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

In the Matter of	)	
	)	
Framework for Broadband Internet Services	)	GN Docket No. 10-127
	)	

REPLY COMMENTS OF THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA, INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, SCREEN ACTORS GUILD, AND MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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Summary

The American Federation of Television and Radio Artists ("AFTRA"), Directors Guild of America ("DGA"), International Alliance of Theatrical Stage Employees ("IATSE"), and Screen Actors Guild ("SAG") (collectively the "Guilds and Unions") and the Motion Picture Association of America, Inc. ("MPAA") hereby jointly comment on the Notice of Inquiry ("NoI") in the above-captioned docket. The filing parties are collectively referred to as the "Guilds, Unions, and MPAA."

The primary purposes of the Guilds, Unions, and MPAA'S filings in this and the related Broadband Industry Practices proceeding are to draw attention to the epidemic that is the online theft of copyrighted works, and to beseech the Commission that any regulatory measures it enacts clearly allow for collaboration between content owners and Broadband Internet Access Providers ("BIAPs") to proactively combat online theft regardless of the legal framework in which broadband is classified.[1] Accordingly, the FCC should declare that it is presumptively reasonable, and not unreasonably discriminatory, for BIAPs to use the best available tools and technologies to detect and deter content theft on the Internet.

The Guilds, Unions, and MPAA question the Commission's potential reversal of its earlier regulatory classification decisions with respect to Broadband Internet Access Services and whether a sufficient basis exists to support such a decision. If the Commission opts to classify broadband services under Title II of the Communications Act[2], despite widespread opposition, and the Guilds, Unions, and MPAA's grave concerns, it should make clear that BIAPs will be able to continue

[1] *See, e.g.,* Reply Comments of the American Federation of Television and Radio Artists, Directors Guild of America, International Alliance of the Theatrical and Stage Employees, and Screen Actors Guild in Dockets 09- 191 and 07-52 (April 26, 2010) (the "Guilds and Unions Reply Comments") at 2; *see also* Reply Comments of the Motion Picture Association of America, Inc. in Dockets 09- 191 and 07-52 (April 26, 2010) ("MPAA Reply Comments") at 1-2.
[2] 47 U.S.C. 201 et seq.

efforts to prevent the unlawful and unauthorized distribution of copyrighted works online, as detailed in section II. of this filing. In the absence of clear, unequivocal, and substantively sustainable statements by the Commission that fighting online content theft is in the public interest and not unreasonable under the Communications Act, any FCC regulation of BIAPs will likely have a chilling effect on the battle against the online theft of content.

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The American Federation of Television and Radio Artists ("AFTRA"), Directors Guild of America ("DGA"), International Alliance of Theatrical Stage Employees ("IATSE"), and Screen Actors Guild ("SAG") (collectively the "Guilds and Unions") and the Motion Picture Association of America, Inc. ("MPAA") hereby jointly comment on the Notice of Inquiry ("NoI") in the above-captioned docket. The filing parties are collectively referred to as the "Guilds, Unions, and MPAA."

I. Online Copyright Infringement is a Substantial and Pervasive Problem that Undercuts the Market for Content and has a Detrimental Effect on the U.S. Economy, Including Jobs, Compensation, and Pension and Health Benefits for Hundreds of Thousands of American Workers.

Content is a driving force behind broadband deployment. Last month, this Commission established a new benchmark for defining broadband services. The Commission now defines broadband services as "the minimum speed required to stream a high-quality… video while leaving sufficient bandwidth for basic web browsing and e-mail, a common mode of

broadband usage today…"[3] The Commission chose this definition because, "consumers increasingly are using their broadband connections to view high-quality video…"[4]

But how are broadband consumers gaining access to high-quality video? In prior filings, the Guilds, Unions, and MPAA have repeatedly emphasized the rampant theft and online distribution of creative works in violation of copyright.[5] In its comments in this proceeding, Google, Inc. has stated that there is a, "healthy symbiotic relationship that exists today between providers of Internet applications and content…"[6] However, any serious discussion of the online marketplace for content must begin with the acknowledgement that many providers of Internet applications and content are parasitic entities; thousands of these entities exploit our members' content for profit in contravention of copyright.

