

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.
IN RESPONSE TO THE WORKSHOP ON THE ROLE OF CONTENT IN THE
BROADBAND ECOSYSTEM**

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The Motion Picture Association of America, Inc. (“MPAA”), on behalf of its member studios, hereby respectfully submits these comments in response to the Commission Workshop entitled “The Role of Content in the Broadband Ecosystem” (the “Workshop”), held September 17, 2009, in connection with the above-captioned proceeding. MPAA is pleased that the Commission has turned its attention to the critical issue of the unauthorized distribution of stolen property on the Internet, and it greatly appreciates that the Commission already tentatively has concluded, as part of the rulemaking proposing new network neutrality rules, that “open Internet principles” do not apply to “activities such as the unlawful distribution of copyrighted works, which has adverse consequences on the economy and the overall broadband ecosystem.”¹ In that spirit, MPAA welcomes the opportunity to provide this additional information.

¹ See *In re Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93 (Notice of Proposed Rulemaking) (rel. Oct. 22, 2009) (the “Notice”), at ¶ 139.

Introduction and Summary

If the National Broadband Plan is to serve as a successful road map for ubiquitous broadband for all Americans, the government must recognize the vital role that high quality, high value content plays in driving adoption of new technologies. Compelling content is an essential ingredient in the consumer Internet experience and a key driver of broadband adoption. Inadequate respect for creative rights online will impede the roll-out of creative new content offerings, undermining the Commission's, Congress' and the Administration's goal of ubiquitous national broadband. For this reason, MPAA urges the Commission to make respect for creative content online a core and guiding principle of the National Broadband Plan.

Indeed, if it is to become national policy that the Internet serve as the center of modern society – a digital intersection of Main Street, a town square and a mega-shopping and entertainment complex all-rolled-into-one – it must be a place governed by laws, standards and rules, just like the real streets and communities inhabited all across America. Anarchy and disrespect for the rule of law online are no less pernicious to society than the flouting of our laws would be anywhere else. The government cannot let the anonymity of the Internet become a cloak behind which people think that unlawful conduct can continue unabated.

Combating online content theft successfully also will substantially reduce or eliminate vast amounts of unlawful traffic that currently clogs the Internet and degrades service to law-abiding consumers. Simultaneously, reducing unlawful online conduct will help assuage the concerns that many law-abiding consumers have about whether their rights and freedoms adequately are protected in the online environment. If the Internet is treated like the wild, wild West, it will be exceedingly difficult, if not

impossible, for the Commission to achieve Congress' and the Administration's vision of a nation where all Americans not only have access to, but equally important adopt, broadband. If, in contrast, the Internet is seen by consumers as a place where safety and security are hallowed, and where miscreants and lawbreakers are not free to engage in illegal activity, they will be far more comfortable inviting the Internet to be a central part of their lives.

In addition to providing consumers with a better online experience, reducing the amount of copyright-infringing material on the Internet could substantially reduce the cost of bringing high-speed broadband access to all Americans. The Commission has projected that it could cost \$350 billion to ubiquitously deploy broadband networks capable of delivering 100 Mbps, which is rapidly becoming the international standard. The Commission, however, should not ignore that illegal content accounts for a vast amount of online traffic.² Thus, it could generate substantial savings in this tremendous build-out cost – to be borne by both government and private sector investment – by encouraging construction of networks that are designed not on the basis of accommodating capacity-hogging transmissions of unlawful content but rather with the goal of providing consumers a rich broadband experience. The Commission should ensure that broadband network operators and content providers have the tools, and the

² See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923, 933 & 940 (2005) (“vast majority of users’ downloads are acts of infringement”; “90% of works available on one of the networks was shown to be copyrighted”; “evidence of infringement on a gigantic scale”); see also *Comments of AT&T Inc. on Petitions of Free Press and Vuze* (filed Feb. 13, 2008), at 14 (“P2P traffic ‘constitutes approximately 60% of all traffic that traverses the public internet’”) and 20 (“[t]he top 5% of users account for roughly 50% of all downstream traffic, indicating that it is these few ‘bandwidth hogs’ that are pushing the limits of network capacity through massive P2P file transfers”) (citing David Vorhaus, *Confronting the Albatross of P2P*, Yankee Group (May 31, 2007)).

flexibility to use those tools, to combat online content theft, which in turn would yield a more efficient network that provides more value to consumers.

Respect for copyrighted materials online also will ensure that consumers are given more legitimate opportunities to access compelling, high-value content on the Internet. A variety of approaches, including graduated response policies and technological tools, can meaningfully contribute to thwarting unlawful conduct online, ensuring the safety and security of the Internet and encouraging content creators to offer even more of their products online. The government can play a vital role in encouraging private industry to be flexible and employ multiple approaches to combat unlawful conduct online and other Internet threats while simultaneously protecting consumers' ability to safely access and enjoy the lawful online experiences of their choice.

The MPAA is confident that, through this multi-pronged effort, and in cooperation with Internet Service Providers ("ISPs"), emerging technologies can drive solutions to help address the threats posed by unlawful conduct online. If these techniques are to be part of the answer, however, the government must foster an environment in which they are permitted to develop. Private industry is capable of implementing existing and new technological tools to target and diminish unlawful activity on the Internet, and continuing to develop new innovations, but it will take a commitment of time and resources to make it happen. Because this investment of time and resources will serve important national goals, the government must encourage it by making it clear that industry efforts will not be hobbled by regulations that would inhibit the use of these increasingly effective tools for legitimate anti-theft purposes.

Moreover, as the United States seeks to maintain its international leadership on technology issues, it should take the opportunity to study other nations that already have been down the road of rolling out ubiquitous broadband access. A number of countries have adopted proactive policies to deal with online content theft, and the Commission should learn from these countries' experiences in advising Congress about the threats posed by this unlawful conduct. South Korea, in particular, represents a sobering case study with regard to both the consequences of inaction and the array of potential responses. Disregard of widescale online content theft decimated the international and domestic film businesses in South Korea, but the government has now responded by making intellectual property rights enforcement one of the nation's core policy goals. Unless the United States learns from the mistakes of nations such as South Korea, it is at great risk of repeating them here.

