Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Promoting and Protecting the Open Internet	)	
	)	GN Docket No. 14-28

Comments of the Future of Music Coalition

July 15, 2014

I. Introduction

The arrival of broadband Internet has reshaped how music is accessed and enjoyed while presenting new challenges and opportunities for creators and the music industries. Though these developments had an early, disruptive initial impact on traditional music business models, there is every reason to believe that Internet-engendered innovations will also pave the way for a brighter future for music, provided that the ability for creative entrepreneurs to reach audiences online is not compromised.

In pre-Internet days, most artists—irrespective of talent or ambition—had limited opportunities to reach audiences, due to high barriers to entry and a concentration of

powerful gatekeepers. These barriers to entry have been greatly lowered due to widespread broadband Internet access. Today, musicians and other creators have numerous tools at their disposal to do everything from selling music and merchandise to booking tours to engaging with fans and collaborating with other artists around the world. Innovations in digital music distribution have made it a great time to be a fan, with a broad array of legal, licensed services with vast catalogs available for discovery and access. It is fair to say that, without an open Internet, these and other innovations are unlikely to have been developed.

It is also true that the Internet has posed challenges to creators. We are experiencing an ongoing shift in the economics of cultural production; whether the outcome is favorable to artists to a large extent depends on whether creative entrepreneurs can compete on a level online playing field. With tremendous concentration among major labels and publishers, it is essential that small to medium enterprises (SMEs), such as independent artists and labels can take part in the emerging digital economy without being disadvantaged by just a handful of Internet Service Providers (ISPs) and their preferred business partners.

Broadband Internet has driven the adoption of new digital technologies, which in turn empower creators in nearly every aspect of their lives and careers. This dynamic is a result of an open Internet where creative expression, innovation and new forms of commerce can come together. Artists big and small benefit from this virtuous cycle, as do independent labels, developers and music fans. Future of Music Coalition supports the growth of a legitimate digital music marketplace where artists are fairly compensated and

fans can find the music they want. We aren't there yet, but we won't get there at all if ISPs are allowed to pick winners and losers in the online marketplace.

II. The FCC Must Act Now to Preserve an Open, Accessible Internet

This Notice of Proposed Rulemaking (henceforth "the Notice") comes at a critical juncture. Following many years of uncertainty among ISPs, content creators, edge providers and the public, the FCC now has an opportunity to establish a framework for broadband Internet service that allows America to remain globally competitive and that honors our traditions of free speech, creativity and entrepreneurship. The time to act is now, not in five or ten years. We appreciate that the Commission has recognized the importance of having rules in place, and we likewise appreciate the opportunity to weigh in on their provisions and scope.

The questions put forth in this Notice are about how best to preserve an open, and accessible Internet free from discrimination and undue gatekeeper interference. Unfortunately, the current proposal, which relies on §706 of the Telecommunications Act, leaves too many questions about how rules would be enforced, and would place creators, content providers and the public at a disadvantage compared to the telecommunications and cable incumbents. The costly and complicated case-by-case determinations proposed under §706 are insufficient to achieving the goals of preserving an open and accessible Internet where all lawful content, applications and services can compete on their own merits against the offerings of the biggest corporations.

It is our belief that reclassification of broadband Internet service as a common carrier under Title II of the Act would provide for far more sufficient protections. Though the Commission has amended an earlier proposal to strengthen its approach under §706, there remain too many troubling exceptions and loopholes to guarantee the basic protections that creators and other entrepreneurs require. Instead, the proposed rules may encourage a system similar to payola[1], in which the best-capitalized content and edge providers could pay ISPs for faster connections to end users, thereby cementing their place at the top of the marketplace to the disadvantage of other cultural, commercial and civic interests.

The open Internet has become an indispensable tool for independent musicians and labels. We feel strongly that the FCC should reconsider the current proposal in favor of reclassification under Title II. In doing so, the Commission would better serve the interests of creators and the public.

