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

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

Joint Comments of Computer and Communications Industry Association, Consumer Electronics Association, Electronic Frontier Foundation, Home Recording Rights Coalition, NetCoalition, and Public Knowledge on the Matter of Copyright Infringement in the Open Internet Rules

The undersigned organizations represent a diverse coalition of industry groups, trade associations, and public interest groups committed to ensuring that the openness of the Internet is not unduly restrained by intellectual property law. This coalition, composed of entities with widely varying opinions on the Commission's proposed rules, takes no shared position on the main focus of the rules. However, we join together in these comments urging the Commission to carefully delineate its definition of "reasonable network management" in its proposed open Internet principles, in particular with regard to how it deals with questions of copyright infringement.

Each of the six proposed open Internet principles in the Notice of Proposed Rulemaking is made subject to the requirements of "reasonable network management."[1] The NPRM defines "reasonable network management" as:

> reasonable practices employed by a provider of broadband Internet access service to
>
> > (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns;

[1] NPRM Appendix A.

(ii) address traffic that is unwanted by users or harmful;

(iii) prevent the transfer of *unlawful content*; or

(iv) prevent the *unlawful transfer* of content.[2]

The third and fourth elements of this definition are problematic. In order to protect the free speech interests of law-abiding Internet users, the Commission should not treat copyright enforcement and other ISP efforts to block, interfere, or discriminate against purportedly "unlawful content" or "unlawful transfers of content" as "reasonable network management" that would justify a deviation from open Internet principles. Because the proposed regulations by their terms do not encompass "unlawful content" or "unlawful transfers" in the first place, there is no need for an exception to permit ISPs to block such transfers—nothing in the six principles restricts ISPs from blocking unlawful content or activities. Accordingly, copyright enforcement exceptions to the six principles run the risk of excusing overbroad techniques that interfere with *lawful* activities. In other words, under the proposed regulations, an ISP would be free to employ undisclosed mechanisms to discriminate against *lawful* content and *lawful* transfers on the basis of application, protocol, or content, as long as it was able to successfully argue that it was attempting to restrict *unlawful* content. This "copyright loophole" cannot be what the Commission had in mind.

The Commission should be extraordinarily reluctant to adopt any exception that permits ISPs to block lawful activities as a side effect of efforts to block copyright infringement or unlawful conduct. After all, ISPs are poorly placed to determine whether or not transfers of content are infringing or otherwise unlawful, a task generally reserved to attorneys, courts, and

[2] *Id.* (emphasis added).

law enforcement. An exception permitting overbroad mechanisms would encourage ISPs to use systems that would encourage more false positives—and thus more blocking of lawful transfers of content—than otherwise. Also, the exception is not needed—both ISPs and content owners themselves (the entities better placed to determine infringement) already have a range of tools at their disposal to battle copyright infringement.

In short, the issue raised by broadening the "reasonable network management" exception to include copyright enforcement and the blocking of unlawful content transfers is not whether ISPs may undertake these efforts, but rather whether they may inflict collateral damage on *lawful* traffic when they do so.

A. The proposed regulations do not protect unlawful content, and thus there is no need for an exception for copyright enforcement or unlawful content.

The structure of the proposed regulations makes exceptions for copyright enforcement or other efforts to block "unlawful content or traffic" unnecessary. As drafted, the six principles already exclude unlawful content from their scope. For example, the principle of nondiscrimination provides that an ISP "must treat *lawful* content, applications, and services in a nondiscriminatory manner."[3] The first, second, and third principles include similar language limiting their scope.[4] And the NPRM in explaining the principles confirms that they are not meant to protect unlawful content or activities.[5]

Accordingly, there is no need for an exception (whether included in the definition of "reasonable network management" or otherwise) to allow ISPs to block unlawful content or unlawful transfers of content. By their terms, nothing in the six principles purports to restrain an

[3] *Id.*
[4] *Id.*
[5] NPRM ¶ 96.

ISP from acting to block or otherwise discriminate against unlawful content or activities. The six principles only come into play when an ISP employs practices, whether in the name of copyright enforcement or otherwise, that interfere with a consumer accessing *lawful* content, using *lawful* devices, running *lawful* applications, or accessing *lawful* services.

In other words, *copyright enforcement efforts will only run afoul of the six principles to the extent they inflict collateral damage on lawful content and activities*. Viewed in this light, there is no basis for granting a general exception in the name of copyright enforcement or blocking otherwise unlawful content. Rather, it is precisely the goal of the six principles to *prevent* ISPs from engaging in practices that improperly sacrifice *lawful* content or activities in the name of blocking copyright infringement or other unlawful content.

B. Any exception for reasonable network management should be limited to practices designed to ensure the proper technical functioning of the network.

"Reasonable network management" is a term that is generally understood as relating to practices promoting the proper technical functioning of an ISP's network, not to questions regarding whether any particular subscriber activity infringes copyright law. The first two categories in the NPRM's proposed definition of the term reflect this understanding, addressing "reasonable practices employed by a provider of broadband Internet access service to (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns; [or] (ii) address traffic that is unwanted by users or harmful."[6]

Defining as "reasonable network management" the blocking of lawful content or activities for the purposes of copyright enforcement would undermine a basic goal of this proceeding. The Commission has stated that a major objective of this proceeding is to protect

[6] NPRM, Appendix A.

consumers of Internet access services that cannot or may not be adequately protected by free market forces. An exception for "reasonable network management" is congruent with this goal, as the interests of consumers and ISPs will generally be aligned where genuine network management is at issue—better network management delivers a better product from the consumer's point of view.[7] In light of the alignment of incentives between ISPs and customers on these issues, ISPs should be able to reasonably engage in such practices under the proposed principles.

