of Proposed Rulemaking on Preserving the Open Internet, Digital Society would ask the FCC consider the impact its rules may have on the information economy.

**The Information Economy**

Increasingly, the United States is transitioning from an industrial economy to an information economy. Information and intellectual property drives tremendous economic growth and creates millions of jobs, both directly and indirectly. The potential of the digital economy is enormous. As the [Global Intellectual Property Center](#) has reported,

- U.S. intellectual property is worth between \$5.0 trillion and \$5.5 trillion—more than the nominal gross domestic product (GDP) of any other country
- Intellectual property accounts for more than one-half of all U.S. exports, helping drive 40% of U.S. economic growth.
- America is a net exporter of intellectual property, contributing \$37 billion to our trade balance in 2006.

The benefits of Intellectual Property and the information economy extend far beyond the immediate jobs it provides. Many millions of other jobs exist to support the information economy. What’s more, it is fair to say that the ability to create effective markets for, and access to, intellectual property will do more than any other factor to drive the growth and universal adoption of the Internet.

However, the rules you make will play a significant role in how our information economy develops. If the Internet facilitates voluntary & free (as in speech) exchanges – both commercial and non-commercial – that allow maximum freedom and minimal violations of the rights of participants, then we will have a flourishing digital economy.

If the FCC imposes new rules that forbid networks from facilitating voluntary and harmless new business models, then we risk a tragedy of the commons. By forbidding services that application developers, content creators, networks and users want and freely choose, the FCC could actually *become* the gatekeeper it seeks to prevent. The economic impact of foreclosing entire new business models and innovation is incalculable.

As Jaron Lanier wrote [in the Wall Street Journal](#)...

*On the one hand we want to avoid physical work and instead benefit from intellectual property. On the other hand, we're undermining intellectual property so that information can roam around for nothing, or more precisely as bait for advertisements. That's a formula that leaves no way for our nation to earn a living in the long term. [...] Some kind of intellectual-property system is the only way Americans, or people anywhere, can earn money in the long, long term, as technology gets very good.*

In 2000, [Paul Krugman also worried](#) about policymakers who made "guesses about the effects of policy on technological innovation"...

"The truth is that we don't know very much about what promotes innovation, and even some of what we think we know may not be true. [...] My point is not that it is wrong to consider the impact of policy on innovation; it is that because the determinants of innovation are not well understood, clever advocates can invoke technological progress as an all-purpose justification for whatever policy they favor."

[...]

"In short, the promise of technological benefits has become the universal policy justification."

Since nobody can be sure of the best services and business models for everybody, the best choice is to allow for the protection of the freedom and property rights of all participants in the Internet ecosystem, but otherwise leave as many options open as is reasonably possible.

## **The Innovation Economy**

In 1997, Kevin Werbach, then-Counsel for New Technology Policy at the FCC, wrote a report entitled "[\*Digital Tornado: The Internet and Telecommunications Policy\*](#)", which argued that "Government policy should be forward-looking, recognizing that the Internet will continue to grow and evolve, and should not attempt to impose on the Internet the familiar limitations of traditional communications technologies". We believe the policy approach he laid out then remains true today...

*Government policy approaches toward the Internet should therefore start from two basic principles: **avoid unnecessary regulation, and question the applicability of traditional rules**. Beyond these overarching themes, some more specific policy goals can be identified. For the FCC in particular, these include the following.*

*[...]*

*Facilitate network investment and technological innovation. **The Internet encourages the deployment of new technologies that will benefit consumers and produce jobs. The Commission should not attempt to pick winners, but should allow the marketplace to decide whether specific technologies become successful. By eliminating regulatory roadblocks and other disincentives to investment, the FCC should encourage both incumbents and new entrants to develop innovative solutions that transcend the capabilities of the existing network.***

It is often said that content industries must adopt "new business models" in order to adapt to the Internet, and that is certainly true. They ought to be given a chance to do so. Services that benefit

consumers, compensate creators and harm nobody should be our goal, not something to regulate out of existence.

The role of the FCC is not to stand between competitive new business models and the consumers who will benefit from them.

The continued development of new business models and smart networks will enhance, not prevent, the universal adoption of an open Internet. Kevin Werbach's 1997 conclusion is still appropriate today...

*The growth potential of the Internet lends itself to both pessimistic and optimistic expectations. The pessimist, having struggled through descriptions of legal uncertainties, competitive concerns, and bandwidth bottlenecks, will be convinced that all these problems can only become worse as the Internet grows.*

*The optimist, on the other hand, recognizes that technology and markets have proven their ability to solve problems even faster than they create them.*

We at Digital Society are the optimists. We believe we can have both smarter networks *and* an open Internet. Digital Society asks that the FCC not force us to choose between two good options.

*Jon Henke  
Digital Society  
April 26, 2010*