

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

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

**REPLY COMMENTS OF
THE INDEPENDENT FILM & TELEVISION ALLIANCE**

The Independent Film & Television Alliance (“IFTA”) respectfully submits these Reply Comments in response to the Federal Communication Commission’s (“FCC” or “Commission”) Notice of Inquiry *In the Matter of A National Broadband Plan for Our Future*.¹ IFTA recognizes the importance of and challenges presented in developing a national broadband plan and commends the Commission for seeking input from all stakeholders on the wide variety of issues related to a National Broadband Plan for Our Future.

A national broadband plan that promotes network management practices based on principles set forth in the Commission’s 2005 *Internet Policy Statement*,² as well as principles of open networks, nondiscrimination and transparency, is vital to America’s future economic well-being, cultural growth and social enrichment. The regulatory infrastructure should permit only limited and reasonable network management practices that are narrowly tailored to address actual piracy and network congestion and do not discriminate against competitive content providers and application providers.

¹ GN Docket No. 09-51, FCC 09-31.

² See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Red 14986, 14987-88 (2005).

IFTA Background

IFTA is the non-profit trade association for the independent film and television industry worldwide, representing over 150 companies, including The Weinstein Company, Lionsgate, Summit, PeaceArch, Lakeshore, Morgan Creek and NuImage. IFTA members are independent production and distribution companies, as well as sales agents, television companies, studio affiliated companies and financial institutions. IFTA members produce, distribute and finance some of the world's most successful films and generate more than \$3.5 billion in distribution revenues annually. Since 1980, over one half of the Academy Awards for Best Picture have been produced by IFTA member companies.

IFTA regularly advocates for greater distribution opportunities and resources for independent content providers on major media platforms, and in turn, greater access by the public to more diverse content.³ For independent content providers who historically have been vulnerable to displacement from traditional distribution channels due to media consolidation, the Internet offers a new and in many cases the *only* distribution platform to reach the public. It is the only accessible and practical distribution platform not yet significantly damaged by media consolidation.

³ IFTA has participated in prior proceedings requesting the Commission to address the ever-diminishing distribution opportunities for independent content. *In the Matter of 2006 Quadrennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et seq.*, MB Docket No. 06-1211 (Oct. 23, 2006); *In the Matter of 2002 Biennial Regulatory Review, and Related Dockets*, MB Docket No. 02-277 (May 12, 2003). Last year, IFTA's President and CEO, Jean M. Prewitt, testified at one of the FCC public hearings regarding traffic management practices and emphasized the need for policies that prevent discriminatory management practices. Statement of Jean Prewitt, Before the FCC 2nd Public *En Banc* Hearing on Broadband Network Management Practices, Palo Alto, CA (04/17/08). IFTA has also filed comments in the network management proceeding before the Canadian Radio-Television Telecommunications Commission (CRTC) on the importance of nondiscriminatory management practices. CRTC Public Notice 2008-19 – *Review of the Internet traffic management practices of Internet service providers*. CRTC 8646 – C12-200815400.

Discussion

The emerging importance and reliance on the Internet as a distribution tool for independent content highlights the critical need for a regulatory framework based on the *Internet Policy Statement* principles as well as nondiscrimination and transparency.

Lawful Access Must be Favored over Deterrent Network Management Practices

The national broadband plan must promote network management practices that favor access to legal content and applications over management practices that allow those legitimate uses to be obstructed under the banner of “detering piracy.” There are some legitimate issues related to the management of networks to improve traffic flow and to prevent the real damages inflicted by copyright piracy and other illegal uses of the Internet. However, the regulatory infrastructure should permit only reasonable network management practices that are narrowly tailored to address actual network congestion and actual piracy. The result of such practices should not effectively “block” legitimate competition in content or applications or interfere with the public’s ability to access and view any legal content of their choice.⁴ While copyright piracy on the Internet must be addressed seriously and effectively, it should not be an excuse for broad obstruction or manipulation of Internet traffic.

Some of the Initial Comments suggest that “nondiscrimination” principles incorporated in a national broadband plan would impede effective prevention of copyright piracy on the Internet. At a minimum, this theory suggests that no technology or other solutions can be developed to identify and target illegal content; but there is no evidence to support that suggestion. Perhaps

⁴ The essence of federal policy is to preserve and promote the open nature of the Internet, which entitles consumers to access the lawful content of their choice and to competition among network providers, application providers and content providers. See *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* Memorandum Opinion and Order, 23 FCC Rcd 13028 at para. 13 (2008) (hereafter “*Comcast Order*”) (noting the Commission’s responsibility for overseeing and enforcing the federal Internet policy set forth in the *Internet Policy Statement*).

more importantly, the line of argument also seems to be that broadband providers seeking to stop piracy should be beyond scrutiny even if their efforts to block illegal content also interfere with legitimate uses and applications or if such efforts result in disproportionate damage to those who produce legal content or offer applications and services in competition with the broadband providers themselves. This simply cannot coexist with the expansive goals for the Internet expressed by the FCC, Congress and the new Administration.⁵

When the Commission released the *Internet Policy Statement*, it promulgated Internet management principles emphasizing the importance of consumers' ability to access content and applications of their choosing. A broadband plan that blesses purported attempts to "deter" potential, rather than actual, illegal content by "network management" would stifle, rather than promote, innovation as well as empower broadband providers to impact competition as described below. Instead, the balance must be struck in favor of permitting legal content, services and applications to flow, rather than to allow the obstruction of these lawful uses as a deterrent of illegal content.