The current broadband environment lacks the measures necessary to combat content theft. Without these measures, the unauthorized distribution of copyrighted content continues to undermine the development of an online marketplace for content.

The Guilds, Unions, and MPAA have repeatedly noted that piracy costs jobs.[7] In its filing in this proceeding, the Communications Workers of America ("CWA") included an Exhibit

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[3] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future,* GN Docket Nos. 09-137, 09-51, Sixth Broadband Deployment Report (July 16, 2010) at ¶ 5.

[4] *Id.* at ¶ 11.

[5] *See* Comments of the American Federation of Television and Radio Artist, Directors Guild of America, International Alliance of Theatrical and Stage Employees, and Screen Actors Guild in Dockets 09- 191 and 07-52 (January 14, 2010) (the "Guilds and Unions Comments") at 10; *see also* Comments of the Motion Picture Association of America, Inc. in Dockets 09- 191 and 07-52 (January 14, 2010) ("MPAA Comments") at i.

[6] Comments of Google, Inc. in Docket 10-127 (July 15, 2010) at 2.

[7] *See* Guilds and Unions Comments at 5; *see also* MPAA Comments at 13.

demonstrating that BIAPs employ many more people than application service providers.[8] Along the same lines, companies engaged in the production and distribution of audiovisual works and sound recordings employ hundreds of thousands of people, with many more and scores of communities relying on large-scale film and television productions for their income.[9] However, the jobs of the Guilds and Unions' members and the thousands more employed by MPAA companies are put at serious risk by online entities that are facilitating the theft of intellectual property, which will negatively impact piracy's potential impact on our nation's economy.[10]

Some parties have abandoned their arguments that piracy is immaterial to the Net Neutrality debate, and now contend that efforts to protect against online theft will impede First Amendment rights.[11] Nothing could be further from the truth. Protection of copyright online will further rather than hinder the First Amendment. As the Supreme Court held in *Harper & Row Publishers v. Nation Enterprises*, copyright law is "the engine of free expression."[12] Protecting creators of movies, music, and television shows from theft advances free speech. Movies, music, and TV shows are embodiments of the free expression exercised by their multiple creators, and convey American culture and ideas to every corner of the globe. Any reduction in opportunities to create these expressive works diminishes both the ability of creators to exercise their First Amendment rights and the culture of creativity and free expression that is a hallmark of our nation. Internet theft should be seen as an existential threat to a broad range of American creative and expressive endeavors.

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[8] Comments of the Communications Workers of America in Docket 10-127 (July 15, 2010) (the "CWA Comments") at Exhibit 3.
[9] MPAA Comments at 9.
[10] *Id.* at 8.
[11] *See, e.g.*, Comments of the Center for Democracy & Technology in Docket 10-127 (July 15, 2010) (the "CDT Comments") at 4 ("On the Internet, all of the data contained in communications between two endpoints is protected speech, and hence generally cannot be regulated").
[12] *Harper & Rowe Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

Therefore, the FCC should consider the potential negative impact of Title II regulation on the First Amendment rights of the Guilds and Unions members and the MPAA member companies, some of the world's most prominent creators of expressive works. The Guilds and Unions' members have devoted their lives to self-expression, but will not have the ongoing ability to do so if they are not compensated for their work. Nothing will silence our nation's expressive output more than the inability of artists to earn a living from their creative endeavors.

II. Absent an Unprecedented Degree of Forbearance and Clarity of Direction in a Title II Context, We Share the Concerns Voiced by Numerous Parties that Title II Regulation Would Create Extensive Regulatory Uncertainty, Which Would Likely Chill Reasonable Efforts to Detect and Impede the Online Distribution of Infringing Content.

