

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	GN Docket No. 09-191
Preserving the Open Internet)	
)	WC Docket No. 07-52
Broadband Industry Practices)	

COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA

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The Recording Industry Association of America (“RIAA”), on behalf of its member companies, hereby respectfully submits these comments in response to the Commission’s October 22, 2009 Notice of Proposed Rulemaking in the above-captioned proceeding (hereinafter “Open Internet NPRM”).

INTRODUCTION AND SUMMARY

The RIAA is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the most vibrant and innovative music labels in the world and create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States.

Our members’ business models are increasingly dependent on the Internet to connect their music, sound recordings, and music videos with consumers. We expect the Internet and mobile networks to be our members’ primary means of distribution, marketing, and communication in the near future. In order to bring our members’ music to fans online, our members work regularly and closely with creators and technology companies that participate in bringing content to consumers, from large digital entertainment services, mobile operators, and

ISPs to many smaller yet vital technology companies across the digital spectrum. As a result, we have a deep interest and vital stake in an Internet that is open and that promotes new business models and applications for the distribution and performance of music. It is essential that the Internet be a place in which copyrights are respected and in which the lawful commercialization of entertainment content can flourish. It is thus critically important that ISPs have reasonable tools at their disposal to address the unauthorized exploitation of copyrighted works, which frustrate the viability of lawful forms of online commerce, waste network resources, crowd out legitimate applications, and harm our culture.

The RIAA appreciates that the Commission, along with several lawmakers such as Chairmen Waxman and Markey,¹ have already recognized the importance of these principles. The Open Internet NPRM acknowledges that the proposed Open Internet principles should not apply to “unlawful” content, such as copyrighted works distributed without authorization, and that ISPs may engage in reasonable network management practices to address such uses of their networks.² Unlawful use of the Internet to traffic in unauthorized copies of copyrighted works, including music and music videos, frustrates both legitimate efforts to bring such entertainment content to consumers online and the ability of law-abiding Internet users to use networks to their fullest potential. In these Comments, we encourage the Commission to stay its course and explicitly support, encourage and endorse ISP efforts to fight piracy. These efforts should include, but not be limited to, adopting reasonable network management practices that reduce the

¹ See Ed Markey, *Time for Net Neutrality*, The Huffington Post, Oct. 29, 2009, http://www.huffingtonpost.com/rep-ed-markey/time-for-net-neutrality_b_339480.html (stating that Chairman Markey’s proposed “net neutrality” bill, cosponsored by Chairman Waxman, calls for a policy that permits ISPs to “thwart illegal content”).

² *In re Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13114, ¶ 139 (Oct. 22, 2009) (“Open Internet NPRM”).

unauthorized copying and exploitation of copyrighted works and encourage users to engage in legitimate business transactions for music.

We also ask the Commission to ensure that its final rules enable such beneficial antipiracy practices to be effective as a practical matter. Specifically:

- The Commission should ensure that its final rules provide flexibility to ISPs to address illegal activity through practices that are commensurate with the scope of the problem. The final rules should be forward-looking and recognize that methods available to ISPs tomorrow may look very different from those available today. Likewise, in crafting solutions, the perfect should not be the enemy of the broader societal good reflected in our Constitution and centuries of policy to incentivize the creation of new content.
- The Commission should clarify that its proposed rules governing “Transparency” require disclosure of sufficient detail so that consumers can make informed decisions whether or not to purchase the Internet access services, but do not require ISPs to reveal the details of their antipiracy practices at such a level of detail as to allow them to be circumvented.
- While at this time we do not offer any opinions on the broader issues raised by the Open Internet NPRM, we urge the Commission to examine those issues cautiously in order to avoid any unintended consequences.

I. THE RECORDING INDUSTRY HAS A VITAL STAKE IN THE OPEN INTERNET DEBATE.

The member companies of the RIAA have a vital stake in the Commission’s consideration of rules for an open Internet. RIAA members are embracing the transition from traditional business models to the opportunities afforded by the Internet and other digital platforms. As such, RIAA members support open Internet standards that will allow content creators and providers to thrive.

