

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

In the Matter of )  
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Protecting and Promoting the Open Internet ) GN Docket No. 14-28  
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**Reply Comments of the  
Motion Picture Association of America**

*I. Introduction*

The Internet has been a tremendous driver of free expression, commerce, and social change. The Motion Picture Association of America, like all stakeholders, wants that to continue. Our six members—Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox, Universal City Studios, and Warner Bros. Entertainment—are some of the leading providers of television and film content. They are committed to ensuring audiences have a wide range of choices for accessing great news and entertainment content, including over the Internet. Indeed, the more than 100 legal online outlets for film and television content in the United States<sup>1</sup> have enabled consumers to access an estimated 5.7 billion movies and 56 billion television episodes in 2013 alone.<sup>2</sup>

For the past 10 years, the Commission has been at the center of a debate focused on whether FCC regulation of Internet service providers is necessary to keep the Internet vibrant, growing, and “open” and, if so, what such regulation should look like. Regardless which side of the debate one falls on, most spectators and participants agree that has been the focus of this and the FCC’s related proceedings. And that is what most commenters have focused on in response to the recent Notice of Proposed Rulemaking.

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<sup>1</sup> See [www.WhereToWatch.org](http://www.WhereToWatch.org).

<sup>2</sup> IHS Screen Digest.

A small handful of cable commenters, however, now seeks to inject a new issue into the debate as a means of deflection: whether network neutrality regulation should apply to edge providers, including providers of content. The MPAA files these comments to address that narrow issue.<sup>3</sup> We believe the FCC should adopt its tentative conclusion not to impose network neutrality obligations on “edge provider activities, such as the provision of content on the Internet.”<sup>4</sup> Adopting that conclusion will maintain the flexibility that has produced rapid innovation in the online video marketplace, remain true to the way the FCC has always conceived of the rules, and abide by the limits of the Communications Act. By contrast, expanding the network neutrality rules to, for example, compel content providers to make their content available over the Internet and dictate the terms of such access, would conflict with the First Amendment and copyright law.

## *II. The Network Neutrality Rules Have Always Focused on Internet Service Providers*

As the FCC explained in its 2010 network neutrality order, “[t]he Commission has always understood [the network neutrality] principles to apply to broadband Internet access service only, as have most private-sector stakeholders.”<sup>5</sup> A few commenters, however, are attempting to advance their own special interests by asking the FCC to expand the network

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<sup>3</sup> This submission focuses on whether the FCC can and should expand the network neutrality rules to edge provider activity, such as provision of content online. The MPAA also believes, however, that the FCC should adopt its tentative conclusion to reaffirm the 2010 network neutrality order’s determination that the rules do “not prohibit broadband providers from making reasonable efforts to address transfers of unlawful content and unlawful transfers of content.” *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, *Notice of Proposed Rulemaking*, FCC 14-61 at ¶ 160 (rel. May 15, 2014) (quoting *In re Preserving the Open Internet*, GN Docket No. 09-191, *Report and Order*, 25 FCC Rcd 17905, 17964-65, ¶ 111 (2010)).

<sup>4</sup> See *Protecting and Promoting the Open Internet*, at ¶ 58 (citing *Preserving the Open Internet*, 25 FCC Rcd at 17934-35 ¶ 50).

<sup>5</sup> *Preserving the Open Internet*, 25 FCC Rcd at ¶ 50.

neutrality rules to edge providers, including providers of content.<sup>6</sup> Expansion of these principles and any proposed regulations by, for example, compelling content providers to offer their content online, goes far beyond any previous understanding of the network neutrality rules, notwithstanding commenter suggestions to the contrary.<sup>7</sup>

Former FCC Chairman Michael Powell did challenge “all facets of the industry” in 2004 to abide by four “Internet freedoms.”<sup>8</sup> Those freedoms were called out in the context of an exhortatory speech, however, not in rules adopted by the Commission. The meaning of that language is also unclear in light of the focus elsewhere in the text on “broadband networks,” “network owners,” “broadband platforms,” “network operators,” and the “broadband network industry,” all of which suggest that “the industry” he was talking about could have been the broadband provider industry. Regardless, Chairman Powell was articulating the principles *in lieu* of regulation, which he said was inappropriate at the time.<sup>9</sup> The speech cannot be cited to support

