Before the

DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

and

DEPARTMENT OF AGRICULTURE
Rural Utilities Service

Washington, D.C.

In the Matter of	)	
	)	Docket No. 090309298-9299-01
Broadband Initiatives of the	)	
American Recovery and	)	
Reinvestment Act of 2009	)	

COMMENTS ON JOINT REQUEST FOR INFORMATION

The undersigned organizations respectfully submit these comments in response to the March 10th, 2009 Federal Register notice from the National Telecommunications and Information Administration (NTIA) and Rural Utility Service (RUS) seeking comment on establishment of the Broadband Technology Opportunities Program (BTOP). These comments respond specifically to the 13(c)(1) question posed by NTIA. Namely:

> *"(1) In defining nondiscrimination obligations, what elements of network management techniques to be used by grantees, if any, should be described and permitted as a condition of any grant?"*

Introduction

We support the public policy goal of ensuring all Americans have broadband access. Universal broadband access will greatly increase democratic engagement and economic opportunity by and for all Americans. Universal broadband access will also enable us to reach new consumers, and provide old ones with exciting new ways to enjoy our creative works. Therefore, we strongly support the goals of the BTOP.

However, we are concerned that, in defining nondiscrimination obligations under the BTOP, NTIA and RUS may unintentionally prohibit or deter grantees from employing reasonable network management techniques in order to limit illegal activity on these taxpayer-subsidized networks. Federal policy and taxpayer dollars should not be used to facilitate illegal activity, including the theft of intellectual property, let alone prevent grantees from taking reasonable measures to prevent such illegal activity. Therefore, NTIA and RUS must be careful to ensure that nondiscrimination obligations do not impair the ability of grantees to engage in reasonable network management techniques deployed to prevent or deter illegal activity occurring on their networks.

The Epidemic of Internet Copyright Infringement

Broadband network capacity is being encumbered by the ever-increasing volume of unlawful and otherwise harmful network traffic, from copyright-infringing material, to viruses, spam, and even child pornography. For example, a number of studies document that peer-to-peer (P2P) file trafficking, the vast majority of which is infringing, constitutes anywhere from 50% to 80% of all Internet traffic.[1] This fact was highlighted in a dramatic, recent example, when the Netnod Internet Exchange (an organization measuring Internet traffic) offered statistics suggesting that daily online activity in Sweden dropped more than 40 percent after a Swedish law allowing ISPs to unmask P2P file traffickers took effect on April 1, 2009.[2]

Absent the ability to utilize reasonable network management techniques to address this kind of illegal activity, a government-funded increase in the deployment and speed of broadband networks will, especially considering the increasing penetration of high definition video, almost invariably increase the amount of copyright infringement on the Internet in lockstep with increases in capacity. It would be an enormous waste of taxpayer dollars for government-funded increases in network capacity to simply be consumed by illegal traffic rather than freed up for legitimate uses.

The rampant copyright infringement on the Internet today imposes significant losses on not just U.S. creative industries, but on the U.S. economy as a whole.[3] These losses threaten the jobs and income of millions of creative artists and other workers employed by the copyright industries, many of whom subsist largely on royalties and residuals paid in consideration for the legal use of their creative works. For example, legal sales of movie DVDs generate payments both directly and indirectly to directors, actors, writers, musicians, and other film industry workers. These creative artists benefit from the revenue stream generated from films and television shows, which includes both direct payments to some talent, and contributions to the health and pension plans of the industry guilds and unions. Copyright theft has a similar impact on other creative industries, particularly the music industry which has experienced the devastating effects of piracy over the last ten years.[4] Piracy costs these workers twice: first, by reducing the

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

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

[3] For example, in 2005 the U.S. movie industry lost $2.3 billion due to Internet piracy ("The Cost of Movie Piracy," prepared by LEK Group for Motion Picture Association of America). Overall, motion picture piracy is estimated to cost the U.S. economy more than $20 billion annually in lost output among all U.S. industries and $5.5 billion in lost earnings for U.S. workers ("The True Cost of Motion Picture Piracy to the U.S. Economy", prepared by Stephen E. Siwek for the Institute For Policy Innovation).