At the same time, it is no secret that the recording industry has suffered debilitating losses from the unauthorized copying and distribution of our music online. Digital piracy – or better,

digital theft³ – threatens the legitimate commercialization of music and music videos online and through other outlets, putting lawful distribution channels at risk of being crowded out by unlawful means to access the very same content. Digital theft also consumes vast amounts of bandwidth, jeopardizing the ability of the nation’s broadband networks to handle the inevitable growth in traffic in coming years as content industries – including the music, film, television, games, and software industries – make more content and innovative offerings available online. The RIAA’s members thus have an interest in policies that inhibit online piracy: not only to limit the direct harm to creators, content owners, and those who work with them, but also to ensure that Internet resources remain available to deliver the lawful online entertainment offerings that consumers demand.

A. Content Industries Are Critical Contributors To The Nation’s Economy.

Our nation’s historically strong protection for the rights of copyright owners – enshrined in Article I, Section 8, Clause 8 of the Constitution – has led the United States to be the world leader in creative industries. Industries that create copyrighted works, or “content” industries, are one of the nation’s greatest economic success stories. The “core” content industries – representing fields dependent on copyright protection such as sound recording, music publishing, filmmaking, and computer and gaming software – directly account for large portions of the nation’s GDP and employment, accounting (by some estimates) for over 6% of GDP, over 22% of real economic growth, and the employment of over 5.5 million Americans as of 2007, or more than 4% of the nation’s workforce.⁴ Indeed, in an economy in which the United States runs perennial trade deficits, the nation’s content industries are the rare exception to the rule,

³ As Justice Breyer so aptly put it, the unauthorized transfer of copyrighted digital music and sound recording files over the Internet is simply “garden variety theft.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 961 (2005) (concurring opinion).

⁴ Stephen E. Siwek, *Copyright Industries in the U.S. Economy, 2003-2007 Report*, 2009, at 3 & 5-6, available at <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>.

generating positive trade balances year after year through foreign sales of more than \$125 billion as of 2007.⁵ And those are just the direct contributions of content industries. Content industries have massive “upstream” and “downstream” effects on the rest of the economy.⁶

B. The Recording Industry Has Embraced And Increasingly Depends Upon The Internet To Connect Consumers With Content.

The music industry has fully embraced the Internet as a major channel for connecting with consumers to market and provide access to our copyrighted works. Sales of digital albums and digital singles continue to break new records each year,⁷ as personal computers, portable devices, and smart phones increasingly displace physical media as the primary means for consuming music. For example, Soundscan has reported that in 2009 digital downloads accounted for nearly 40% of legitimate sound recording sales in the U.S.⁸ Accordingly, the industry has greatly expanded the range of options available to consumers for accessing, listening to, enjoying, and experiencing music online as it continues to invest in innovative online business models. Today, fans can listen to music through streams, choose their favorite songs on demand, subscribe to unlimited download services, or purchase their own digital copies. Online business models for lawful music consumption have included, for example, webcasting or on-demand streaming, free-to-the-consumer advertising-based models, subscription services, the provision of ongoing value-added digital content to customers, and

⁵ *Id.* at 7.

⁶ Stephen E. Siwek, Institute for Policy Innovation, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, Policy Report 189 (Oct. 2007), at 1-2, available at [http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/02DA0B4B44F2AE9286257369005ACB57/\\$File/CopyrightPiracy.pdf](http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/02DA0B4B44F2AE9286257369005ACB57/$File/CopyrightPiracy.pdf).

⁷ For example, see the RIAA’s *2008 Year-End Shipment Statistics*, available at <http://76.74.24.142/D5664E44-B9F7-69E0-5ABD-B605F2EB6EF2.pdf>. See also Nielsen, *2009 U.S. Music Purchases Up 2.1% Over 2008; Music Sales Exceed 1.5 Billion for Second Consecutive Year*, 2010, available at <http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/01/Nielsen-Music-2009-Year-End-Press-Release.pdf>

⁸ See Nielsen, *2009 U.S. Music Purchases Up 2.1% Over 2008; Music Sales Exceed 1.5 Billion for Second Consecutive Year*, 2010.

digital sampling options. The range of authorized partners spans hundreds of companies from iTunes, AmazonMP3, Rhapsody, Napster, MySpace Music, and eMusic to others such as Slacker, Artist Direct, Lala, Vevo, iLike, and Last.fm. The RIAA further estimates that by 2011, more than half of the industry's revenue will be based on legitimate online consumption of music. In sum, we expect that the Internet will become the recording industry's primary channel for communicating with customers and for distributing content.