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<sup>6</sup> See American Cable Association at 24 (advocating that the FCC impose network neutrality rules on “online video providers”); Bright House Networks at 7 (advocating that the FCC impose network neutrality rules on “online publishers”); Cox Communications at 13 (advocating that the FCC impose network neutrality rules on “an edge provider that hosts its content online”); National Cable & Telecommunications Association at 4, 69, 76-78 (proposing to extend the network neutrality rules to edge providers); Time Warner Cable at 25-26 (advocating that the FCC impose network neutrality rules on “content owners.”).

<sup>7</sup> See American Cable Association at 9 (claiming the FCC did not expect only ISPs to abide by the Internet policy statement the FCC adopted in 2005 under then-Chairman Kevin Martin; reciting former FCC Chairman Michael Powell’s statement in his 2004 four freedoms speech that “ensuring that consumers can obtain and use the content, applications and services they want ... is critical to unlocking the vast potential of the broadband Internet”); Time Warner Cable at 25 & n.71 (citing the 2005 Internet policy statement to support the claim that “the Commission has previously recognized that the principles of Internet openness apply equally to other participants in the broadband ecosystem”).

<sup>8</sup> Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Silicon Flatirons Symposium on “The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age,” at 5-6 (University of Colorado School of Law Feb. 8, 2004), *available at* [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-243556A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf).

<sup>9</sup> *Id.* at 4.

a broadening of regulations that did not yet exist and that then-Chairman Powell was trying to avoid in the first place.

The Internet policy statement the FCC adopted in 2005 under then-Chairman Kevin Martin did state that “consumers are entitled to competition among network providers, application and service providers, and content providers.”<sup>10</sup> Chairman Martin also recognized in a news release at the time, however, that “policy statements do not establish rules nor are they enforceable documents.”<sup>11</sup> The D.C. Circuit reinforced that point in April 2010 when it vacated Chairman Martin’s attempt to enforce the policy statement against an ISP.<sup>12</sup> Thus, the policy statement cannot be used as historical support for any expansion of the network neutrality rules. Indeed, the 2010 rules the FCC ultimately adopted focused squarely on ISPs, an approach the FCC has again proposed in the instant proceeding.

### *III. Section 706 Does Not Authorize the FCC to Expand the Network Neutrality Rules to Edge Providers*

Section 706 of the 1996 Telecommunications Act, the section upon which the FCC proposes to base its network neutrality rules, does not authorize regulation of entities beyond ISPs. By its own language, section 706 focuses on deployment of facilities, stating in subsection (a) that the FCC “shall encourage the deployment . . . of advanced telecommunications capability” and in subsection (b) that, if such deployment is lacking, the FCC shall “accelerate” [deployment] “by removing barriers to infrastructure investment and by promoting competition

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<sup>10</sup> *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Policy Statement*, FCC 05-151, at ¶ 4 (rel. Sept. 25, 2005).

<sup>11</sup> News Release, Chairman Kevin J. Martin Comments on Commission Policy Statement (Aug. 5, 2005), available at <http://transition.fcc.gov/meetings/080505/policy.pdf>.