Numerous lawmakers, including 244 Members of the House of Representatives and Senator Olympia Snowe, have voiced their strong opposition to this proposed reclassification.[13] While a National Broadband policy, including Network Neutrality, is a stated public priority of the Obama Administration, so too is its commitment to protecting America's creative output. To quote President Obama, "our single greatest asset is the innovation, ingenuity, and creativity of the American people. It's essential to our prosperity. But it's only a competitive advantage if our companies know that someone else can't just steal that idea and duplicate it with cheaper inputs and labor."[14]

This policy of protecting creative output is an important underpinning of the Administration's vital goal of preserving the health and strength of American industry, along with job creation and retention, strong health care, and pension plans for working Americans. For the

[13] *See, e.g.*, Sara Jerome, *Snow pans FCC plan on Net Neutrality*, The Hill (June 3, 2010), available at http://thehill.com/blogs/hillicon-valley/technology/101335-snowe-a-net-neutrality-supporter-pans-genachowskis-plan.

[14] Remarks of President Barack Obama before the 2010 Annual Conference of the Export-Import Bank of the United States, March 11, 2010.

content industries, and the millions of American creators, talent, performers and workers whose livelihoods depend on creativity, content protection is central to that latter commitment.

Those who claim that an irreconcilable tension exists between preserving an open internet and protecting creative output posit a false conflict. As the Guilds and Unions stated in their January 14 submission on "Preserving the Open Internet," we "laud the goal of preserving a 'free and open Internet' insofar as it permits end-users to access the content of their choice *lawfully."*[15] The Guilds, Unions, and MPAA do not believe that content protection and an open Internet are mutually exclusive. To quote Chairman Genachowski, "…open Internet principles apply only to lawful content, services and applications - not to activities like unlawful distribution of copyrighted works, which has serious economic consequences. The enforcement of copyright and other laws and the obligations of network openness can and must co-exist."[16]

Given the vital importance of combating online content theft, we urge the Commission to make content protection a key component of any regulation of the Internet that may be adopted. Regardless of the legal framework, content owners and BIAPs must have the flexibility to deploy the best available tools and technologies to detect and deter online theft.

We share the concerns voiced by numerous parties that, absent a sweeping and clearly articulated forbearance that is unprecedented in a Title II context, any form of Title II regulation will foster regulatory uncertainty to the detriment of consumers.[17] We support the statement of the CWA that, "either route proposed in the NOI… could present difficult and unsettled legal

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[15] Guilds and Unions Comments at 17.

[16] Remarks of FCC Chairman Julius Genachowski before Brookings Institution, "Preserving a Free and Open Internet, A Platform for Innovation, Opportunity and Prosperity," Brookings Institution, September 21, 2009.

[17] *See* Comments of the American Federation of Television and Radio Artists, Directors Guild of America, International Alliance of Theatrical and Stage Employees, and Screen Actors Guild in Docket 10-127 (July 15, 2010) (The Guilds and Unions NoI Comments") at 6; *see also* Comments of the Motion Picture Association of America, Inc. in Docket 10-127 (July 15, 2010) at 4-5.

questions."[18] Our concerns are also shared by Samsung Telecommunications America, LLC, which posited that Title II will create "significant legal uncertainty" and "inevitable legal challenges to reclassification that could last for years," slowing innovation and deterring investment.[19]

As the Guilds and Unions' pointed out in their initial filing in this proceeding, the nub of the problem in a Title II approach is that "this Commission has never forborne from the non-discrimination provision articulated in Section 202(a)... by applying Section 202(a) to broadband access, the Commission could handcuff all broadband sector participants by requiring 'equal rights' for all who transmit files via broadband, regardless of the origins of the files they transmit, and without concerns for such 'details' as copyright."[20]

