

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
A National Broadband Plan) GN Docket No. 09-51
For Our Future)
)

**JOINT COMMENTS OF
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS AFL-CIO
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
THE COPYRIGHT ALLIANCE
THE DIRECTORS GUILD OF AMERICA
GRAPHIC ARTISTS GUILD
THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES
MOTION PICTURE ASSOCIATION OF AMERICA
PROFESSIONAL PHOTOGRAPHERS OF AMERICA AND ALLIANCE OF
VISUAL ARTISTS
PROPERTY RIGHTS ALLIANCE
RECORDING INDUSTRY ASSOCIATION OF AMERICA
THE SCREEN ACTORS GUILD**

The American Federation of Television and Radio Artists, the American Society of Media Photographers, the Copyright Alliance, the Directors Guild of America, the Graphic Artists Guild, the International Alliance of Theatrical Stage Employees, the Motion Picture Association of America, the Professional Photographers of America and Alliance of Visual Artists, the Property Rights Alliance, the Recording Industry Association of America, and the Screen Actors Guild hereby submit our comments in the above captioned proceeding.¹ Our organizations represent a wide range of interests contributing to the United States copyright industries,² which collectively account for

¹ See In the Matter of A National Broadband Plan for Our Future, Notice of Inquiry, GN Docket No. 09-51, FCC 09-31 (released April 8, 2009) (“NOI” or “Notice”).

² The organizations listed here represent industries and individuals in every U.S. state, in fields such as motion pictures and broadcasting; recorded music, music publishing and songwriting; book, magazine and

more than 11% of the total U.S. Gross Domestic Product and employ more than 11 million people.³ As representatives of the content-creation industry, which distributes content around the world to an ever-increasing number of platforms, we have a unique interest in this proceeding and look forward to working with the Commission on this matter.

INTRODUCTION

In this proceeding, the Commission has initiated a landmark, comprehensive Notice of Inquiry (“NOI”) to study our nation’s broadband infrastructure and capabilities, with a view towards developing recommendations for a national broadband plan. The Joint Commenters applaud this important undertaking and share the Commission’s interest in ensuring that the United States not only leads the world in broadband deployment, but that broadband consumers are able to enjoy the maximum benefit of this investment by accessing a wide array of rich, digital media services. As members of creative industries, we fully support this initiative and the possibilities it presents in terms of enabling consumers to reach news, information, and entertainment with easy to use and reliable access.

While the NOI seeks comment on a variety of issues and concerns implicated by the development of a national broadband plan, the Joint Commenters wish to specifically respond to questions regarding the potential incorporation of a “nondiscrimination” principle into either the Commission’s existing *Internet Policy Statement*⁴ or a national

newspaper publishing; business and entertainment software; graphic and photographic arts; and amateur and professional sports leagues.”

³ See [Copyright Industries in the U.S. Economy: The 2006 Report](http://www.iipa.com/pdf/2006_siwek_full.pdf), prepared for International Intellectual Property Alliance by Stephen E. Siwek of Economists Incorporated (released January 2007) available at http://www.iipa.com/pdf/2006_siwek_full.pdf.

⁴ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005).

broadband plan. As the Commission evaluates such proposals, we strongly urge that it permits, indeed encourages, network operators to have the ability to use reasonable network management techniques in order to limit and deter illegal online piracy. For the reasons set forth below, the Joint Commenters encourage the Commission to recognize that reasonable network management tools and applications are necessary to fight unlawful conduct such as online piracy. We urge the Commission to adhere to its established practices of distinguishing between lawful and unlawful content, which ensures consumers' ongoing access to a robust array of lawful content and enables network providers to limit access to illegal content, including pirated content.

DISCUSSION

We strongly support the public policy goal of ensuring all Americans have broadband access. Universal broadband access will connect people and cultures, foster education and improved learning, and support the next generation of services offered to consumers, whether for informational or entertainment purposes. The content creation industry continues to move rapidly to support this paradigm shift in consumer access by making available its creative works on a wide variety of new services.⁵ Therefore, we