A. The Broadband Marketplace & ISP Incentives

The market for high-speed Internet service has, in recent years, become highly concentrated. A very small number of ISPs control the vast majority of the wired broadband market, and in some markets a single provider holds almost complete control over access to Internet users. In the best-case scenario, most markets exist under a cable and telecommunications duopoly with little opportunity for competition to emerge. ISPs further cement their dominance by locking users into contracts with high cancellation

[1] Marcus, Adam. "Payola Education Guide." 27.8 (2010): 480-523.*FutureofMusic.org*. Future of Music Coalition, 12 June 2008. Web. 14 July 2014.

fees,[2] which, in many cases, force the user to stay with an ISP until the contract term has expired. With the recent merger of Comcast and Time Warner Cable, a single ISP now has presence in every major market in America and is pushing up against the 30 percent market share cap imposed by US antitrust regulations.[3]

In such a marketplace, ISPs no longer have the competitive incentive to develop their services to exceed that of their competitors. As Internet traffic has grown, many ISPs have chosen not to build out their networks, but rather continue to charge the same or higher prices while providing users with significantly lower levels of service than expected or advertised. High prices of connectivity may lead consumers to reduce the amount they spend on entertainment, which ultimately impacts creators. Where this uncompetitive market is combined with an Internet that is not entirely neutral, the resulting landscape is one that is prohibitive to creative expression and innovation.

In addition to advancing strong net neutrality rules, the Commission can also help to spur competition by promoting innovation. Part of these efforts should involve making available unlicensed and newly opened up spectra to small and independent providers and innovators. It is undoubtedly these smaller operators and experimenters who will drive innovation in broadband access and deployment, which may establish a virtuous cycle of lower consumer costs, further innovation and a more diverse array of lawful content. The current cable and telecommunications incumbents have shown themselves to be poor stewards of innovation that isn't on their own terms. As it

[2] http://www.fcc.gov/encyclopedia/early-termination-fees
[3] http://www.theverge.com/2014/2/13/5407932/comcast-and-time-warner-a-very-dark-cloud-with-a-tiny-silver-lining

considers the appropriate framework to preserve the open Internet, the Commission should also look for ways to promote competition and innovation on the network.

III. The Currently Proposed Rules

A. Transparency

Transparency and accountability are fundamental for the promotion of growth, innovation, and competition in just about any industry. The best tool for achieving this is in the broadband marketplace is a requirement that ISPs be highly transparent in their business practices. Unfortunately, the current network operators have not been held to a very high transparency standard, and, as a result, are in a position to take advantage of their market dominance in potentially uncompetitive ways.

In ¶66 of the Notice, the Commission correctly notes that transparency is key to the virtuous cycle of innovation, however, the proposed rule would not require ISPs to be truly transparent, and thus would fail to establish a proper baseline standard for network operator conduct.

The main problem comes from the overly flexible nature of the proposed rule. In the Notice, the Commission suggests that an effective disclosure would comprise information regarding "(1) network practices, including congestion management, application-specific behavior, device attachment rules, and security measures; (2) performance characteristics, including a general description of system performance (such as speed and latency) and the effects of specialized services on available capacity; and (3) commercial terms,

including pricing, privacy policies, and redress options."[4] The rule, however, fails to require that any of these topics be addressed in an ISP's disclosure, allowing for highly selective transparency, which effectively amounts to no transparency at all.

We would instead advise the Commission to promote ISP transparency by requiring the inclusion of all three topics in the disclosures. Further, we would support mandating reports tailored to the needs of the different classes of ISP service users. Information related to the provision of broadband Internet is often highly technical, and, while this information is highly useful (and comprehensible) to edge providers, the average end user is not well versed enough in broadband terminology to make sense of such a report. Given that the goal of transparency is to inform *all* users and allow them to hold their ISP accountable, it is necessary for end users to be able to understand these disclosures regardless of their technical knowledge; tailored reports would better promote this end result.

It may be true that the Commission has sufficient authority under §706 to promote the transparency requirements we have prescribed, however, this authority is untested. Were the Commission to follow our recommendation of reclassifying Internet services as a common carrier service under Title II, there would be the adequate and established authority to promote a thorough, effective transparency rule.