Accordingly, the National Broadband Plan should include as a core component the elimination of infringing content and illegal material online. Specifically, the National Broadband Plan should:

- (1) encourage ISPs and the creative community to work on a variety of measures to deter unlawful online conduct and free up broadband capacity for legitimate activity;
- (2) recommend that government policies support these multiple efforts and not foreclose any particular anti-theft approach;
- (3) recommend that Congress encourage ISPs to work with the creative community to implement the best available, commercially practicable policies and technological solutions to diminish the theft and unauthorized distribution of copyrighted materials online;
- (4) recognize that flexibility is needed to encourage continuous advances in such technological solutions and their subsequent adoption; and

- (5) acknowledge, as the Commission proposed to do in its network neutrality notice of proposed rulemaking, that using technological solutions to combat the transmission of unlawful content online constitutes a reasonable network management practice.³

In short, the National Broadband Plan can serve as a landmark template for driving the roll-out of high-speed Internet to all Americans only if the government appropriately recognizes the critical need to combat online theft and permits industry to develop and implement the best available solutions to combat this acute and growing problem.

I. MPAA’S MEMBER STUDIOS CONSIDER THE INTERNET TO BE A TREMENDOUS OPPORTUNITY TO BUILD THEIR BUSINESSES AND CONNECT WITH CONSUMERS IN NEW AND EXCITING WAYS

Content creators across the country recognize the incredible power that the Internet holds to positively transform their businesses. The motion picture and television industries in particular are excited to embrace the expansion of broadband and to take advantage of the enormously positive impact that online distribution can have in enabling consumers to access a wide variety of content when and where they want it. MPAA’s member studios fully appreciate that ubiquitous broadband can dramatically increase the potential audience for their entertainment products. So let there be no mistake: MPAA is profoundly supportive of the national effort to ensure that all Americans can access a robust, high-speed Internet.

At the same time, however, online content theft represents one of the most significant threats facing the motion picture and television industries today. Thus,

³ See Notice, at ¶ 139.

MPAA has made combating content theft – both on the Internet and in terms of so-called hard goods (*e.g.*, unauthorized copies of DVDs) – one of its highest priorities. This is no small task, which is why MPAA member studios already devote enormous time and resources to fighting back against the scourge of content criminals.

During the Workshop, Frederick Huntsberry of Paramount Pictures demonstrated the ease with which consumers can obtain unlawful content online, as well as the increasing sophistication of web sites intended to look and feel legitimate in order to lure consumers into accessing infringing downloads or streaming services.⁴ For example, Mr. Huntsberry showed that full-length, camcorder-recorded versions of the movie *Star Trek* were available on the Internet almost immediately upon the movie's theatrical release; within days, millions of copies had been downloaded by consumers worldwide.⁵

The *Star Trek* example demonstrates that, even as movie studios welcome a future of ubiquitous broadband, the threats from unlawful online activities to their businesses – and to a vital and growing sector of the American economy – are real and they are dangerous. In fact, the production and distribution of motion pictures and television programs is one of the United States' most valuable cultural and economic resources. In 2007, the motion picture and television industries were responsible for 2.5 million American jobs; more than \$41 billion in wages to workers in America; more than

⁴ See Federal Communications Commission, National Broadband Plan Workshop, The Role of Content in the Broadband Ecosystem, Transcript (Sept. 17, 2009) (the "Transcript"), at 31-32 (Testimony of Frederick Huntsberry).

⁵ See *id.*

\$38 billion in payments to U.S. vendors and suppliers, small businesses and entrepreneurs; and \$13 billion in income and sales taxes.⁶

Moreover, the industries are comprised of more than 115,000 businesses in all 50 states – greater than 80% of which employ fewer than 10 people. The industries carry a positive trade balance around the world and a \$13.6 billion trade surplus – which accounts for 10% of the total U.S. private-sector trade surplus in services. The 2007 trade surplus for motion picture and television exports was larger than the combined surplus of the telecommunications, management and consulting, legal, and medical services sectors, and larger than sectors such as computer and information services and insurance services. In 2007, the enduring value and appeal of U.S. entertainment worldwide resulted in \$15 billion in audiovisual services exports, a 23% increase over 2006 and more than 50% higher than in 2003.⁷

The threats facing this industry from content theft, particularly online, are demonstrably serious. As MPAA Chairman and CEO Dan Glickman referenced at the Workshop,⁸ the Institute for Policy Innovation (“IPI”) released a study in 2007 concluding not only that industries that rely on copyright are important contributors to the American economy, but also that unlawful distribution of intellectual property costs Americans hundreds of thousands of jobs and federal, state and local governments

⁶ See *The Economic Impact of the Motion Picture & Television Industry on the United States*, Motion Picture Association of America, Inc. (April 2009).

⁷ See *id.*

⁸ See Transcript, at 93 (Testimony of Dan Glickman).

billions of dollars in annual revenues.⁹ Equally important, IPI explained that the “economic impact of copyright piracy is not limited to the companies that design, create and sell copyright protected works. The impact of piracy flows throughout the U.S. economy. Piracy in one segment of the economy can affect other industries because the economy is an interdependent system.”¹⁰ Thus, losses from copyright theft cascade down the economic pipeline, harming not just content producers, but also all of the various small businesses whose revenues are tied to content production. In particular, using *conservative* estimates, IPI found that copyright theft from the motion pictures, sound recordings, business and entertainment software and video games industries costs the U.S. economy \$58 billion in total output, results in the loss of nearly 375,000 jobs for American workers, and costs Federal, state and local governments \$2.6 billion in lost tax revenue.¹¹

In this regard, the Commission should pay no heed to assertions by some members of the advocacy community that the problem of content theft can be ignored

⁹ See *The True Cost of Copyright Industry Piracy to the U.S. Economy*, Institute for Policy Innovation, Policy Report 189 (October 2007) (“*IPI Study*”), at i, 11-13.

¹⁰ *Id.* at 3.