C. Digital Theft Continues To Threaten Content Industries As The Content Business Increasingly Moves Online.

As the Internet has allowed content owners to offer new entertainment experiences to consumers, it has also created unprecedented opportunities for the unauthorized and illegal exploitation of copyrighted content. The challenges faced by the music industry are well known. From Napster to Kazaa to Grokster to LimeWire, the music industry has battled those seeking to profit from illegal business models. While the music industry has achieved success against this profiteering in court, justice often takes too long and new forms of theft emerge that interfere with the adoption of new offerings in the interim. Today, examples of techniques to steal content are numerous, more sophisticated, and harder to combat through the courts alone. For example, in addition to open peer-to-peer networks, there are now websites that stream unauthorized copies of content, online "lockers" from which content is made available at a central location for unauthorized copying by anyone in the world, and unauthorized distribution of music via instant messaging, social networking sites, and bulletin boards. Often, unauthorized copies of movies or songs are made available via such outlets even before they are released commercially. Such piracy continues to be a major drag on the economic health of the nation's content industries, causing tens of billions of dollars in economic damage each year.

Music files (as opposed to movies or gaming software) are particularly easy to replicate and transmit online, due to their comparatively small size. Thus, the sound recording industry was among the first to be significantly impacted by the problem of large-scale digital theft. The International Federation of the Phonographic Industry (“IFPI”) estimates that worldwide more than 40 billion songs were illegally downloaded via file-sharing in 2008 alone, resulting in global online music piracy rate of more than 95%.⁹ As available Internet bandwidth has expanded in recent years, the problem has also seriously affected other content industries, along with the music industry’s higher-bandwidth products, like music videos.

Music has been the canary in the coal mine when it comes to digital theft, and other content industries are now under assault as well. The economic damage wrought by the ongoing theft of copyrighted content is enormous. By recent estimates, copyright piracy caused over \$58 billion in economic harm to the United States in 2005, over \$23 billion of it in direct revenue losses to “core” American copyright businesses, and has cost the American economy over 373,000 jobs.¹⁰ Although more “traditional” forms of piracy (such as counterfeit CDs) continue

⁹ IFPI, “Digital Music Report 2009,” at 22, *available at* http://www.ifpi.org/content/section_resources/dmr2009.html.

¹⁰ Stephen E. Siwek, Institute for Policy Innovation, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, Policy Report 189 (Oct. 2007), at 11, *available at* [http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/02DA0B4B44F2AE9286257369005ACB57/\\$File/CopyrightPiracy.pdf](http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/02DA0B4B44F2AE9286257369005ACB57/$File/CopyrightPiracy.pdf); *see also* Stephen E. Siwek, Institute for Policy Innovation, *The True Cost of Sound Recording Piracy to the U.S. Economy*, Policy Report 188 (Aug. 2007), *available at* [http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/\\$File/SoundRecordingPiracy.pdf](http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/$File/SoundRecordingPiracy.pdf) at 14-15 (estimating that as a consequence of global and U.S.-based piracy of sound recordings, the U.S. economy loses \$12.5 billion in total output annually, over 71,000 jobs, \$2.7 billion in workers’ earnings and \$422 million in tax revenue). In virtually every year in the past decade, the major record companies have been forced to reduce their work force, resulting in a 60% decline in the number of people they directly employ in the United States. While piracy is not the sole factor contributing to this job loss, clearly massive unauthorized online copyright infringement is a significant contributor to the current state of the U.S. recording industry.

to harm music sales as well, digital piracy from online file-trading constitutes a major component, with study after study confirming the self-evident proposition that the massive unauthorized sharing of copyrighted sound recordings on the Internet depresses music sales.¹¹