⁵ Over 78 percent of American Internet users view video online. A multitude of partners, including television networks, social networking sites, retailers, gaming systems and new sites are devoted to online distribution. Over 1.1 billion videos were viewed on Fox Interactive Media sites, Viacom Digital sites, Disney Online and Hulu in December 2008; Hulu, which launched to the public in March 2008, was the 6th ranked Web site in the U.S. in videos viewed by December with 241 million videos viewed, and 25 million unique viewers. Hulu reached the number two position by February 2009; Nickelodeon's Nick.com delivered 69 million streams and had 2.5 million unique video viewers for the month of February 2009; Users watched over 140 million episodes of ABC primetime series during the first year that ABC.com's broadband player was available (September 2006-2007). As of January 2009, that number has grown to over 500 million episodes; iTunes customers rent or purchase over 50,000 movies online every day; and Xbox live users watched 25 million hours of movies and TV shows from Netflix on their Xbox in the three months following launch in November 2008. See The Economic Impact of the Motion Picture & Television Industry on the United States, <http://www.mpaa.org/EconReportLo.pdf>.

strongly support the goals outlined by the Commission in creating a national broadband plan.

As part of this initiative, however, we believe that the Commission must carefully consider the potential impact of a nondiscrimination principle (in either the Commission's existing *Internet Policy Statement* or any future national broadband plan) on the fight against illegal activity on the Internet, which includes the distribution of illegal content. If distribution of illegal content is limited it then in turn becomes easier to maximize the utilization of, and the availability of legal content on, the Internet. If the distribution of illegal content is allowed to expand unchecked absent reasonable network management, the availability of bandwidth diminishes and it becomes increasingly difficult for network operators to meet consumers' expanding broadband needs, and to ensure ease of access and the provision of greater services, including entertainment offerings. Failure to safeguard the ability of the ISPs to address the problem of online piracy certainly has consequences. We anticipate that other commenters will explain in greater detail the potential impact of a nondiscrimination principle on the ability of network operators to meet consumers' access needs, and thus will not expand upon that point here.

Importantly, the Commission should focus on the potential impact of nondiscrimination principles on reasonable network management techniques that limit illegal activity over the Internet. Federal policy should not be construed to facilitate illegal activity, including the theft of intellectual property. The Commission has recognized the problems posed by online illegal activity, including copyright infringement, and the ability of network providers to use reasonable measures to stop

such illegal activity.⁶ As the Commission moves forward with this NOI, it should clarify that any policies or principles it recommends neither protect illegal activity on the Internet, nor prevent or limit the use of reasonable network management tools to address such activity. Such an approach would be consistent with American copyright policies. Below we provide additional detail on the current state of copyright infringement over the Internet and how reasonable network management is essential to curtailing its growth.

The Epidemic of Internet Copyright Infringement

Broadband network capacity is being encumbered by the ever-increasing volume of unlawful and otherwise harmful network traffic, from copyright-infringing material, to viruses, spam, and even child pornography. For example, a number of studies document that anywhere from 50% to 80% of all Internet traffic is infringing.⁷ This fact was highlighted in a dramatic, recent example when the Netnod Internet Exchange (an organization measuring Internet traffic) offered statistics highlighting that daily online activity in Sweden dropped more than 40 percent after a Swedish law allowing ISPs to unmask illegal P2P file traffickers took effect on April 1, 2009.⁸

The spread of piracy on broadband networks will only exacerbate the already significant losses suffered by U.S. creative industries, their employees, and individual

⁶ See e.g., *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-toPeer Applications*, 23 FCC Rcd 13028, ¶ 50 (2008) (“Comcast Order”).

⁷ See “Time Warner Links Web Prices With Usage,” (Jan. 17, 2008), available at http://biz.yahoo.com/ap/08011/time_warner_cable_internet.html; CacheLogic, “P2P in 2005,” http://www.chachelogi.com/home/pages/studies/2005_01.php; PeerApp White Paper, “Comparing P2P Solutions,” available at <http://peerapp.com/solutions-managing-transit-link-growth.aspx>; Statement of Sam Yagan, president of P2P application eDonkey), available at http://judiciary.senate.gov/testimony.cfm?id=1624&wit_id=4689

⁸ http://news.yahoo.com/s/ap/20090403/ap_on_re_eu/eu_sweden_online_piracy_3 “Henrik Ponten of the Swedish Anti-Piracy Bureau welcomed the plunge in Internet traffic as a sign that file-swappers are reducing their activity for fear of getting caught. ‘There’s no other explanation for it,’ he said.” See also <http://www.precursorblog.com/content/lessons-swedens-illegal-file-sharing-crackdown>.

creators. As recently noted by Vice President Biden, the online distribution of content without permission is “pure theft, stolen from the artists and quite frankly from the American people...”⁹ The Federal Government should not – and need not – adopt policies that incidentally impose additional economic losses on U.S. industries, employees, and creators. Considering that the U.S. “total” copyright industries accounted for an estimated \$1.38 trillion or 11.12 % of GDP and employed 11.3 million workers in 2005,¹⁰ the creative industries remain among the most promising sources of economic growth in this country at a time when job creation is of paramount importance. At a minimum, the Commission should be careful to “do no harm” to these vitally important, job-creating industries.

