August 6, 2010

U.S. House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Waxman and Ranking Member Barton:

We commend you on your valuable service and applaud your work to provide guidance to the Federal Communications Commission (FCC) regarding its authority with respect to the Internet.

The question Committee staff asked us to address is: “In any targeted legislation on the FCC’s authority over broadband, what provisions need to be incorporated to ensure the integrity and protection of content against theft?”

The Distributed Computing Industry Association’s (DCIA) relevant experience relates primarily to private sector initiatives for solving specific problems, through such methods as applying joint optimization principles, among affected parties engaged in disputes over Internet business practices.

These efforts are generally conducted through focused working groups of limited duration comprised of directly involved participants that emphasize technological and business solutions in favor of legislative action, agency intervention, or litigation.

Our success in such endeavors has been primarily in matters affecting network providers and application and service providers, where results have included new protocols and commercial deployments, which have significantly improved network efficiency and software performance.

The technical complexity of the issues typically associated with these problem areas and the rapid pace of innovation, somewhat ironically, makes it difficult and undesirable to mandate precise technological solutions that may be outdated by ongoing advancement.

Addressing the behavior of players by defining voluntary business practices has been preferable to dictating exact technological solutions in achieving successful results.

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Ensuring the integrity and protection of Internet content against infringing use is an excellent example of this type of problem. Several attempts to address this through such working groups frankly have not been as successful as our other initiatives because major content providers have not yet been ready to productively engage in these efforts.

This is the primary reason why there are not yet any voluntary best practices (VPBs) that address copyright infringement,

In fact, a major area for further development on the Internet is the creation and adoption of fundamental business models regarding content consumption, replication, and distribution; and in some cases the general types of technological solutions as well as the new business practices that will ensure the integrity and protection of content against copyright infringement in these models.

Numerous web-based technologies have been invented that can offer consumers the means to discover, access, and redistribute content, but large content providers are not yet ready to license these as standard operating procedure for authorized use of their copyrighted works.

Examples include file-sharing applications (e.g., LimeWire); peer-to-peer (P2P) protocols (e.g., BitTorrent); Voice-over-Internet-Protocol (VoIP) programs (e.g., Skype); user-generated content (UGC) websites (e.g., YouTube); instant-messaging (IM) services (e.g., AIM); cyber-lockers (e.g., RapidShare); cloud computing solutions (e.g., Amazon); and commercial search engines (e.g., Google).

Indeed the proliferation of online technologies that can be used to facilitate file transfers and/or real-time streaming of Internet content has grown exponentially, whereas the typical licensing infrastructures of major established content providers have not adjusted to this disruptive change.

This situation is typical when new content delivery mechanisms are initially introduced. There is usually a period of time during which the disruptiveness of such inventions causes widespread copyright infringement before the entertainment industry has had time to react and adjust. This was as true of the VHS player and satellite TV as it is of file sharing and cloud computing.

Once the transition is complete, however, all constituents benefit from the faster, better, and more affordable distribution channels that have been created. More people are able to access a larger variety of Internet content on more attractive terms than ever before and rights holders generate more revenue than previously.

Even if the strategic decisions regarding terms-and-conditions for content utilization by each of these web-based technologies had been made, which they have not, the ability to service the unprecedented number of potential distributors and sales agents in all of these new potential distribution channels does not yet exist.

Before turning to the question we have been asked to address, it is important to note that distributed computing technologies, including P2P downloading and live P2P streaming, do enjoy many fully authorized and licensed implementations by industry-leading companies which serve both the entertainment and enterprise sectors. Typically, these deployments permit the redistribution of content seeded exclusively by rights holders and do not support user-originated content.

The FCC has as its primary purpose in the context of this discussion to protect consumers against harm from abuses of network providers, application and service providers, and/or content providers.

We were therefore somewhat surprised by the question we were asked to address: “In any targeted legislation on the FCC’s authority over broadband, what provisions need to be incorporated to ensure the integrity and protection of content against theft?” And even more-so by the imprecise and provocative word-choice “theft,” when what seems to have been intended is “online copyright infringement.”