[4] IFPI estimates that more than 40 billion music files worldwide were illegally file-shared in 2008, resulting in an online music piracy rate of around 95%. Digital Music Report 2009, IFPI, p. 22, available at http://www.ifpi.org/content/section_resources/dmr2009.html

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

The impact of copyright infringement goes beyond the tangible economic impact. American films, television, music, video games, books, and other creative works are manifestations of uniquely American art forms that are woven into American culture and serve as goodwill ambassadors to the world. But art does not exist in a vacuum. Culture always has, and always will, need to be supported. Protecting the freedom to create and the right to be compensated for it has always been a fundamental concept in this country. So fundamental, in fact, that the right to intellectual property was the only "Right" our Founding Fathers specifically referenced as such in the original United States Constitution.[5] The laudable objective of promoting broadband access and deployment must not be implemented in a way that undermines these important creative and economic rights by inadvertently disallowing the means of protecting creative content.

The spread of piracy on broadband networks will only exacerbate the significant losses suffered by U.S. creative industries, their employees, and individual creators. The Federal Government should not – and need not – adopt policies that will impose additional economic losses on U.S. industries, employees, and creators. Considering that the U.S. "total" copyright industries accounted for an estimated $1.38 trillion or 11.12 % of GDP and employed 11.3 million workers in 2005,[6] the creative industries remain among the most promising sources of economic growth in this country at a time when job creation is of paramount importance. At a minimum, NTIA and RUS should be careful to "do no harm" to these vitally important, job-creating industries. NTIA and RUS should ensure that the rules promulgated do not prevent grantees from engaging in reasonable network management to deter online copyright infringement and other forms of unlawful activity on their networks.

Reasonable Network Management Includes Prevention and Reduction of Illegal Activity

While no network management technique yet provides a "silver bullet" to stop all online copyright infringement, there is a substantial amount of investment being made in techniques that show promise for reducing or deterring online copyright infringement.[7] No one can predict at this early stage how these technologies will develop. Nonetheless, in the well-tested cycle of technological innovation and experimentation, these kinds of technologies continue to evolve and improve constantly. Utilization and refinement of these techniques should be encouraged by NTIA and RUS, not discouraged.

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[5] Article I, Section 8, Clause 8, "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

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

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

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

By directing NTIA and RUS to ensure that the nondiscrimination principles adhere to the FCC's broadband policy statement,[8] which in turn provides that consumers are entitled to access the lawful Internet content of their choice,[9] the text of the BTOP itself establishes the appropriate course for NTIA and RUS to follow. In interpreting and applying this principle, the FCC has made clear that Internet service providers, "consistent with federal policy, may block transmissions of illegal content (*e.g.*, child pornography) or transmissions that violate copyright law."[10] The FCC thus recognizes the importance of developing and deploying technologies that ensure the safety and security of the Internet and that misguided regulatory polices can thwart that overarching goal.

Accordingly, whatever approach NTIA and RUS take in defining nondiscrimination obligations in connection with the BTOP, it should adhere to the important principle adopted by the FCC that unlawful conduct and the distribution of unlawful content are not protected by nondiscrimination principles. To do otherwise would conflict with the FCC's definitive interpretation of the broadband policy statement, stifle innovation in promising new technologies and exacerbate the rampant problems related to illegal activities online.

Recommendation

In defining the nondiscrimination obligations imposed on grantees, NTIA and RUS should explicitly state that grantees are permitted and encouraged to use reasonable network management techniques deployed to prevent or deter illegal activity, like copyright infringement.

Respectfully submitted,

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[8] Section 6001, American Recovery and Reinvestment Act of 2009.

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

[10] *See Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-toPeer Applications,* Memorandum Opinion and Order, 23 FCC Rcd 13028, ¶ 50 (2008). Former FCC Commissioner Deborah Taylor Tate's statement further elaborated on the meaning of this part of the order by noting that network managers must play a key role "in filtering and guarding their platforms against the growing problem of illegal content distribution, and the potentially adverse effect regulatory prescription can have on stemming its growth." *Id.*, Statement of Commissioner Deborah Taylor Tate.

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