Reasonable Network Management Includes Prevention and Reduction of Illegal Activity

While no network management technique yet provides a “silver bullet” to stop all online copyright infringement, there is a substantial amount of investment being made in techniques that show promise for reducing or deterring online copyright infringement.¹¹ No one can predict at this early stage how these technologies will develop. Nonetheless, in the well-tested cycle of technological innovation and experimentation, these kinds of technologies constantly evolve and improve. Utilization and refinement of these

⁹ See CBSNews.com, Biden Pledges More Efforts Against Internet Piracy, April 22, 2009; available at <http://www.cbsnews.com/blogs/2009/04/22/politics/politicalhotsheet/entry4960832.shtml>.

¹⁰ See [Copyright Industries in the U.S. Economy: The 2006 Report](#), prepared for International Intellectual Property Alliance by Stephen E. Siwek of Economists Incorporated (released January 2007) available at http://www.iipa.com/pdf/2006_siwek_full.pdf.

¹¹ Measures ranging from blocking known illegal sites, to watermarking, to acoustic and video fingerprinting are all in use to varying degrees today. Companies such as Vobile, Audible Magic, Auditude, and others have developed technologies that have been used on corporate, university and municipal networks to significantly reduce the copyright-infringing traffic that will otherwise congest their networks.

techniques should be encouraged by the FCC and incorporated into a national broadband plan.

The utility of these network management technologies is not limited to protecting against copyright infringement. Many of these same technologies are used to prevent or limit spam, computer viruses and even child pornography. Any policy that limits the ability to manage copyright infringement will necessarily affect the ability to manage other forms of illegal content to the detriment of online consumers.

Indeed, the failure to provide for reasonable network management that can effectively address illegal activity would have a negative impact on our economy, at a time when we can least afford it, and would cost Americans jobs. The rampant copyright infringement on the Internet today imposes significant losses not just on U.S. creative industries, but on the U.S. economy as a whole.¹² These losses threaten the jobs and income of millions of creative artists and other workers employed by the copyright industries, many of whom subsist largely on royalties and residuals paid in consideration for the legal use of their creative works.

For example, legal sales of movie DVDs generate payments both directly and indirectly to directors, actors, writers, musicians, and other film industry workers. These creative artists benefit from the revenue stream generated from films and television shows, which includes both direct payments to some American workers, and contributions to the health and pension plans of the industry guilds and unions. Piracy costs workers twice: first, by reducing the income they would earn on the copyrighted

¹² For example, in 2005 the U.S. movie industry lost \$2.3 billion due to Internet piracy (“The Cost of Movie Piracy,” prepared by LEK Group for Motion Picture Association of America). Overall, the cost of piracy to the U.S. copyright industries, which includes motion pictures, sound recordings, business software and entertainment software, collectively is at least \$25.6 billion in lost revenue (“The True Cost of Copyright Industry Piracy to the U.S. Economy,” prepared by Stephen E. Siwek for the Institute For Policy Innovation).

material; and second, by reducing the number of copyrighted works made because of reduced revenue forecasts or the inability to finance their production due to the damage to the overall marketplace.

Copyright theft has a similar impact on other creative industries, particularly the music industry which has experienced the devastating effects of piracy over the last ten years. The International Federation of the Phonographic Industry's Digital Music Report 2009 estimated that 95% of all music downloads in 2008 were illegal; a staggering 40 billion illegal downloads in a single year.¹³ If music downloads are the entertainment industry's digital "canary in the coalmine," the Commission, in formulating its broadband plan for the future, would be wise to allow copyright holders and network providers the requisite flexibility to develop and implement robust responses to piracy.