<sup>12</sup> *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. 2010).

in the telecommunications market.”<sup>13</sup> The Senate and Conference reports to the Telecommunications Act buttress this point, echoing the focus on deployment of facilities and directing the FCC to examine in particular “the availability, at reasonable cost, of *equipment* needed to deliver advanced broadband capability.”<sup>14</sup>

The D.C. Circuit’s decision in *Verizon v. FCC* upholding section 706 as a potential source of authority for network neutrality rules<sup>15</sup> supports this view. In the *Verizon* case, the D.C. Circuit was concerned only with the imposition of requirements on ISPs. Thus, the applicability of its holding on FCC authority under section 706 is limited to ISPs. Further reinforcing this interpretation is the majority opinion’s statement that the network neutrality rules “apply directly to broadband providers, the precise entities to which section 706 authority to encourage broadband deployment presumably extends.”<sup>16</sup>

To justify claims that section 706 has a broader reach, some commenters point to the indirect nature of the “virtuous circle” theory that the court condoned.<sup>17</sup> Under that theory, the network neutrality rules promote broadband deployment not directly, but by promoting edge-provider innovation, which in turn increases consumer demand for broadband, and then prompts broadband providers to invest in further deployment. In particular, these commenters cite the court’s statement that “a triple-cushion shot , although perhaps more difficult to complete, counts the same as any other shot”<sup>18</sup> to support the proposition that section 706 authorizes almost any

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<sup>13</sup> 47 U.S.C. § 1302(a), (b).

<sup>14</sup> S. Rep. No. 104-23, at 50-51 (1995) (emphasis added); H. Rep. No. 104-458, at 210 (1996) (emphasis added).

<sup>15</sup> 740 F.3d 623 (D.C. Cir. 2014).

<sup>16</sup> *Id.* at 643.

<sup>17</sup> See *American Cable Association* at 5, 44-45, 47; *Cox Communications* at 12.

<sup>18</sup> *Verizon*, 740 F.3d at 643.

regulation of any entity within the FCC’s jurisdiction if it ultimately promotes broadband deployment in some manner.<sup>19</sup> Seen in the context of the narrow issue before the court and its comments about broadband providers being the entities to which section 706 applies, however, the better interpretation is that a particular regulation *of broadband providers* can fall within the ambit of section 706 even if the connection between that regulation and promoting broadband deployment is indirect.

The *Verizon v. FCC* case was a limited ruling on the FCC’s authority to adopt the specific network neutrality rules it imposed on ISPs. Any attempt to expand the scope of section 706 to other entities would violate the D.C. Circuit’s admonition that interpretations of section 706 must not “‘stray’ so far beyond the ‘paradigm case’ that Congress likely contemplated” as to become unreasonable.<sup>20</sup> This would only invite further litigation, making it harder for the FCC, industry, and consumers to move forward with the real matter at hand: promoting, providing, and enjoying the benefits of Internet investment and innovation.

#### IV. *The First Amendment and Copyright Law Require This Narrow Interpretation of Section 706 and the Network Neutrality Rules*

Among other proposals advanced by cable commenters in this proceeding, dictating to content providers what content they must make available—as well as when and how—would violate the First Amendment.<sup>21</sup> As the Supreme Court has made clear, government forced access to media “brings about a confrontation with the express provisions of the First Amendment and

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<sup>19</sup> See *Time Warner Cable* at 26-27.

<sup>20</sup> *Verizon*, 740 F.3d at 643 (quoting *National Cable & Telecommunications Ass’n v. FCC*, 567 F.3d 659, 665 (D.C. Cir. 2009)).

<sup>21</sup> See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (finding government compulsion of a newspaper to publish content it otherwise would not have published violated the First Amendment).

the judicial gloss on that Amendment.”<sup>22</sup> And when it comes to regulation of speech on the Internet, the Supreme Court’s “cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”<sup>23</sup> Indeed, according to the Court:

[T]he record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.<sup>24</sup>

Congress has been careful to minimize the Communication Act’s impact on speech,<sup>25</sup> and is explicit when it wants the FCC to regulate in ways that bear upon the First Amendment.<sup>26</sup>

Thus, to avoid potential First Amendment issues, the FCC must not interpret provisions of the Act as authorizing regulation of speech absent express authorizing language. The D.C. Circuit held in 2002, for example, that the First Amendment precluded the FCC from imposing video description rules absent a direct Congressional authorization to do so.<sup>27</sup> Because the FCC was trying “[t]o regulate in the area of programming,” it could not rely on the general provisions of section 1 of the Communications Act.<sup>28</sup> Similarly, because nothing in section 706 speaks to regulation of any form of content, the FCC cannot rely on it to apply network neutrality rules to

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<sup>22</sup> *Id.*, at 254.