¹¹ See *id.* at i, 11-13. Some in the advocacy community have criticized studies such as the IPI analysis for purportedly calculating economic loss by assuming that every stolen product is the equivalent of a lost sale. See Transcript, at 94-95 (Testimony of Gigi Sohn). This criticism is plainly wrong, however, since the *IPI Study* makes clear that it employed a “conservative approach” and did “not assume[] that each pirated product served to deprive the industry of a legitimate sale.” See *IPI Study*, at 8. In any case, the advocacy groups’ criticism appears designed mainly to cause distraction. Regardless of whether any particular product would have been purchased if it had not been taken by theft, the stark reality is that theft is occurring in dramatic volumes. The key takeaway from the IPI studies and others drawing similar conclusions is not the precise *amount* of economic *loss* but rather the incredible *amount* of property *theft*. No one rationally could argue that widespread stealing is not occurring, nor could anyone reasonably claim that theft of this magnitude has little or no impact on the economic fortunes of the content industries and, thus, the American economy. The bottom line is, no matter what the actual losses measure up to in economic terms, a decrease in the amount of piracy necessarily would increase overall revenues, which in turn would increase incentives for investment in the content industries. See *IPI Study*, at 3.

because some amount of legitimate e-commerce already occurs through vendors such as iTunes.¹² Of course, a society built upon the foundation of rules and laws should not countenance rampant illegal activity of any magnitude, nor should law-abiding members of society be subjected to some arbitrary threshold of economic loss that must first be met before the rule of law is enforced. The same holds true for the preposterous notion that the law should be ignored unless a property owner can demonstrate that a thief, in the absence of stealing, otherwise would have legitimately purchased a stolen product. A shoplifter who steals a DVD from a store in a mall is not immune from security intervention, let alone prosecution, simply because he might not have planned to buy the product that he attempted to steal.

Nor should the presence of a miniscule amount of legal content in a file containing predominantly illegal content serve to shield those who steal content. No rational person would suggest that a purveyor of stolen property on a street corner could not be prosecuted simply because the individual also offers a small amount of legitimate goods.

In short, the motion picture and television industries are essential contributors to the American economy. That they are now under siege from rampant theft should be a wake-up call that action is needed *before* the impact overwhelms this vital contributor to the American economy. No business can long sustain itself if forced to compete against the widespread unlawful distribution of its products by thieves. And

¹² See Transcript, at 85 (Testimony of Michael Carroll) (“Can someone explain to me why there are all those iTunes downloads? I mean, because all that music is available on peer-to-peer networks. So why did anybody pay for an iTunes download if it’s available for free?”); see also *id.* (Testimony of Gigi Sohn) (“Why do people pay for bottled water?”).

no industry, let alone one as fundamentally ingrained into the core of the national economy, should be subjected to this threat without recourse.

Nonetheless, MPAA's members know that the key to success in their businesses is to continue to embrace technology and be responsive to the tastes and interests of consumers. The television and motion picture industries, after all, have always been proud to lead the way in offering consumers compelling content in new and exciting ways. The Internet is but the latest – albeit most powerful – technology with the capacity to make it easier and more enjoyable for consumers to access the content of their choice. Following in the footsteps of motion pictures on theatrical big screens and television programming and movies delivered straight to consumers' living rooms (over-the-air, via cable and satellite and through DVDs and video-on-demand), the Internet now can enable consumers to view their favorite programming on home and mobile devices at the times and places of each individual's choice. The creative industries stand ready to continue embracing new technologies to ensure that their content is widely available to anyone who wants to receive it.

II. A NATIONAL INVESTMENT IN DEPLOYMENT OF BROADBAND TO ALL AMERICANS WILL BE A FRUITLESS ENDEAVOR WITHOUT THE QUALITY CONTENT NEEDED TO DRIVE ADOPTION

A. The Commission Should Continue to Appropriately Recognize Congress' Concern that Broadband Actually Be Adopted By American Consumers

In directing the Commission to develop a national plan for the future of the Internet in the United States, Congress expressly made clear that deploying broadband to all Americans is only one part of the overarching national goal. Aside from seeking to ensure that all Americans have *access* to broadband, Congress also evinced a

strong desire to encourage all Americans to *adopt* broadband and thereby obtain access to the manifold benefits that the Internet brings. Thus, the Recovery Act directs the Commission, as part of the National Broadband Plan, to formulate “a detailed strategy for achieving . . . maximum *utilization* of broadband infrastructure and service by the public.”¹³

Quite clearly, it is the promise of access to the content flowing over the Internet’s network architecture that motivates Americans to adopt broadband. The Internet without content would be nothing more than a collection of hardware; a series of computer links and protocols with great capacity to communicate but nothing to say. Television once was unfairly derided as little more than a toaster with pictures. In the absence of compelling content, the Internet would offer consumers even less value than that proverbial toaster. It is the content that flows over and through the Internet that makes the breakthrough technology so potentially powerful. Whether in the form of galvanizing political speech, critical health care data, news, educational or informational programs or compelling audio-visual entertainment, content is what makes consumers and businesses excited by the potential of the online experience.

In addition, if broadband is to serve as the Main Street for our modern society, it must be a worry-free environment where consumers can be comfortable knowing that going online will be a safe and secure experience. Unless consumers are confident that accessing content online will not expose them to rampant viruses, malware,

¹³ See *In re A National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51, FCC 09-31 (rel. April 8, 2009), at ¶ 9 (emphasis supplied).

or even identity theft and financial fraud, neither the Commission nor Congress will be able to achieve truly ubiquitous broadband.

Accordingly, if the Commission is to adhere to Congress' directive and devise a National Broadband Plan that encourages not just deployment but also adoption, the Plan must take into account the need to deter unlawful conduct online and to protect content from theft and unlawful distribution.

B. Every Time Consumers Have Embraced New Media Technologies, Compelling Content Has Been A Key Catalyst

Content's central role in this equation is nothing new. Throughout history, whenever transformative communications technologies have captured the imagination of consumers, compelling content has been the vehicle for forward progress.

As far back as Gutenberg's invention of the printing press in the 15th century, it has been clear that the creation of a mechanical system to disseminate the written word was not merely an achievement unto itself but also a means to an end. The printing press transformed communication not just because of the technical innovation embodied in the machine, but more significantly because that machine enabled written content – the product of intellectual creation – to be widely shared and distributed. The relationship between technology and content, of course, was symbiotic, and the invention of the printing press in Europe also was immensely valuable in encouraging artists, authors and scientists to develop their creative endeavors. Yet without content, there would have been little motivation for Gutenberg to invest his time and effort in creating a device capable of spreading information so far and wide.