B. No Blocking

[4] *Protecting and Promoting the Open Internet*, GN Docket 14-28, ¶ 64 (May 15, 2014)

As the Commission pointed out in its 2010 *Open Internet Order*, and restated in the Notice, "the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking is essential to the Internet's openness and to competition in adjacent markets."[5] The unobstructed transmission of all lawful content is of particular importance to independent musicians, the majority of whom do not have access to the same marketing channels as label and publisher-backed artists.

ISPs have shown that, in the absence of a strong no blocking rule, they are more than willing to interfere with the flow of information when doing so is beneficial to them, as was the case when Comcast degraded traffic using the BitTorrent protocol.[6] While there are many legitimate services and offerings that use this technology, we are aware that BitTorrent is also used in peer-to-peer networks in which unauthorized distribution occurs. We supported the distinction made in the previous *Order* that clearly stated that net neutrality rules apply only to lawful content, applications and services. We are also encouraged that the Commission appears to remain committed to prohibiting the blocking of lawful content online. However, the no-blocking rule alone is insufficient to prevent "pay-to-play" schemes that would ultimately disadvantage creators, innovators and the public. And before it can even get to the point where all lawful content is protected, the Commission must devise rules that will withstand legal scrutiny.

[5] *Open Internet Order*, 25 FCC Rcd at 17941-42, ¶ 62 (2010)
[6] McCullagh, Declan. "FCC Formally Rules Comcast's Throttling of BitTorrent Was Illegal - CNET." *CNET*. N.p., 1 Aug. 2008. Web. 14 July 2014.

In its decision *Verizon v. FCC*, the D.C. Circuit Court struck down the no blocking rule proposed in the *Open Internet Order* on the grounds that the Commission failed to provide legal backing that would take the rule out of the realm of common carriage.[7] In the Notice, the Commission has attempted to re-justify its authority under §706 by making the clarification that the no blocking rule would allow for individualized negotiations between ISPs and edge providers. The existence of priority agreements is fundamentally opposed to the idea of net neutrality, and we will discuss the harm they present in greater detail in subsequent sections. The Commission's primary mistake, however, comes in the decision to rely on §706 authority. Dependence on such a framework forces the Commission to create exceptions to the rules and then establish limitations to those exceptions. If the Commission were to reclassify, they would have the authority to ban priority agreements outright, and there would be no need for discussions of minimum access levels for those edge providers who simply cannot or who choose not to enter into priority agreements.

As specialized applications become increasingly prevalent on both fixed and mobile devices, it is important that innovation has a chance to occur. In the past, it has been primarily voice and telephony applications that have been subjected to blocking, yet increased consolidation in the ISP marketplace along with the development of provider-owned services places applications of all kinds at risk. To promote innovation and competition, we urge the Commission to reclassify and use their ample Title II authority to expand the no blocking rule to cover the full spectrum of applications.

[7] *Verizon v. FCC*, 740 F.3d 658 (D.C. Circuit 2014)

C. Commercial Reasonableness

The question of commercial reasonableness is an important one, as determination of this standard directly circumscribes the actions and operations of service providers. In the Notice, the Commission proposes a commercial reasonableness rule that would be enforceable under §706 authority by allowing for individualized negotiations between ISPs and edge providers.[8] Such priority agreements stand in stark opposition to the goals of an open Internet.

The allowance of priority agreements would give the best-situated edge providers the ability to receive preferential access to consumers. Such agreements would not always come in the form of standard "paid prioritization," in which the edge provider makes a direct monetary payment to the ISP in exchange for increased bandwidth. Other priority arrangements could include the exclusion from data caps, as is the case with T-Mobile's "Music Freedom" program.[9] In this arrangement, the data used during consumption of certain music streaming services does not count towards a T-Mobile user's data cap. This results in an artificial distortion of market conditions through T-Mobile's selective privileging of certain edge providers over others. For T-Mobile, the deal will likely lead to an increased customer base at the cost of increasing barriers to entry for new edge and content providers. These kinds of interventions evoke comparisons to payola and other anticompetitive behaviors that inhibit the growth of a free market not just for online content distributors, but also for innovation more broadly.