Competition: Open Networks Require Nondiscriminatory Network Management Practices

To ensure the development of national broadband networks that meet the public's needs, network management practices that prevent competitive application providers and content providers from obtaining equal service or carriage should be considered unreasonable "network management." An "open" network *must* incorporate the principle of nondiscrimination, which

⁵ Providers may block transmissions of illegal content, but to the extent that they "choose to utilize practices that are not application or content neutral, the risk to the open nature of the Internet is particularly acute and the danger of network management practices being used to further anticompetitive ends is strong." *Comcast Order*, 23 FCC Rcd at para. 50; *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (Recovery Act) § 6001 (j) (stating that nondiscrimination obligations shall be a contractual minimum for grants awarded pursuant to the Act, including, at a minimum, adherence to the principles set forth in the Commission's *Internet Policy Statement*); *See also supra* n. 4.

should be seen as inherent in the FCC's *Internet Policy Statement* principles, with respect to applications, bandwidth allocation and content from diverse sources. The NOI asks commentators to address the value of open networks and the impact on content, competition and innovation.⁶ Quite simply, the value of an open network is in giving consumers the direct choice in what content and applications they will access without relying on an intermediary or without having their choice limited by "shelf space." This is in stark contrast to today's reality of the broadcast, cable and retail markets. In an open environment, innovation and creativity will increase, driving competition directly toward ultimate consumer choice.

But the critical component for an open network is a regulatory framework that prohibits discriminatory network management practices that create access barriers similar to those that exist on major media platforms such as broadcast or cable television or that provide a justification for exclusionary practices by broadband providers to the detriment of certain content or applications. The risks to the public and to the independent content providers are evident from history.

In traditional media, a decade of vertical integration has merged major studios, networks and cable channel ownership, and as a result, much of American television programming is produced internally within consolidated entities and then recycled among affiliates.⁷ Elimination of the Financial Interest & Syndication Rules has allowed this vertical integration of program development and broadcast interests and has deeply and negatively impacted the American public's access to independently produced content. It has resulted in the near disappearance of independent content from broadcast television. In 1995, 50% of all network prime time

⁶ GN Docket No. 09-51, FCC 09-31 para. 47.

⁷ Independent producers are asked to relinquish significant rights and to accept below-market pricing, if indeed any offer is made. Source diversity has been eliminated from U.S. television, and the consumer must look elsewhere to hear voices other than the major studios and networks.

programming was independently produced, but by 2003 only 18% of programming broadcast during prime time was independently produced.⁸ Cable networks, which are commonly owned with the broadcasting networks, have also significantly closed their doors to independent content. This devastating reduction of available distribution platforms for independent content is the result of a few huge companies functioning as gatekeepers who make programming decisions for the majority of broadcast and cable television distribution and unsurprisingly choose self-produced content or affiliated content via exclusive supply arrangements.

Now, in the context of the Internet, independent content providers are rightfully concerned that broadband providers will become gatekeepers and will control access to content via the Internet, establish exclusive supplier relationships, grant preferential carriage to their own or affiliated content, and squeeze out independent content from the last open major media distribution platform under the pretext of “network management.”

Competitive implications must be considered when ever any network provider seeks to "reasonably manage" its network in favor of specific applications, services or content. By the time actual evidence of the harm of such practices and the resulting damage to availability of independent and diverse content can be documented in detail, irreparable harm will have already occurred and will not be able to be undone. The losers will be the public, diversity of views, and the interests of IFTA members.

Independent Content Providers and Consumers are Stakeholders

This NOI seeks comments on the best ways to ensure that all stakeholders work cooperatively to achieve the goal of broadband access for all Americans. The first step is to recognize the compelling public need for independent content and that the providers of that

⁸ Mark Cooper, Ph.D., *The Impact of the Vertically Integrated, Television-Movie Studio Oligopoly on Source Diversity and Independent Production*, Consumer Federation of America (2006).

content must be considered significant stakeholders in this initiative. We believe that thoughtful input from all stakeholders, including independent content providers, will result in policies that maintain an open Internet, while also allowing thoughtful and effective deployment of techniques that attack illegal, not lawful, content and applications.

Conclusion

For the creative industries, the Internet offers tremendous promise as a medium of distribution and a vehicle that may change the nature of the creative arts themselves. The goal of a national broadband infrastructure should be to ensure that the promise is fulfilled through access to an open and robust Internet with diverse sources of content and applications and nondiscriminatory and transparent network management practices by broadband providers.

At the same time, techniques must be developed and deployed to prevent illegal content and applications from reaching the public. To that end, the national broadband policy must enable the use of tools and technologies that narrowly target and excise or block these unprotected activities without condoning overbroad use of these tools in a way that impacts lawful activities or raises competitive implications. The public interest in open access and energetic innovation can only be achieved by striking this delicate balance.

Respectfully submitted,

INDEPENDENT FILM & TELEVISION ALLIANCE

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