The 20th century saw myriad examples of this phenomenon long before the Internet came onto the scene. From the introduction of radio to the emergence of motion

pictures and television, content has led the way. As Ed Sullivan and Milton Berle became television icons in the 1950s, the percentage of U.S. households with television sets increased from only 9% in 1950 to 64.5% in 1955 (and nearly 90% by 1960).¹⁴ Later in the century, VCR adoption jumped from approximately 1% of households in 1980 to nearly 70% a decade later as Americans embraced the concept of watching films at home via rental and sales.¹⁵ And as studios added special new features and higher quality resolution to movies distributed for home viewing, DVD players in the 1990s became the fastest-growing consumer electronics device ever sold (at least until recently, as Blu-Ray players have been selling at an even faster clip).¹⁶

All of these developments share a common link – content – which has presaged similar excitement for the Internet over the last 10+ years. As consumers and businesses have welcomed the Internet into their lives, it is no surprise that compelling, high value content has increasingly become available online.

C. Content Creators Are Continuing to Invest In New and Innovative Business Models to Distribute Movies, Television Shows and Other Programs

Legitimate sources for high value content online are growing rapidly, as MPAA member studios and other content creators continue to roll out new business models seeking to capitalize on the power of the Internet. Content creators naturally seek

¹⁴ See Television Bureau of Advertising, Media Trends Track, Television Households, available at http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/02_TVHouseholds.asp (last visited Oct. 19, 2009).

¹⁵ See Television Bureau of Advertising, Media Trends Track, Multi-set & VCR Households, available at http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/03_MultiSet_and_Color_HH.asp (last visited Oct. 19, 2009).

¹⁶ See *Industry Celebrates DVD-Video – The Fastest Growing and Most Rapidly Adopted Consumer Electronics Product*, Business Wire (Jan. 5, 2001).

to distribute their products to as many viewers and listeners as possible, and the Internet has proven to be an incredibly powerful and cost-effective distribution tool. Although this tool has been put to ill use by a great many miscreants whose *modus operandi* has been to steal and redistribute the property of others, that has not stopped MPAA's members from making their content available for viewing through literally hundreds of legitimate online outlets and in a wide variety of alternative forms.

Examination of just one of those forms – video streaming – is sufficient to illustrate the point. Nielsen recently reported that nearly 140 million unique viewers in the United States watched streamed online video in September 2009, an increase of 12% over the prior year.¹⁷ In all, Americans watched more than 11 *billion* streams of video in September, up nearly 25% from the prior year (and that figure does not include downloaded video).¹⁸ The average viewer spent 195 minutes of time watching streaming video online.¹⁹ Hulu.com, a joint venture mostly owned by several MPAA-member studios but featuring content from a host of creators, had more than 437 million videos streamed in September.²⁰ Each of Turner (owned by Time Warner), ESPN (owned by Disney), Fox (owned by News Corporation) Nickelodeon (owned by Viacom) and MTV Networks (Viacom) also had at least 114 million videos streamed that month alone.²¹

These figures offer a mere glimpse of the power that online video has to attract American consumers, and MPAA appreciates how important it is (and

¹⁷ *See Watch It: Online Video Tiny But Growing*, MediaDaily News (Oct. 13, 2009).

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

increasingly will be) for content creators to satisfy Americans' appetite for video programming on the Internet. For that very reason, MPAA member studios and other content companies, including television networks, social networking sites, retailers, gaming systems and news sites, already have begun to experiment with a wide variety of innovative business models that enable consumers to lawfully access compelling content online. A summary of several prominent examples of these efforts appears below:

Hulu.com – Jointly owned by NBC Universal, News Corporation and The Walt Disney Company, Hulu.com provides consumers with no-cost access to full-length, streamed television shows and movies, including programming from the libraries of its owners as well as a wide array of third parties. Nielsen ranked Hulu.com as the second-most-visited streaming video site in September 2009, with more than 13 million unique viewers watching more than 437 million video streams.

Netflix –MPAA member studios have licensed Netflix to provide video streams of full-length feature films and television programs to consumers for viewing on computers, television sets and other platforms using a broadband Internet connection. Netflix currently has thousands of movies and television shows available for legitimate instant viewing. During the last calendar quarter, 43% of Netflix's 11.1 million subscribers streamed at least one movie or television show online, up from 22% (of a smaller subscriber base) in the same period a year ago.²²

iTunes – MPAA members also have licensed movies and television program to iTunes, which enables consumers to download (to rent or own) full-length movies, television shows and special programming – including in high definition – for viewing on their computers or on mobile devices. iTunes currently offers more than 50,000 episodes of television programs and makes available more than 7,500 movies to purchase or rent. As of March 2009, consumers had purchased more than 250 million television episodes, while more than 33 million movies had been purchased or rented.

TV Everywhere – A number of content producers are experimenting with a TV Everywhere model, pursuant to which consumers who already subscribe to a particular multichannel video service (e.g., cable or satellite) would get access to that content online as well.

²² See *Netflix Preparing for Future With Delayed Rentals, More Internet Streaming*, Los Angeles Times (Oct. 23, 2009).

It suffices to say that these various endeavors already have made it possible for millions of Americans to gain access to the content of their choice in new and exciting ways.²³ These models, as well as those new ideas that inevitably will follow, hold great promise for spurring broadband adoption – so long as the content is adequately protected from theft.