As we move increasingly to Internet-based business models for distributing and streaming music and music videos online, pirated digital copies will compete even more directly with legitimate products and services. This undermines incentives for record labels and others to invest in artists and innovative ways to get the music to music fans.¹² As it is, only 10-15% of albums produced by the major record labels recoup their investment, much less become significantly profitable. It is these successful albums that help fund ongoing investment in new and up and coming artists. However, of those albums that are successful, the measure of success has dropped significantly. For example, according to Soundscan, in 1999 the top 10 selling album titles in the United States sold an aggregate of 54.7 million albums. In 2009, the top 10 selling album titles only sold an aggregate of 21.4 million albums, a decline of more than 60%. Given this alarming trend, the possibility of a reasonable return on investment – and, with it, the appetite for investing in music – will continue to erode unless significant steps are taken to move online music consumption away from a culture in which the rule of law is flouted and to advance a culture that embraces legitimate avenues for enjoying music.

¹¹ See generally Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & Econ. 1 (2006); Rafael Rob & Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, 49 J.L. & Econ. 29 (2006); Alejandro Zentner, *Measuring the Effect of File Sharing on Music Purchases*, 49 J.L. & Econ. 63 (2006). We understand that the precise quantification of the harm caused by digital piracy has been the subject of public debate, particularly from members of the advocacy community who wish to downplay the seriousness of the problem. It is not our intent to engage in such a debate here, for we believe that the *fact* of massive harm to the nation's content industries from online piracy is undeniable.

¹² For example, see *Finnish label will not sign more artists until piracy stops*, January 5, 2010, available at <http://www.afterdawn.com/news/archive/21144.cfm>, in which a Finnish record label declared it would no longer sign new artists due to illegal file-sharing concerns.

More fundamentally, the large-scale theft of copyrighted materials undermines incentives for artists to create and distribute their creations. Digital theft means less art is produced, a harm that cannot be precisely measured, but whose impact on our culture is undoubtedly profound. Music is woven into the fabric of our lives. Each person has his or her own personal soundtrack through which music connects the events experienced in life. We therefore should not forget the social toll that digital theft will have. As artist rosters are pared and future artists opt for other careers, digital theft has the effect of quieting countless voices we will never have the privilege to hear. For years, artists have remained silent, fearing the backlash of a generation now used to taking content for free. But that is changing and the chorus of those warning of the damage is growing. As singer-songwriter Lily Allen said, illegal file sharing “is a disaster as it’s making it harder and harder for new acts to emerge.”¹³

Indeed, while the great artists make success look easy, succeeding takes years of perfecting one’s craft and often many years before achieving recognition and commercial success. There are numerous icons like Bruce Springsteen who did not achieve commercial success immediately but were afforded the opportunity to reach an audience that has supported the creation of decades of works treasured by millions of fans. Digital theft presents a formidable obstacle to such stories in the future, thus resulting in the loss of creative works that might raise our social consciousness and improve our everyday lives. The United States has been a shining example of art and expression. Now, with digital theft unchecked, we are

¹³ Bono, Paul McGuinness and others have expressed similar concerns with the impact that online copyright theft has on new artists. Bono, *Ten for the Next Ten*, The New York Times, Jan. 3, 2010, at WK10; Paul McGuinness, Speech at Midem, Cannes (Jan. 28, 2008), *available at* http://www.billboard.biz/bbbiz/content_display/industry/e3i062b16e707aa99916c212e660cbffd3e.

witnessing a direct and unprecedented attack on our cultural foundation and our ability to lead the world in creativity.

II. ONLINE PIRACY UNDERMINES THE COMMISSION’S INTERNET AND BROADBAND POLICIES.

In addition to its effects on our culture, the content industries, U.S. jobs, and on the nation’s economic health, online theft of copyrighted works frustrates the Commission’s Internet and broadband policies. Internet piracy harms legitimate online channels for bringing entertainment media and other copyrighted content to consumers, hindering the creation of vibrant Internet services that use copyrighted content to enrich the online experience. In addition, online theft of copyrighted materials clogs up vast amounts of bandwidth, crowding out and degrading lawful online activity while unnecessarily inflating bandwidth requirements and thus increasing the costs of expanding broadband networks.