The impact of copyright infringement goes beyond the tangible economic impact. American films, television, music, video games, books and other creative works are manifestations of uniquely American art forms that are woven into American culture and serve as goodwill ambassadors to the world. But art does not exist in a vacuum. Culture, has needed, and always will need to be supported. Protecting the freedom to create and the right to be compensated for it has always been a fundamental concept in this country. So fundamental, in fact, that the right to intellectual property was the only "right" our Founding Fathers specifically referenced as such in the original United States Constitution.¹⁴ The laudable objective of promoting broadband access and deployment

¹³ The 2009 IFPI Digital Music Report stated that "(c)ollating separate studies in 16 countries over a three-year period, IFPI estimates more than 40 billion files were illegally file-shared in 2008, giving a piracy rate of around 95 per cent." <http://www.ifpi.org/content/library/DMR2009-key-statistics.pdf>.

<http://www.nme.com/news/various-artists/42116>

¹⁴ US Const. Art. 1, sec. 8.

must not be implemented in a way that undermines these important creative and economic rights by inadvertently disallowing the means of protecting creative content.

Furthermore, absent the ability to utilize reasonable network management techniques to address illegal activity, it would be an enormous waste of both public and private sector resources for increased network capacity and broadband availability to simply be consumed by illegal traffic rather than preserved for legitimate uses. Costs for all consumers would increase to expand network capacity in order to manage the influx of illegal activity. It would also do little to advance the important goal of creating viable and robust broadband networks in our nation.

The FCC's *Internet Policy Statement and Report on a Rural Broadband Strategy* already acknowledge that consumers are entitled to access the lawful Internet content of their choice.¹⁵ In interpreting and applying this principle, the FCC has made clear that network providers, "consistent with federal policy, may block transmissions of illegal content (e.g., child pornography) or transmissions that violate copyright law."¹⁶ The Commission's *Report on a Rural Broadband Strategy* likewise concludes that a nondiscrimination principle would allow for reasonable network management.¹⁷ The FCC thus has already recognized the importance of developing and deploying technologies that ensure the safety and security of the Internet, and that regulatory policy should not thwart this important overarching goal.

¹⁵ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005); *Report on a Rural Broadband Strategy* at ¶ 140 (rel. May 22, 2009).

¹⁶ See *Comcast Order* at ¶ 50. Former FCC Commissioner Deborah Taylor Tate's statement further elaborated on the meaning of this part of the order by noting that network managers must play a key role "in filtering and guarding their platforms against the growing problem of illegal content distribution, and the potentially adverse effect regulatory prescription can have on stemming its growth." *Id.*, Statement of Commissioner Deborah Taylor Tate.

¹⁷ *Report on a Rural Broadband Strategy* at ¶ 141.

Accordingly, in crafting its recommendations for a national broadband plan, the Commission should continue to ensure that unlawful conduct and the distribution of unlawful content are not inadvertently protected by regulatory policy or principles. To do otherwise would conflict with the FCC's *Internet Policy Statement*, stifle innovation in promising new technologies, and exacerbate the rampant problems related to illegal activities online. The FCC should encourage and promote reasonable network management and ensure that government policies or regulations do not prevent the use of reasonable network management techniques to deter online copyright infringement and other forms of unlawful activity on broadband networks.

RECOMMENDATION

In crafting its recommendations for a national broadband plan, the Commission should explicitly state that network operators are permitted and encouraged to use reasonable network management techniques to prevent or deter illegal activity, like copyright infringement.

Respectfully submitted,

/s/ Kim Roberts Hedgpeth
Kim Roberts Hedgpeth
National Executive Director
American Federation of Television and
Radio Artists, AFL-CIO

/s/ Victor Perlman
Victor Perlman
General Counsel
American Society of Media Photographers

/s/ Patrick Ross
Patrick Ross
Executive Director
Copyright Alliance

/s/ Jay D. Roth
Jay D. Roth
National Executive Director
Directors Guild of America

/s/ Tricia McKiernan
Tricia McKiernan
Executive Director
Graphic Artists Guild

/s/ Matthew D. Loeb
Matthew D. Loeb
International President
International Alliance of Theatrical Stage
Employees (IATSE)

/s/ Dan Glickman
Dan Glickman
Chairman and Chief Executive Officer
Motion Pictures Association of America

/s/ David P. Trust
David P. Trust
Chief Executive Officer
Professional Photographers of America and
Alliance of Visual Artists

/s/ Kelsey Zahourek
Kelsey Zahourek
Executive Director
Property Rights Alliance

/s/ Steve Marks
Steve Marks
Executive Vice President and General
Counsel
Recording Industry Association of America

/s/ David White
David White
Interim National Executive Director
Screen Actors Guild