III. CONTENT MUST BE PROTECTED FROM THEFT AND ILLEGAL DISTRIBUTION IF IT IS TO PROSPER ONLINE

A. Absent Adequate Protections, The Availability of Quality Content Will Be Delayed and Inhibited

As Chairman Genachowski consistently has made clear, the promise of a free and open Internet to “unleash creative genius” for all Americans cannot be fulfilled if the online world is subject to anarchy and chaos: “It is vital that illegal conduct be curtailed on the Internet. As I said in my Senate confirmation hearing, 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

²³ A multitude of parties, including television networks, social networking sites, retailers, gaming systems and news sites are now devoted to the *lawful* online distribution of creative content. Some additional examples include: Over 1 *billion* videos were viewed on Fox Interactive Media sites, Viacom Digital sites, Disney Online and Hulu.com in September 2009. *See Watch It: Online Video Tiny But Growing*, MediaDaily News (Oct. 13, 2009). Nickelodeon’s Nick.com delivered 125 million video streams for the month of May 2009. *See* Written Statement of Cyma Zarghami, President of Nickelodeon and the MTV Networks Kids & Family Group, Before the Senate Committee on Commerce, Science and Transportation, Hearing on Rethinking the Children’s Television Act for a Digital Media Age (July 22, 2009). Users watched over 140 million episodes of ABC primetime series during the first year that ABC.com’s broadband players was available (September 2006-2007); as of January 2009, that number had grown to more than 500 million episodes. *See The Economic Impact of the Motion Picture & Television Industry on the United States*, <http://www.mpaa.org/Econ-ReportLo.pdf>.

can and must co-exist.”²⁴ In connection with the release of the Commission’s notice of proposed rulemaking regarding potential network neutrality rules, Chairman Genachowski reiterated that “open Internet rules should apply to lawful content, applications, and services. They are not a shield for copyright infringement, spam, or other violations of the law.”²⁵

In order for legal, licensed platforms for distribution of copyrighted content to be sustainable online, content creators and their distribution partners must curtail the distribution of that same content through unlawful and unauthorized web sites, peer-to-peer services, cyberlockers and other online distribution mechanisms. Creating compelling content is an extraordinarily expensive proposition. It is not uncommon for blockbuster movies to cost well over \$100 million to produce and market; a single episode of an hour-long television drama easily can cost more than \$2 million. It also takes time and resources to create lawful platforms for online content distribution. In addition to the investment in technology, these legitimate sites also must spend money on marketing and communications to reach consumers and let them know that content is available.²⁶ Meanwhile, these legal platforms must compete for consumers’ attention with unauthorized alternatives that make copyrighted material available without the creator’s permission (either for free or for a purported “subscription” price that siphons revenues away from copyright holders).

²⁴ *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity*, Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, The Brookings Institution (Sept. 21, 2009).

²⁵ *Notice*, at Separate Statement of Chairman Genachowski.

²⁶ Hulu.com, for example, ran an advertisement during *Super Bowl XLIII* in January 2009. Although the site has witnessed tremendous growth in terms of audience traffic, Hulu.com spent roughly \$3 million to broadcast the commercial (and that figure does not include substantial production costs).

Even worse, the web sites devoted to the unlawful distribution of copyrighted content are becoming increasingly sophisticated. Because these illegal sites often have the look and feel of legitimate and professional businesses, and because they often are advertising- and subscription-supported, the sites are confusing to consumers. Although they peddle stolen products, the sites maintain a professional-style presentation designed to give them an aura of legitimacy that can result in consumers being unaware that they are transacting with an illegal distributor. Not only do these sites engage in theft that is harmful in its own right, but the purveyors of stolen copyrighted works also make it that much more difficult for legitimate sites to gain consumer acceptance and confidence.

The bottom line remains that no industry can compete fairly with the “free by theft” distribution of its products. No one would doubt the harmful economic consequences that would befall General Motors, Ford, Toyota or Honda if so-called “competitors” were permitted to steal thousands of their newly-manufactured cars and distribute them without consequence to consumers at cut-rate prices, or worse, for free. The fact that some, or even many, legitimate sales might still occur in such a scenario diminishes neither the obviousness of the wrongdoing nor the potential economic threat. The same is true for the motion picture and television industries, which are attempting to provide consumers with a variety of legitimate ways to access content online even as they face a tidal wave of theft and unlawful distribution of the very same products.²⁷

²⁷ As noted above, it is entirely irrelevant whether any particular instance of theft can be tied to a lost sale; online conduct should be subject to enforcement of the law just as is conduct offline. *See supra*, note 11.

It therefore comes as no surprise that the Commission’s proposed network neutrality rules would expressly recognize that “reasonable network management” includes an ISP’s right to “prevent the transfer of unlawful content” and “prevent the unlawful transfer of content.”²⁸ The *Notice* specifically “propose[s] that broadband Internet access service providers may reasonably prevent the transfer of content that is unlawful. . . . In order for network openness obligations and appropriate enforcement of copyright laws to co-exist, it appears reasonable for a broadband Internet access service provider to refuse to transmit copyrighted material if the transfer of that material would violate applicable laws.”²⁹ Moreover, “if particular content or a particular transfer of content is prohibited by law, the provider may be justified in not carrying that traffic.”³⁰

In short, a failure to protect content online inevitably will stunt the growth of legitimate, innovative alternatives, which in turn will dampen consumer interest in adopting broadband.

B. The Commission Should Foster An Environment in Which Technological Innovation Can Be Used As Part of A Multifaceted Effort to Combat Copyright Theft

Content creators, ISPs and policymakers can and must respond to the threat posed by unlawful online conduct from a variety of perspectives. A multi-pronged approach can adequately protect creative works from theft while ensuring that consumers have lawful access to the compelling content of their choice.

²⁸ *Notice*, at ¶ 135.

²⁹ *Id.* at ¶ 139.

³⁰ *Id.*

Working in cooperation with ISPs, MPAA's member studios and other creators can utilize a variety of technological tools and policy approaches to address the threat of unlawful conduct online. These efforts, which include graduated response policies as well as technologies such as watermarking and filtering, have proven to be successful in various contexts. MPAA strongly urges the Commission to recommend that Congress encourage multiple efforts to deter unlawful activity and not interpose any legal or regulatory obstacles that would *per se* bar the use of any otherwise lawful methodology. The threat is too real, and the consequences too harmful, for the government arbitrarily to limit the range of potential solutions.