Piracy, particularly piracy conducted by high-volume users, notoriously hogs bandwidth. Peer-to-peer file-sharing services – a favorite means of unlawfully stealing copyrighted material – represent a huge portion of the traffic on the Internet today. Based on recent estimates, peer-to-peer file-sharing applications represent over 20% of the total bytes that traverse the Internet and 17% of the bandwidth used during peak hours.¹⁴ Moreover, in an average month, the top 1% of subscribers account for 25% of total Internet traffic, and 40% of the upstream traffic; more than 46% of top subscribers’ traffic comes from file-sharing applications.¹⁵ So too in the mobile context, where, by recent estimates, peer-to-peer file-sharing is the “single largest factor leading to cell congestion,” taking up 21% of bandwidth on the average cell and 42% in the top 5% of

¹⁴ Sandvine, *2009 Global Broadband Phenomena*, Oct. 2009 at 6, 9, available at <http://current.com/1diai4c>.

¹⁵ *Id.* at 14-15.

cells.¹⁶ The reality is that – now as in the past – the overwhelming majority of this traffic represents copyright piracy.¹⁷

Put bluntly, huge amounts of the Internet’s bandwidth are tied up in unlawful traffic. Piracy of copyrighted works wastes scarce network resources and crowds out legitimate uses of the network. It costs more to bring broadband to additional areas because of this inflated bandwidth usage. As we, along with our partners, launch music services depending on higher bandwidth, we have a particularly strong interest in ensuring an Internet in which media applications – which, unlike file-sharing applications, have a low tolerance for network delay – can function smoothly and without the network congestion caused by piracy-inflated traffic.

More generally, rampant copyright infringement on the Internet contributes to a culture of lawlessness online that limits the growth of electronic commerce, destroys consumer confidence in online transactions, and ill-serves the Commission’s goals of encouraging a vibrant Internet. It has created a generation of Americans that do not respect others’ creative contributions online, because it is so easy and feels so anonymous to make and obtain unauthorized copies. Most people would never consider stealing a CD or DVD from a store shelf. Yet, too many of those same people do not think twice about stealing the digital version of the identical content online. Should this culture continue it will limit the growth of online commerce and the economic potential of the Internet.

¹⁶ Allot Communications, *Global Mobile Broadband Traffic Report*, Q2/2009, July 2009, at 2, available at http://www.allot.com/download/Allot_GMBT_Report.pdf.

¹⁷ See *Joint Comments of the American Federation of Television and Radio Artists AFL-CIO et al., in the Matter of a National Broadband Plan for our Future*, GN Docket No. 09-51, submitted June 8, 2009, at 5; see also Alexandre M. Mateus and Jon M. Peha, *Dimensions of P2P and Digital Piracy in a University Campus*, Proceedings of 2008 Telecommunications Policy Research Conference, Sept. 2008, at 12, available at http://digitalcitizen.illinoisstate.edu/press_presentations/documents/mateus-peha-TPRC-paper.pdf (finding in monitoring study at Illinois State University that at least 82% of P2P users had transferred or attempted to transfer copyrighted music and movies).

III. THE FCC SHOULD ENCOURAGE INTERNET SERVICE PROVIDERS TO ADDRESS THE PROBLEM OF COPYRIGHT THEFT ON THEIR NETWORKS, AND SHOULD IMPLEMENT OPEN INTERNET RULES THAT DO NOT CHILL PRACTICAL, EFFECTIVE ISP APPROACHES TO SUCH THEFT.

We appreciate that the FCC has recognized the importance of preventing online copyright theft. The Open Internet NPRM acknowledges that “broadband Internet access service providers may reasonably prevent the transfer of content that is unlawful,” that “the open Internet principles . . . do not . . . apply to activities such as the unlawful distribution of copyrighted works,” and that such unlawful distribution “has adverse consequences on the economy and the overall broadband ecosystem.” Open Internet NPRM ¶ 139. Importantly, the NPRM recognizes two crucial principles: first, that the proposed nondiscrimination rule applies only to “lawful” content, *id.* ¶ 104, and second, that “reasonable network management” includes “reasonable steps to address unlawful conduct on the Internet.” *Id.* ¶ 139.