<sup>23</sup> *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 866-70 (1997).

<sup>24</sup> *Id.* at 885.

<sup>25</sup> *See, e.g.*, 47 U.S.C. § 544(f) (providing that “[a]ny Federal agency ... may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title”); 47 U.S.C. § 326 (providing that “no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication”).

<sup>26</sup> *See, e.g.*, 18 U.S.C. § 1464 (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”); 47 U.S.C. § 315 (governing provision of broadcast time to candidates for public office); 47 U.S.C. § 399 (“No noncommercial educational broadcasting station may support or oppose any candidate for political office.”).

<sup>27</sup> *See MPAA v. FCC*, 309 F. 3d 796 (D.C. Cir. 2002).

<sup>28</sup> *Id.* at 804.

content providers whose speech is protected by the First Amendment.

Expanding the network neutrality rules to mandate access to copyrighted works online would also conflict with the Copyright Act. Section 106 of the Copyright Act gives copyright holders the exclusive rights to distribute and publicly perform their works.<sup>29</sup> Although the Copyright Act does, in limited circumstances, create a compulsory copyright license authorizing the use of content on certain platforms without the owner's consent,<sup>30</sup> it does not create such a license for use of content on the Internet. Forcing copyright holders to make their works available online, and restricting the terms and conditions they could otherwise negotiate in the free market, is tantamount to creating a compulsory license for Internet access to content. That is something outside the authority of the FCC to create, conflicts with the policy choices Congress has made in the Copyright Act in decidedly not creating such a compulsory license, and encroaches on the discretion the Copyright Act gives to copyright holders over the distribution and public performance of their works.<sup>31</sup>

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<sup>29</sup> 17 U.S.C. § 106 (3), (4).

<sup>30</sup> *See, e.g.*, 17 U.S.C. § 119 (creating a limited compulsory copyright license allowing satellite operators to distribute without consent of the copyright holders certain distant broadcast signals to “unserved households,” *i.e.* those viewers who are unable to receive an over-the-air network signal in their home markets).

<sup>31</sup> *Cf. Orson Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3<sup>rd</sup> Cir. 1999) (partially pre-empting a Pennsylvania statute restricting a motion picture distributor from entering into an exclusive first-run exhibition agreement with an exhibitor because it violate the distributor's rights under the Copyright Act); *Naumkeag Theatres Co. v. New England Theatres, Inc.*, 345 F.2d 910, 912 (1<sup>st</sup> Cir. 1965) (supporting proposition that a movie distributor is under no obligation to make its motion picture available in all markets at the same time); *Syufy Enterprises v. National General Theatres*, 575 F.2d 233, 236 (9<sup>th</sup> Cir. 1978) (supporting proposition that a movie distributor may license a movie exclusively); *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 124 (5<sup>th</sup> Cir. 1954) (stating that “a distributor has the right to license or refuse to license his film to any exhibitor, pursuant to his own reasoning, so long as he acts independently”); *Westway Theatre Inc. v. Twentieth Century Fox Film Corp.*, 30 F. Supp. 830, 836-37 (D. Md.) (stating “it is clearly the established law that the distributors have the right to select their customers, and

V. *Conclusion*

Expanding any network neutrality rules the Commission may adopt to edge providers, such as by directing whether, when, and how content providers must make their content available over the Internet, would put FCC regulations in conflict with both the First Amendment and the Copyright Act. Because of that conflict, and because the network neutrality rules have always focused on ISPs, the FCC should decline invitations by a tiny number of commenters to change course in this proceeding.

Respectfully Submitted,

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therefore the plaintiff has no absolute right to demand exhibition rights for the pictures of any of the distributors”) (citations omitted), *aff’d*, 113 F.2d 932 (4<sup>th</sup> Cir. 1940).