A number of these solutions are used in practice today. For example, ISPs can block access to certain web sites (or to IP addresses) that are known to engage in unlawful behavior. They also can cap the bandwidth (or speed) of a subscriber's Internet connection or cap the volume of data traffic that a particular subscriber can access; and they can employ a more nuanced bandwidth shaping (which limits the speed of a subscriber's access to selected protocols/services or caps the volume of data to selected protocols/services), in each case in response to a subscriber who violates the applicable terms of service. Similarly, technologies available today can be effective in a number of environments at preventing the dissemination of copyrighted works by those lacking authorization. Technologies that recognize digital fingerprints, watermarks or hash marks can be utilized to identify copyrighted content when it is unlawfully distributed. These same technologies also can be used to stop the spread of other unlawful images (such as child pornography) as well as viruses and malware. MPAA understands the Commission's concern that consumers should not be misled when these techniques are

employed to combat online theft. Thus, MPAA supports the Commission's proposal to require transparency so that consumers are appropriately advised if these methodologies are used by their ISPs.³¹

Regardless of the utility of these methodologies, however, MPAA does not want the Commission's consideration of the important overarching issue of unlawful online conduct to be derailed by backward-looking debates about the pros and cons of any given technology, particularly those that already have been surpassed by new innovations. MPAA firmly believes that future developments will yield an entirely new generation of ever-more-sophisticated online protection technologies. Far more important than any existing tool, then, is the promise of emerging techniques, which are developing rapidly and portend new and increasingly effective methods to both combat online theft and ensure that consumers will not be impeded from safely accessing lawful content.

Although existing technologies provide a sense of what currently is possible, they undoubtedly are rudimentary compared to the multitude of ideas that research and development might nurture into successful new tools. Thus, it is critically important that the Commission not stunt the development or deployment of dynamic, next-generation technology models to prevent and address the online theft of content. Given the rapidity with which technology changes occur, the Commission would be far better off focusing on ensuring that content creators and ISPs have the flexibility to work together to take advantage of new and evolving opportunities.

³¹ See Notice, at ¶ 118.

Moreover, as new technologies for content security are developed, not only will creative works obtain more protection, but the Internet as a whole will operate more securely and efficiently for consumers, encouraging further investment and innovation and, ultimately, increased broadband adoption. Given that a substantial amount of Internet traffic today is comprised of infringing material,³² it is apparent that unless checked, the tidal wave of unlawful online content will overwhelm the Internet and degrade the consumer experience. Connections rendered sluggish by the transmission of vast amounts of stolen content will only thwart broadband development and discourage consumer confidence in the Internet experience, directly undermining the Commission's, Congress' and the Administration's goals. Furthermore, ceding half or more of the available bandwidth to thieves will result in huge sums of government and private money being wasted on network expansion. On the other hand, innovative technologies and bandwidth management tools, if permitted and encouraged to develop, can lead to sophisticated new methods that can combat theft, ensure that bandwidth is utilized efficiently, provide a smooth and safe online experience for consumers, and protect the enormous public and private investment in our nation's broadband networks.

C. The Commission Should Advise Congress to Support A Policy That Encourages Flexibility in Addressing Online Content Theft

MPAA believes that a variety of existing and new technologies, together with appropriate policy responses, can stem the tide of unlawful online conduct. To be sure, no technological solution can ever be 100% guaranteed effective. That reality, however, only serves to underscore how vitally important it is that the threat of content

³² See *supra*, note 2.

theft be met by a multi-pronged approach to finding solutions. No single mechanism alone is capable of addressing this problem, and all stakeholders – from content creators to consumers to ISPs to the government – would benefit from a flexible environment in which ISPs and copyright holders are encouraged to cooperate together to implement the best available solutions and in which innovators are left ample incentive to develop those solutions.

Accordingly, MPAA respectfully requests that the Commission incorporate into its report to Congress the importance of flexibility.³³ The Commission should recommend that Congress encourage ISPs to work cooperatively with technology innovators and the creative community to implement the best available, commercially practicable graduated response policies and technological solutions to diminish the theft and unauthorized distribution of copyrighted materials online.

Moreover, contrary to the claims by some in the advocacy community,³⁴ MPAA would like to make clear that it is not as part of this proceeding asking the government to mandate any particular outcomes. Rather, MPAA is advocating vigorously for government to play a constructive role by encouraging private industry to devise its own solutions. MPAA is confident that, if given the space, flexibility and encouragement, industry, working together, can develop and implement the best

³³ In this regard, the *Notice* appropriately recognized that “reasonable network management would provide broadband Internet access service providers *substantial flexibility* to take reasonable measures to manage their networks, including but not limited to measures to . . . provide a safe and secure Internet experience for their users.” *Notice*, at ¶ 108 (emphasis supplied).

³⁴ *See* Transcript, at 43, 90 (Testimony of Michael Carroll) (“no one is telling you how to run your business, but when you come to the government and ask for additional assistance in running your business, then we all have a stake in that conversation”); *see also id.* at 63 (Testimony of Gigi Sohn).

commercially available practices for protecting online content from theft and unlawful distribution.

To the extent that some advocacy groups have characterized technological solutions such as filtering and digital fingerprinting, watermarking and hash mark recognition as purportedly “blunt instruments,”³⁵ MPAA respectfully disagrees. Today’s technologies can be deployed in precise ways to strike against the unauthorized distribution of unlawful content, and tomorrow’s solutions hold the promise of even greater precision. Some in the advocacy community also have expressed concern that the same tools capable of deterring the transmission of infringing content could be used nefariously to interfere with political speech or social commentary.³⁶ That a tool intended to stop unlawful conduct could be put to ill use, however, is not an argument for prohibiting the use of the tool; it is an argument for sanctioning the bad actors.³⁷

The reality is that the harms caused by rampant theft warrant an aggressive response. Thus, MPAA believes that the Commission should recommend that content creators and ISPs be encouraged to develop the best available solutions – even though it is impossible today to identify what all of those solutions may look like. Whether in the form of forensic tools or policies designed to discourage consumers from engaging in

³⁵ See, e.g., Transcript, at 62 (Testimony of Gigi Sohn).

³⁶ See Transcript, at 63 (Testimony of Gigi Sohn).

³⁷ Equally unavailing is the critique leveled by some that using technology portends an unwinnable technological arms race, whereby creators can never hope to stamp out all unlawful conduct because outlaws will constantly seek to evade tools designed to deter theft. See Transcript, at 63 (Testimony of Gigi Sohn); see also *id.* at 71 (Testimony of Michael Carroll). That fallacious argument, though, is really an endorsement of online anarchy. Of course, in the offline world, society would never cease efforts to combat illegal activity simply because criminals attempt to use ever-more-sophisticated techniques to avoid law enforcement. It beggars belief that anyone would advocate that the government endorse a different standard online.

unlawful conduct, the government should give private industry wide latitude to find effective strategies.