We welcome these principles and their implicit recognition of the important role ISPs must play in combating piracy. Online copyright theft is a complicated problem with no easy solutions or “silver bullets.” There are practical limitations on the ability of copyright owners to tackle the problem of online piracy on their own. Copyright owners often lack sufficient information about the full scope of the theft of their content on the Internet, much of which is dispersed, anonymous, and prohibitively resource-intensive for outsiders to track.

Additionally, given the financial advantages of digital piracy, there is an incentive for digital pirates to continuously devise new ways to avoid detection and enforcement while distributing copyrighted works without authorization. Indeed when faced with identification or enforcement actions by copyright owners in the past, those engaged in digital piracy have responded by using new technologies or relocating to countries with less-effective copyright

enforcement systems. The reality is that effective approaches to reducing online piracy require cooperation by multiple players.

ISPs are in a unique position to limit online theft. They control the facilities over which infringement takes place and are singularly positioned to address it at the source. Without ISP participation, it is extremely difficult to develop an effective prevention approach.

We thus urge the Commission to adopt rules that not only allow ISPs to address online theft, but actively encourage their efforts to do so. Crucial to this project, the Commission must ensure that its Open Internet rules do not have a chilling effect on such efforts. To ensure that ISPs will not forgo antipiracy efforts for fear of running afoul of the nondiscrimination or other Open Internet rules, the Commission should take several steps as it formulates its final rules. First, the Commission should ensure that its final rules provide flexibility to ISPs to address illegal activity through practices that are commensurate with the scope of the problem, acknowledging that perfection is not required and that methods available to ISPs tomorrow may look very different from those available today. Second, the Commission should clarify that its proposed rules governing “Transparency” require disclosure of sufficient detail so that consumers can make informed decisions whether or not to purchase the Internet access services, but do not require ISPs to reveal the details of their antipiracy practices at such a level of detail as to allow them to be circumvented. Finally, the Commission should be cautious in its examination of the broader issues in the Open Internet NPRM to avoid unintended consequences that could, among other things, hinder the incentives for creating a vibrant Internet.

A. ISPs Must Be Permitted Flexibility To Adapt Their Network Management Practices To Address Changing Methods And Technologies For Transmitting Unlawful Content In The Future.

We urge the Commission to permit ISPs flexibility to adapt their network management practices to address changing methods and technologies for transmitting unlawful content in the future. Experience has taught that online piracy adapts to detection and enforcement efforts. For example, following the industry's enforcement campaign against centralized file-sharing services like Napster, much of the illegal reproduction and distribution of copyrighted music moved to decentralized software applications such as Grokster and Streamcast, and then from there to decentralized torrent-based applications. Similarly, as the Internet has itself evolved additional functionalities, copyright thieves have launched new methods of stealing and distributing copyrighted entertainment content online, such as converting Usenet from a forum for text-based messaging into a forum for digital piracy. Although some in the advocacy community have claimed that the changing nature of Internet piracy renders enforcement efforts on the Web pointless, the more accurate conclusion is that effective online copyright enforcement requires the ability to evolve and flexibility to react to new types of threats. The online piracy of tomorrow will not look like the online piracy of today, and the effective methods to prevent it, by necessity, will change as well.

Should the Commission provide in its final order examples of specific permissible network management practices, we urge the Commission to emphasize that any examples it provides are illustrative rather than exhaustive. Indeed, as illustrations, there may be some benefit to naming a few policies that ISPs can implement now. For example, we think it is clear that any ISP should be able to enforce its terms of service or acceptable use policy that prohibits copyright infringement without fear that any such action would be deemed to violate any nondiscrimination or other Open Internet rules. Similarly, there should be no doubt that

voluntary initiatives such as a graduated response program to educate, notify, and warn users about identified instances of infringement, and which impose escalating consequences on subscribers who fail to heed such warnings, are permissible under the Open Internet rules. Indeed, the FCC should encourage these initiatives. Additionally, the Commission should note that ISP efforts to highlight the availability of legitimate services as part of their antipiracy efforts are reasonable.