Given the FCC’s mandate to protect consumers, we would have expected a question such as: “In any targeted legislation on the FCC’s authority over broadband, what provisions need to be incorporated to ensure the safety and protection of consumers against such dangers as malware, deceptive broadband practices, copyright liability, inadvertent exposure of personal and confidential data, and identity theft?”

The Commission should not be catering to special interests of industry groups, whether network providers, application and service providers, or in this instance, content providers. Each of these groups has valuable intellectual property (IP) that can be threatened by abuse, but no sector’s contributions should be deemed superior in subjective ways to the others.

We believe the FCC’s existing six broadband principles should remain as such to be adopted on a voluntary basis by industry participants, including those representing these three primary categories (network, application/service, and content), as a strategic guide for their behavior. In cases where there appear to be violations of these principles threatening demonstrable harm to consumers, then investigations should be undertaken to ascertain the seriousness of such threats and to determine whether government intervention could realistically bring forth remedies.

Techniques for the Commission's intervention where so warranted should be expanded to include the federal agency equivalent of our private sector working groups, where the directly involved participants can be brought together, still voluntarily, with an assignment to solve the clearly delineated problem within a reasonable timeframe through technological solutions and/or business practice changes, or face the prospect of further governmental involvement.

Above all, the FCC's authority over broadband should encourage ongoing innovation and permit experimentation among network providers, application and service providers, and content providers to develop new business models and technological solutions that entitle consumers to: access lawful Internet content of their choice; run applications and use services of their choice; connect to the network with their choice of devices that do not cause harm; enjoy the benefits of competition among network providers, application and service providers, and content providers; experience no discrimination against particular Internet content, services, or applications; and be assured of transparency regarding network management practices, the operation of applications and services, and the terms-and-conditions for acquiring and utilizing Internet content.

In many cases, the implementation of plain language notice-and-consent regimes can be of great benefit to consumers in ensuring that these entitlements are realized; and the FCC along with the Federal Trade Commission (FTC) may be able to contribute substantially to improvements in this regard.

But to directly answer the question we were asked to address, we propose the following.

Provisions in legislation targeting the FCC's authority over broadband with respect to protecting the integrity of IP of major players – including network providers and application and service providers as well as content providers – against potential abuse should limit the Commission's ability to intervene only in those areas where business models have substantially matured and been widely adopted by industry participants and generally accepted by consumers.

A consensus of directly affected industry representatives, whose market share of the defined area covers a majority of the business in that space, should first be required to expressly request the Commission's assistance. In addition, there should be a clear directive from a majority of the affected consumers before the FCC becomes involved.

Industry parties are already protected by existing laws and have recourse to the judicial system for unilateral complaints regarding unlawful utilization of their respective IP.

For instance, if collaborative efforts of network providers, application and service providers, and content providers resulted in resolving the outstanding issues that have prevented the licensing of the Gnutella file-sharing network for popular music distribution, and the ensuing business model was widely adopted by industry participants and generally accepted by consumers, but was subsequently threatened by the abuse of non-participants, then the FCC could be engaged.

The following scenario would need to take place: 1) major network providers representing a majority of broadband subscribers using the newly licensed Gnutella music services, such as Verizon and Comcast, ask for this help; 2) major application and service providers representing the majority of users of these Gnutella services, such as LimeWire and Qtrax, ask for this help; 3) major content providers representing the majority of the licensed music being distributed through Gnutella, such as Universal Music Group and Sony Music, ask for this help; and 4) a statistically valid sample representing the majority of consumers of such licensed music on Gnutella ask for this help.

Absent the conditions precedent of a successfully rolled-out business model for an Internet-based technology and the request for assistance from a majority of the directly involved constituents, the Commission should be limited by legislation to be able to exert authority over broadband only where consumers, not industry special interest groups, are substantially threatened by some type of serious and persistent abuse.

The DCIA will be glad to work with the House Energy and Commerce Committee on details related to the establishment of working groups to solve broadband business practice disputes, the technological aspects of Internet content delivery mechanisms, and related matters. And again, we applaud your efforts to provide clarity to the FCC with respect to its authority over broadband.

Respectfully submitted,

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