Government also must foster an environment in which innovation is able to flourish and new tools are permitted to develop. Technology innovation requires a substantial commitment of time and resources; that investment will not take place if the government signals that resources spent on research and development will be wasted due to regulations that *per se* prohibit, or *post hoc* punish, their good-faith use. The government instead should create incentives for this investment by signaling that industry efforts will be rewarded with an open and flexible regulatory environment.

D. An Analysis of Best Practices for Combating Content Theft Must Account for the Emerging Policies of Other Nations That Are Taking Steps to Combat Unlawful Online Conduct

As part of the National Broadband Plan, Congress intends to position the United States as a worldwide leader on broadband issues. While deployment and adoption of new services is certainly a crucial component of this effort, the Commission should recognize, and report to Congress, that international leadership in this arena requires that the United States pay appropriate attention to the ways in which other nations are fighting the scourge of online content theft. A number of countries have moved ahead of the United States when it comes to government support for anti-theft efforts; while MPAA is not advocating that the Commission adopt every (or even any particular) strategy employed by other nations, MPAA does believe that the Commission should cull from these countries' experiences in advising Congress about the threat of unlawful online conduct.

Indeed, U.S. Trade Representative Ron Kirk recently made clear that he intends to make the protection of intellectual property a priority in trade negotiations and with respect to the enforcement of existing trade agreements:

[We] are working with our trading partners to ensure adequate and effective intellectual property safeguards wherever American goods and services are sold...Intellectual property protection and enforcement not only ensure that the rewards of creativity and invention go to the inventor - they also guarantee America's edge in the global market. To maintain a strong and growing economy - with good jobs, good wages, and a solid future - we must succeed in the global market...We will advance the cause of intellectual property rights for America's innovative and creative industries...Every economy stands to benefit when partners play by trade rules. And the rules on intellectual property are clear: pirates and copycats are not to be tolerated.³⁸

The Commission should take these policies, as well as the experiences of other countries, into account in formulating the National Broadband Plan.

South Korea, in particular, represents a compelling case study on both the threats posed by blatant disregard of content theft and international responses to unlawful conduct on the Internet. South Korea also serves as an important touchstone for this discussion because it often has been held up as a paragon of success in the roll-out of high-speed Internet.³⁹ Yet lurking behind the country's achievement in linking its

³⁸ Remarks by Ambassador Ron Kirk at the Global Intellectual Property Center Annual Summit, As Prepared for Delivery (Sept. 30, 2009)

³⁹ See, e.g., *Bringing Broadband to Rural America: A Report on Rural Broadband Strategy*, 24 FCC Rcd 7366 (2009) ("while the average download speed for residential broadband subscribers in the United States is currently 2.3 Mbps, residential subscribers in . . . South Korea . . . offer 1 Gbps residential service now or are planning to have comprehensive 1 Gbps residential service in the near future . . . South Korea is complementing its fiber rollout with 10 Mbps wireless 4G services for mobility"); Statement of Michael J. Copps, Commissioner, Before the Senate Committee on Small Business and Entrepreneurship; *Improving Internet Access to Help Small Business Compete in a Global Economy* ("The U.S. is ranked 25th in broadband penetration, behind countries including South Korea, where penetration is 89% . . ."); *In re Availability of Advanced Telecommunications Capability in the United States*, 19 FCC Rcd 20540 (2004) (Dissenting Statement of Commissioner Copps) ("America's

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citizens to broadband has been a lawless online environment in which content protection was ignored. The result: American movie studios were left with virtually no home video businesses in South Korea; domestic South Korean filmmakers have been hit hard as well, suffering substantial harm from the theft of their creative content (and therefore curtailing their own investment).⁴⁰

South Korea ignored the problems of intellectual property crimes for far too long, but fortunately, it is no longer sitting idly by as theft ravages its creative industry. South Korean President Lee Myung-bak has said that intellectual property rights enforcement is one of his administration's core policy goals; he went so far as to declare "war against illegal piracy."⁴¹ In fact, South Korea now has passed one of the world's most stringent anti-piracy laws.⁴²

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competitors around the world are implementing comprehensive broadband plans. Countries like Japan, Korea, and Canada have left us far behind. This is unacceptable").

⁴⁰ See *Execs: Piracy is Biz's Primo Peril*, Variety (Oct. 19, 2009) ("In markets where broadband access is widely available, piracy is fast eroding formerly reliable sources of profit [Disney CEO Robert] Iger said. 'In South Korea, it obliterated the secondary market so much that we closed our home video operations"); *Guardrails for the Internet: Preserving Creativity Online*, Michael Lynton, Huffingtonpost.com (May 26, 2009) ("South Korea [] has one of the most highly developed broadband networks in the world. But piracy has also become so highly developed there that we and virtually every other studio has recently had to curtail or close down our home entertainment businesses"); *Warner Bros. to Pull DVDs In South Korea*, The Wall Street Journal (Nov. 12, 2008) ("Warner Bros. is getting out of the business of distributing DVDs in South Korea because of Internet piracy, marking the last major withdrawal by Hollywood in one of the world's most wired countries. . . . The country's DVD market is collapsing . . ."); *Busan Film Fest Highlights Anti-Piracy*, Korean Times (Oct. 12, 2009) ("the widespread circulation of pirated DVDs on the streets and movie files online is deeply hurting the [South Korean film] industry").

⁴¹ See *National Trade Estimate Report on Foreign Trade Barriers*, Office of the United States Trade Representative (2009) ("USTR Report"), at 312.

⁴² See *id.*; see also *Upload a Song, Lose Your Internet Connection*, Korean Times (April 5, 2009). Under the law, the Ministry of Culture, Sports and Tourism ("MCST") has authority not only to terminate individual users' Internet access for up to six months, but also to shut down web sites and message boards that transmit infringing content. And the MCST can take these steps with or without receipt of complaint from a copyright holder. See *id.* An amended Copyright Act in South Korea also *requires* certain online service providers to install filtering devices to prevent online content theft. See USTR Report, at 312.