At the same time, it is absolutely critical that the Commission's final rules not "freeze in time" the approaches that ISPs are permitted to take to address the problem of online piracy using their networks. Neither ISPs nor other innovators should feel that they cannot create new technologies or other approaches to combat copyright theft because the final rules are too restrictive.¹⁸

Lastly, the final rules should permit sensible and practical solutions, and should incorporate the spirit of the old adage "the perfect should not be the enemy of the good." As described in detail above, digital theft is a wide-scale, rampant, and complex problem. ISPs should have flexibility to craft reasonable solutions, so long as they are not a pretext for anti-competitive actions, without fear that such practices might run afoul of the nondiscrimination rules.

¹⁸ Some argue that current content identification techniques are too much of a blunt instrument and too prone to false-positives. However, content identification techniques continue to improve. For example, in its FAQ regarding its paper investigating P2P notice techniques, the University of Washington professors noted that the problems they identified should be addressed by adopting the RIAA approach, stating that "First, we encourage monitoring and enforcement agencies to adopt best practices such as those used by the RIAA to monitor Gnutella. These practices include greater openness and transparency regarding the processes used. Second, we hope that network operators will sanity check information provided in DMCA complaints to eliminate false positives to the greatest extent possible." *See* <http://dmca.cs.washington.edu/faq.html>.

B. “Transparency” Should Not Inadvertently Undercut Legitimate And Realistic Antipiracy Efforts.

We next address the Commission’s proposed transparency requirement.¹⁹ We applaud the general policy behind requiring disclosure of ISPs’ network management practices, so that end-users and application developers can make informed decisions about their use of the ISPs’ systems. Sound recording companies and their partners will almost certainly benefit from such transparency and disclosure as they roll out new products, services, and applications to bring music to consumers in the future.

At the same time, the RIAA urges the Commission to implement its transparency requirements in a manner that does not undercut legitimate efforts by ISPs to combat and prevent digital piracy. As we have already explained, online piracy has historically adapted its methods and technologies to avoid detection and enforcement. This is a “cat and mouse” game. The RIAA is concerned that requiring ISPs to disclose too much information about their network management practices, at least insofar as those practices pertain to the prevention of copyright infringement, will simply give pirates a roadmap for designing techniques to circumvent those measures. Detailed disclosure from ISPs regarding their antipiracy network management practices also risks encouraging infringement-minded users to “comparison shop” among ISPs to choose the one with the weakest or most easily avoided copyright practices. Likewise, excessive disclosure requirements could create competitive pressures for ISPs to abandon serious efforts to prevent copyright infringement, lest they lose customers who want the option of using their Internet connection for unlawful purposes.

We do not believe that this tension is inevitable; we merely propose that the Commission take into account the costs of too much disclosure in formulating its final rules. ISPs adopting

¹⁹ Open Internet NPRM at ¶ 119 & Appx. A § 8.15.

network management practices targeting illegal conduct should not be required to disclose those practices in a way that effectively encourages or enables those practices to be circumvented. To the extent more detailed disclosure requirements are deemed necessary to address network management practices geared at easing congestion or for other purposes, it may make sense to subject different categories of network practices to different disclosure requirements. Otherwise, the FCC's laudable recognition of the role that ISPs should play in combating the illegal transmission of copyrighted works online could be undercut.

C. The Commission Should Proceed Cautiously in Framing the Rules.

The Commission should exercise caution such that whatever steps it takes in this rulemaking do not limit the market's ability to address the issue of online piracy. Overbroad relief would impair the public's interest in accessing music over the Internet, and artists and record companies' right to compensation that is the engine for the creation of new music for the American public. For example, a blanket prohibition on all efforts to curb online piracy would constitute a drastic step with seismic effects not only on ISPs, but also on a plethora of industries including but not limited to software companies, communications industries, and, of course, content providers like the record industry that are concerned about piracy. While we do not believe the Commission agrees with this view, we note that if the inflexible, doctrinal approach suggested by some commenters is adopted, this might be the practical effect. Thus, while the RIAA does not at this time offer any opinion on the broader issues noted in the Open Internet NPRM, the RIAA does urge that the Commission should take care not to inadvertently protect illegal traffic over the Internet or unintentionally create road blocks to innovative, lawful business models for accessing and enjoying music.