Other filings reflected a strong concern with the constraints of Title II regulation. Numerous parties have noted that the Commission's proposed forbearance from certain provisions of Title II would do nothing to alter the stringent requirements of Sections 201 and 202 of the Communications Act, which are the heart of Title II regulation.[21] The National Cable and Telecommunications Association has stated that regardless of any proposed forbearance, "[s]ections 201 and 202… are the source of traditional common carrier obligations that, at their heart, impose a duty to provide services indiscriminately to all comers…"[22] The Telecommunications Industry Association raised the concern that, "[s]ubjecting broadband services to Sections 201, 202, and 208 of the Communications Act, as well as other Title II oversight, undoubtedly would lead to protracted debates over the application of specific rules and

[18] CWA Comments at 1.
[19] Comments of Samsung Telecommunications America, LLC in Docket 10-127 (July 15, 2010) at 4.
[20] Guilds and Unions NoI Comments at 7.
[21] 47 U.S.C. 201, 202.
[22] Comments of the National Cable and Telecommunications Association in Docket 10-127 (July 15, 2010) at 49.

the lawfulness of existing…business practices."[23] AT&T Inc. ("AT&T") has raised concerns that Title II regulation will lead to regulatory uncertainty, which will in turn stifle investment in broadband transmission networks and services, and has substantial concerns that BIAPs' efforts to enact routine and reasonable anti-piracy measures will be chilled by a fear of potential liability under this new regulatory framework.[24] And CTIA - The Wireless Association expressed the broader concern that Title II, "will ensnare the FCC itself in a never-ending series of debates about unjust and unreasonable practices…[which] will limit carriers' ability to quickly introduce new services…[and] their ability to respond competitively to changes in the marketplace…[both of which are] critical to developing an effective online marketplace for American content."[25]

In sum, the very parties whose cooperation is needed to implement content protection measures online have expressed real, substantive concerns, shared by the Guilds, Unions, and MPAA, that Title II regulation may chill their efforts to do so; if fewer resources are dedicated to these efforts due to regulatory uncertainty, the rampant online theft of copyrighted materials will only grow, and one of the core objectives of the Commission's broadband policy – the reasonable protection of legitimate content – will be defeated.

Concerns with Title II regulation have been raised by both labor and management, by ISPs, device manufacturers, and producers and distributors of audiovisual works and sound recordings, and by elected officials on both sides of the political aisle. Various filing parties have also raised concerns about a potential reversal of the Commission's earlier classification decisions, and

[23] Comments of the Telecommunications Industry Association in Docket 10-127 (July 15, 2010) at 19.
[24] Comments of AT&T, Inc. in Docket 10-127 (July 15, 2010) at 95.
[25] Comments of CTIA – The Wireless Association in Docket 10-127 (July 15, 2010) at 3.

whether sufficient basis exists to support such a decision.[26] We share those concerns, particularly in light of the regulatory uncertainty that such a decision could engender. We hope these that these concerns, raised by myriad parties with varying interests, give the Commission pause in its efforts to enact Title II regulation of broadband.

If, notwithstanding these concerns, the Commission chooses to reclassify broadband as a Title II service, the Guilds, Unions, and MPAA respectfully request that the FCC make clear in a manner that addresses the myriad of substantial concerns that have been raised that BIAPs will be able to continue proactive efforts to prevent the unlawful and unauthorized distribution of copyrighted works online. In order to do so, we propose that any FCC regulations reclassifying broadband as a Title II service: (1) simultaneously interpret Section 202(a)'s non-discrimination requirement, in clear and unequivocal terms, as permitting with BIAPs to pursue any measures intended to prevent the transfer of unauthorized content or the unauthorized transfer of lawful content; or (2) simultaneously forbear from enforcement of Section 202(a) against any BIAP that pursues measures intended to prevent the transfer of unauthorized content or the unauthorized transfer of lawful content.

III. There is No Merit to the Argument that Efforts to Prevent the Unlawful and Unauthorized Online Distribution of Content Cannot Exist within the Context of an Open Internet.