[8] See *Notice*, ¶111.
[9] http://futureofmusic.org/blog/2014/06/19/t-mobile-uncarrier-or-plain-unhelpful

In the Notice, the Commission seeks comment on the regulatory position that should be taken in regards to specialized services[10], suggesting that perhaps they could be a safe harbor from openness rules. While we do not outright oppose the enactment of safe harbors for specialized services, we do believe that they should not come at the expense of other edge providers' services. It is also important to highlight that these potential safe harbors could open the door to burdensome future challenges to the definitional scope of a "specialized service." By eliminating any kind of preferential treatment for specialized services, regardless of their ownership, the slippery slope of a vast expansion of a safe harbor could effectively be avoided, thus preserving a more level playing field for competition.

Again, the Commission's reliance on §706 authority results in a flimsy rule that would not provide for true net neutrality. Rather, this logic contributes to an environment that creates practically insurmountable structural obstacles to the effective contestation by underserved populations to commercially unreasonable actions by ISPs. Further, given the absence of any hard and fast rules on what conduct is commercially reasonable, the Commission is forced to address reasonableness issues in an arduous and costly case-by-case basis. We therefore suggest that the Commission reclassify Internet services under Title II. Doing so would provide sufficient authority to impose a rule that would entirely ban priority agreements. In the absence of such agreements, free speech and competition would not be curtailed, and artists and innovators alike would be able to find footing in the digital marketplace. A strong codification would limit the amount of dedicated resources employed in the resolution of disputes regarding the scope of commercially

[10] See *Notice,* ¶60.

reasonable actions, making reexamination only necessary in the case of the development and deployment of significantly unique or disruptive services.

D. Application to Mobile Broadband

Currently, there exists a regulatory dichotomy between fixed-line and mobile broadband services, in which mobile broadband is subject to far fewer regulations than fixed-line. The rules proposed in the notice would maintain the application of a significantly less stringent no-blocking rule to mobile broadband, and would fully exempt mobile broadband from the commercial reasonableness rule.

Mobile broadband is being deployed and adopted at an incredible rate, and it is crucial that the Commission develop stronger regulatory policies that would promote innovation and competition during this evolution. As evidenced by the attempted merger of AT&T and T-Mobile that would have resulted in AT&T and Verizon controlling nearly 80 percent of the mobile marketplace,[11] mobile ISPs have shown a tendency toward anticompetitive consolidation.

This market power concentration, in conjunction with a lack of oversight in the mobile sector, allows these firms a dangerously high degree of control over access to information and the dissemination of content. Given that mobile internet is the primary means of connectivity for a significant segment of underprivileged and underserved populations

[11] "Consumers Union Urges Congress to Examine AT&T / T-Mobile." *Hear Us Now*. Consumers Union, 03 Mar. 2011. Web. 14 July 2014.

with low socioeconomic status in the United States,[12] the reality of increased corporate mergers and sustained lack of regulation will have a disproportionately significant and negative impact on demographics that are already struggling with systemic barriers to high-speed internet access. These communities are culture bearers and ambassadors of the incredible array of art and expression in America. They must not be placed at a disadvantage on today's communications platforms.

If the Commission should ultimately decide to continue to classify Internet access as an information service and regulate it under §706, it is imperative that they increase the regulation of mobile broadband to a level equivalent to that placed on fixed broadband. However, as we have stated previously, the Commission cannot, under §706 authority, establish a regulatory framework capable of preserving a truly open Internet. Therefore, in the interest of promoting net neutrality regardless of how or where users connect, it is our recommendation that the Commission eliminate the discrepancy between fixed-line and mobile broadband regulation, and shift both to reclassification under Title II so as to preserve accessibility for current and future users.