Similarly, legislators and the executive branch in France have demonstrated a steadfast commitment to policies aimed at thwarting unlawful online conduct, even re-authorizing revised anti-theft legislation after an initial effort was struck down by French courts. Under the current French law (known as “HADOPI”), a new government entity will have the power to investigate copyright infringement online and recommend sanctions up to and including suspension of Internet service.⁴³ Although the ultimate decision will reside with a judge, the decision must be made as part of a streamlined judicial proceeding.⁴⁴ Importantly, the law puts consumers in France on notice that repeated attempts to steal intellectual property will have consequences.⁴⁵

In addition, the government of the United Kingdom this year issued its “Digital Britain” report, proposing to require ISPs to notify consumers when their accounts appear to have been used to engage in copyright infringement and to identify such users (pursuant to court order) so that they can be subjected to targeted legal action.⁴⁶ Under the proposal, should the notification regime prove ineffective in stemming piracy, the government would have the power to order additional remedies, such as blocking (web sites or IP addresses), bandwidth capping/shaping and content

⁴³ See *France Passes Harsh Anti-P2P Three-Strikes Law (Again)*, ars technica (Sept. 15, 2009).

⁴⁴ See *id.*

⁴⁵ In New Zealand, an amended copyright law likewise includes a graduated response provision that requires ISPs to “reasonably implement” a policy that provides for service termination for repeat copyright infringers. See *Kiwis Get Strict Copyright, Three-Strikes Law at Month’s End*, ars technica (Feb. 3, 2009). Taiwan is in the process of implementing a similar law. See *Taiwan Passes Three-Strikes Piracy Law*, billboard.biz (Apr. 27, 2009).

⁴⁶ See *Building Britain’s Future, Digital Britain Final Report*, Department for Culture, Media and Sport (June 2009), at 111-112.

identification and filtering (or a combination of these measures).⁴⁷ While it is currently in the process of accepting comments on these proposals, the report again signals that the British government is not willing to ignore the mounting threat from intellectual property theft.

The Swedish government earlier this year also implemented a new law designed to stop online property theft; the law requires ISPs to disclose the IP addresses of consumers who download infringing content.⁴⁸ Almost immediately after the law went into effect, country-wide Internet traffic dropped by almost 50% (leading many to conclude that a tremendous amount of the country's Internet traffic had consisted of infringing material prior to the law becoming effective).⁴⁹ In Germany, Chancellor Angela Merkel recently emphasized that the "German government has a clear position: copyrights have to be protected in the Internet," adding that online copyright protection faces "considerable dangers."⁵⁰ And in Spain, the government is launching a new film commission that will focus on protecting intellectual property rights.⁵¹ The commission will include members from the judicial system, the Ministry of Culture and the wider film industry.⁵²

Notwithstanding these various efforts, content theft remains a substantial problem in these and other countries throughout the world. That these nations are facing

⁴⁷ *See id.*

⁴⁸ *See Swedish Antipiracy Law: Traffic Down, ISP Rebels*, CNETnews.com (April 17, 2009).

⁴⁹ *See id.*

⁵⁰ *See Merkel Criticizes Google for Copyright Infringement*, Reuters (Oct. 10, 2009).

⁵¹ *See Spain Launches New Film Commission to Tackle Piracy*, ScreenDaily.com (Oct. 20, 2009).

⁵² *See id.*

a profound threat from piracy even as they take concrete steps to address the problem should signify why it is all the more important for the United States to get it right. Again, to be clear, MPAA is not suggesting that the Commission recommend that Congress adopt every one (or even any) of the specific anti-theft methods employed by other countries. Rather, MPAA believes that these international efforts should underscore, for the Commission and Congress, that *restricting* technological solutions and anti-theft policies not only would be profoundly harmful to American content creators, but also would increasingly leave the United States as an outlier among nations on a subject – enforcing the rule of law – on which the United States should be a leader.⁵³

IV. IN LIGHT OF THE POWER OF TECHNOLOGY AND INNOVATION, A NATIONAL BROADBAND PLAN SHOULD INCLUDE SPECIFIC RECOMMENDATIONS TO COMBAT ONLINE CONTENT THEFT

Online content theft poses a fundamental threat to content creation and a vital segment of the American economy. Unlawful online conduct also undercuts broadband use and adoption, clogging already taxed network connections with illegal activity, limiting the amount and variety of lawful content on the Internet and undermining consumer confidence in the Internet as a safe and secure environment. Accordingly, if it is to truly serve as a useful roadmap in advancing Congress' and the

⁵³ As Vice President Biden recently pointed out, when content is redistributed without its owner's permission, "[i]t's pure theft, stolen from the artists and quite frankly from the American people" *See Biden Pledges More Efforts Against Internet Piracy*, CBSnews.com (Apr. 22, 2009). Secretary of Commerce Locke also has noted that "[t]he cost of counterfeiting and piracy to [the intellectual property industry] and to our nation is billions of dollars in losses and hundreds of thousands of American jobs"; he added that the United States' "ability to trade in a rules-based system around the world is critical to . . . our economic success as a nation. . . . The Obama administration is well aware of the impact of counterfeiting and piracy on our industries and workers, and we're working to combat it." *See Remarks to the Motion Picture Association of America, Second Biennial Industry Summit, As Prepared for Delivery* (Apr. 21, 2009). The Office of the United States Trade Representative similarly explained that, "[i]n this time of economic uncertainty, we need to redouble our efforts to work with all of our trading partners . . . to enhance protection and enforcement of intellectual property rights" *See USTR Releases 2009 Special 301 Report*, Press Release (April 2009).

Administration's goals of ubiquitous high-speed Internet nationwide, the National Broadband Plan should include as a core component the deterrence of unlawful activity online. To reiterate, the National Broadband Plan specifically should:

- (1) encourage ISPs and the creative community to work on a variety of measures to deter unlawful online conduct and free up broadband capacity for legitimate activity;
- (2) recommend that government policies support these multiple efforts and not foreclose any particular anti-theft approach;
- (3) recommend that Congress encourage ISPs to work with the creative community to implement the best available, commercially practicable policies and technological solutions to diminish the theft and unauthorized distribution of copyrighted materials online;
- (4) recognize that flexibility is needed to encourage continuous advances in such technological solutions and their subsequent adoption; and
- (5) acknowledge, as the Commission proposed to do in its network neutrality notice of proposed rulemaking, that using technological solutions to combat the transmission of unlawful content online constitutes a reasonable network management practice.

Respectfully submitted,

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