While our opponents have advanced various arguments against online content protection, these arguments universally fail to address how to combat the online theft of content, often ignoring that theft as if it does not exist.[27]

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[26] *See FCC v. Fox Television Stations, Inc. v. FCC*, 129 S. Ct. 1800, 1811 (2009) ("The FCC must provide a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy").

[27] *See, e.g.*, Joint Comments of Computer and Communications Industry Association, et al. in Dockets 09-191 and 07-52 (January 14, 2010), at 1-2.

In its comments, the New Media Rights and Utility Consumers Action Network contends that efforts to discriminate against unlawful content, "[are] an example of Internet access providers and copyright owners shaping the future of our Internet by encouraging and discouraging certain content and applications."[28] There are at least three fundamental flaws in this argument.

First, the Guilds and Unions, as well as a number of other labor organizations have repeatedly advocated for content protection measures. The Guilds and Unions are neither Internet providers nor copyright owners, and have no history of or motivation to discourage any content or application. Rather, we represent hundreds of thousands of working men and women who are champions of a diverse marketplace for content and unwavering defenders of free expression.

Second, the Guilds, Unions, and MPAA do not oppose any form of lawful content, application, or expression - we oppose theft. As creators of content, we realize that the theft of copyrighted works is the ultimate discouragement of content. The content protection measures that we have proposed only discourage the outright theft of copyrighted content, while protecting jobs and fostering creativity and American ingenuity. We believe that an open Internet offers tremendous promise for the proliferation of diverse audiovisual content, sound recordings, and myriad other forms of expression - it is those who break the law by exploiting these works without appropriately compensating their creators and financiers who discourage the creation of content.

Third, and most critically, these comments fail to account for or even acknowledge the realities of online theft. This organization implies that a cabal of ISPs and copyright owners conspire to restrict any future expression they do not own, but it fails to acknowledge that any party has a legitimate interest in protecting existing works, or even that hundreds of millions of copyrighted works are stolen and distributed online by those who sycophantically prey on the

[28] Comments of the New Media Rights and Utility Consumers Action Network in Docket 10-127 (July 15, 2010) at 6.

creators of expressive works.

The Center for Democracy and Technology has asserted that the Commission has no regulatory authority over content distributed online, because "[o]n the Internet, all of the data contained in communications between two endpoints is protected speech, and hence generally cannot be regulated."[29] First, ignoring both the absence of legal authority to support this position and the conflation of speech and expression, no technological means of transmission is a determinant of whether speech is protected. Neither a telephone line nor a broadband connection makes all speech protected speech. Second, and more importantly, this view of online content would create a de facto safe harbor for all illegal content, extending protection to child pornography, viruses, etc.

IV. Conclusion

The Guilds, Unions, and MPAA do not believe that Title II regulation is either necessary or desirable to achieve the public policy goals the Commission has articulated for broadband and an open Internet. But whether the Commission reclassifies under Title II or finds a new basis for ancillary jurisdiction under Title I, the Guilds, Unions, and MPAA believe the Commission's ultimate goal remains a clear, enforceable set of rules defining an "open Internet" framework. Whether under the Title II rubric of "reasonable non-discrimination" or otherwise, the Commission must provide clear and unambiguous guidance so that BIAPs can design their networks to include innovative solutions to online theft without fear of liability.

Therefore, the FCC should clearly state in any reclassification order that it is presumptively reasonable, and not unreasonably discriminatory, for BIAPs to use the best available tools and technologies to detect and prevent the unauthorized distribution of content that is protected by

[29] Comments of the Center for Democracy & Technology in Docket 10-127 (July 15, 2010) at 4.

copyright. In the absence of an unequivocal statement by the Commission that fighting online theft is in the public interest, any FCC regulation of BIAPs will likely have a chilling effect on the battle against the theft of creative content.

Respectfully submitted,

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