IV. Title II Reclassification

The open Internet is fundamental to the livelihoods of musicians and composers, particularly those who operate independent of major label and publisher backing. A tiered Internet would present the very real possibility of a great deal of creative expression

[12] *See* http://www.pewinternet.org/2013/09/16/main-findings-2/ : 60% of Hispanics and 43% of African-Americans are cell-mostly internet users. 45% of cell internet users in households with less than $30,000 in annual income are cell-mostly internet users, compared to only 27% of those in households with $75,000 or less in annual income

being relegated to the Internet "slow lane," where artists and startups are left with what amounts to digital table scraps.

As we have pointed out many times in this document, the Commission has not demonstrated sufficient means under §706 to ensure the preservation of a truly open Internet. Though the Commission has attempted to promote rules that may represent the extent of their authority under §706, it has failed to craft a transparency rule that would hold ISPs accountable for their actions, maintained a groundless regulatory distinction between fixed and mobile broadband and created an exception to commercial reasonableness restrictions allowing for a two tiered Internet that would prioritize the content of the economically powerful to the detriment of cultural diversity and innovation.

The reclassification of the Internet as a common carrier and regulation of it under Title II would give the Commission the authority to avoid the glaring inequities of a §706 approach. Under Title II, the Commission would be able to establish a more robust transparency rule, substantive no-blocking regulation that would promote "application neutrality," and set a comprehensive standard for *actual* commercial reasonableness that would effectively preclude the varied and costly legal contestations to the currently proposed rules. Bundled into this new regulatory system would also be a coherent policy that prohibits priority agreements.

A. Legal Basis

Should the Commission choose to reclassify Internet services to fit under Title II, as has been our recommendation, they would do with the support of an ample body of case law and statute. The precedent of administrative deference put forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* and subsequently detailed in *National Cable & Telecommunications Association v. Brand X Internet Services* creates an effective framework through which to defend a shift to Title II.[13] "Chevron deference" implies that the Commission is the ultimate arbiter of the scope and interpretation of any statute or regulation that it administers, while *Brand X* strengthens the idea that the authority of the Commission would supersede any court ruling in the absence of an "unambiguous" statute. §706 as it currently stands in application is far from unambiguous, and the regulatory framework currently used to oversee ISPs and their operation is constituted largely of a patchwork of jurisprudence and legal challenges to the Commission's regulatory authority. As such, reclassification under Title II makes sense in light of shifting perceptions of broadband as a common carrier or utility rather than an information service. To do so is wholly within the Commission's mandate.

Furthermore, such an action by the Commission would yield massive dividends in terms of saved time and effort on the part of both the Commission and the U.S. legal system, as reclassification would obviate a number of costly future adjudications. Though we would be remiss in not recognizing the significant outlays necessary in the initial stages of reclassification, the long-term benefits of the clarity from a move to Title II would vastly outweigh short-term stumbling blocks.

[13] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

In the Notice, the Commission sought comment on the application of the term "commercial mobile service" to mobile broadband. Under §332 of the Communications Act, if a service fits the description of a commercial mobile service it must be regulated as a common carrier. As described in the Communications Act, a commercial mobile service is "any mobile service...that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission."[14] Mobile broadband, which, as we have stated, is a fast growing service, and has been adopted by the public on a massive scale, and, as such should be regulated as a common carrier.

V. Conclusion

The Internet presents an incredible opportunity for musicians, composers, and creators of every conceivable background and discipline. Artists now have the power to communicate with fans across the globe almost instantly, in many cases at no cost beyond the price of a broadband connection. Going further, creators not only have access to a broad array of distribution channels, but also a range of services that create efficiencies in other aspects of their careers. For many artists, especially independents, these tools have come to be commonplace, as has unfettered access to the network. The Internet has come to be seen as an essential utility, and the innovations that are borne of the network part of the toolkit of every creative entrepreneur. Without real net neutrality, a pay to play system would emerge to the disadvantage of smaller voices. To ensure that the next generation of artists and

[14] 47 U.S.C. § 332(d)(1)

innovators can inspire us with their innovation and ingenuity, the Commission must adopt rules that are robust and enforceable. We urge that the current proposal be overhauled in favor of reclassification under Title II.

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