The two categories that follow—which turn on the legality of the content or transmission—are entirely distinct. Here, the interests of ISPs and consumers may diverge. Although ISPs have been under considerable public pressure to increase their efforts to address online copyright infringement, for example, the pressure has not been from customers, but rather from the entertainment industry. Questions relating to the legality of traffic frequently interject the interests of third parties into the commercial relationship between an ISP and its customer. These third party interests are not related to improving the technical functioning of the network, nor to meeting the demands of customers.[8] ISPs may come under great pressure from these third parties to interfere with otherwise lawful customer activities for reasons unrelated to the provision of reliable or high quality internet service. Customers whose lawful communications would suffer as a result of ISPs' arrangements with third parties may have difficulty finding an alternate broadband internet access provider. In light of the misalignment of incentives between ISPs and customers on measures taken to block *unlawful* content and activities, it is sensible to

[7] *See* Mehan Jayasuria *et al.*, *Forcing the Net Through a Sieve: Why Copyright Filtering is Not a Viable Solution for U.S. ISPs* 43-44 Public Knowledge, http://www.publicknowledge.org/paper/pk-filtering-whitepaper_2 (noting an additional 100 ms of delay translated into a 1 percent drop in sales for Amazon.com, and that a 500ms delay resulted in a 20 percent drop in traffic for Google).

[8] In fact, in light of potential mergers in the ISP and entertainment industries, there is reason to suspect that copyright enforcement might be used as a pretext to justify actions undertaken for anticompetitive reasons.

believe that the six principles should intervene to protect the interests of those whose *lawful* activities might get swept up in overbroad efforts to block or discriminate against infringing or otherwise unlawful content.

C. The risks to lawful content and activities from overbroad copyright enforcement mechanisms are real.

The risks posed to innocent users by overbroad measures aimed at curtailing copyright infringement are far from hypothetical. A group of researchers at the University of Washington, for example, reported that weaknesses in online copyright enforcement techniques resulted in the university receiving numerous infringement allegations for IP addresses that were exclusively used by laser printers that were unable to share any copyrighted files. The researchers concluded that "[t]he potential for false positives and implication of arbitrary [IP] addresses undermines the credibility of monitoring and creates a significant inconvenience for misidentified users (if not financial and/or legal penalties)."[9]

A computer science researcher at Princeton similarly found that dozens of infringement notices erroneously identified a research system he operated as a source for BitTorrent sharing, even though no BitTorrent clients were running on the system. "Thus, we can fairly definitively conclude that the [enforcement agent sent the notices] never actually tested the peer for actual infringement: not even by trying to connect to the client's address, let alone determining whether the client was actually uploading or download any data, and let alone valid data corresponding to the copyrighted file in question."[10]

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[9] Piatek, Kohno & Krishnamurthy, Challenges and Directions for Monitoring P2P File Sharing Networks, or, Why My Printer Received a DMCA Takedown Notice (2008).

[10] Mike Freedman, Inaccurate Copyright Enforcement: Questionable "best" practices and BitTorrent specification flaws, Freedom To Tinker blog, Nov. 23, 2009.

YouTube's automated "Content ID" system, currently among the most advanced systems to identify copyrighted works, has frequently been used in ways that have censored noninfringing materials.[11] These situations underscore that while *identifying* a copyrighted work is itself a technically daunting task, making a determination about its *legality* is even more difficult. In fact, in its high-profile lawsuit against YouTube, Viacom recently had to withdraw infringement allegations regarding 250 works after an apparent realization that those works were, in fact, authorized to be on YouTube or otherwise not infringing. If Viacom's own lawyers make mistakes regarding the legal status of its own works, it is certain that ISPs will make similar mistakes. Those mistakes will imperil users' access to lawful content and cause one of the very problems that the Commission is addressing with this NPRM.

D. There are many existing alternatives for addressing copyright infringement and unlawful content that do not impact this proceeding.

There is no evidence that lawful content or activities must be sacrificed in order to make headway against copyright infringement. ISPs can use many mechanisms that would not run afoul of the six principles to curtail unlawful activity, including copyright infringement. In addition, content owners themselves (who are in any event better placed to determine infringement than ISPs) already have a range of tools at their disposal to battle copyright infringement. Copyright infringement is subject to stiff civil remedies—up to $150,000 per work for willful infringement—as well as criminal penalties. The Digital Millennium Copyright Act (DMCA) has given ISPs strong incentives to respond expeditiously to "takedown notices," giving copyright owners a powerful tool to remove infringing material from the Internet without

[11] Corynne McSherry, Careless Copyright Owners, Automated Takedowns: A Disaster for Online Creativity, ACSblog, Mar. 28, 2009, available at http://www.acslaw.org/node/13057 (last visited Jan. 12, 2010).

resort to the courts.[12] Many ISPs have also agreed to forward infringement notices to subscribers—another mechanism that falls outside the scope of the six principles. Also, nothing in the six principles would prevent an ISP from choosing not to do business with subscribers who engage in illegal activities.

Respectfully Submitted,

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[12] At the same time, content owners who use these legal mechanisms can be held accountable when they do so improperly. 17 U.S.C 512(f); *Fogerty v. Fantasy*, 510 U.S. 517 (1994). Thus innocent infringers and customers whose use of material is protected by fair use, first sale or other doctrines have some recourse when they are falsely accused. By contrast, a customer whose Internet communication is blocked or degraded has only two options, if she learns about the interdiction at all. She may try to find another provider (and fail, since most Americans have only one broadband access choice, and at most face a duopoly) or figure out how to "bypass" the filter though encryption or some other mechanism.