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H.R. 5353, THE INTERNET FREEDOM PRESERVATION ACT OF 2008

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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H.R. 5353, THE INTERNET FREEDOM PRESERVATION ACT OF 2008

TUESDAY, MAY 6, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2322 of the Rayburn House Office Building, Hon. Edward Markey (chairman) presiding.

Members present: Representatives Markey, Stearns, Doyle, Upton, Harman, Ferguson, Solis, Pickering, Capps, Walden, Bono, Eshoo, Shimkus, Stupak, Green, Radanovich, Deal, Gonzalez, and Terry.

Staff present: Amy Levine, Tim Powderly, Mark Seifert, Colin Cromwell, David Vogel, Philip Murphy, Neil Fared, and Garrett Golding.

Mr. MARKEY. Welcome to the Subcommittee on Telecommunications and the Internet. Today's hearing is on legislation offered by myself and my subcommittee colleague, Mr. Pickering, from Mississippi, entitled "H.R. 5353, The Internet Freedom Preservation Act of 2008."

[H.R. 5353 follows:]

I

110TH CONGRESS
2D SESSION

H. R. 5353

To establish broadband policy and direct the Federal Communications Commission to conduct a proceeding and public broadband summits to assess competition, consumer protection, and consumer choice issues relating to broadband Internet access services, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 12, 2008

Mr. MARKEY (for himself and Mr. PICKERING) introduced the following bill; which was referred to the Committee on Energy and Commerce

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A BILL

To establish broadband policy and direct the Federal Communications Commission to conduct a proceeding and public broadband summits to assess competition, consumer protection, and consumer choice issues relating to broadband Internet access services, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Internet Freedom
5 Preservation Act of 2008".

SEC. 2. FINDINGS.

Congress finds the following:

(1) The Internet has had profound benefits for numerous aspects of daily life for millions of people throughout the United States and is increasingly vital to the economy of the United States.

(2) The importance of the broadband marketplace to citizens, communities, and commerce warrants a thorough inquiry to obtain input and ideas for a variety of broadband policies that will promote openness, competition, innovation, and affordable, ubiquitous broadband service for all individuals in the United States.

SEC. 3. BROADBAND POLICY.

Title I of the Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by adding at the end the following new section:

"SEC. 12. BROADBAND POLICY.

"It is the policy of the United States—

"(1) to maintain the freedom to use for lawful purposes broadband telecommunications networks, including the Internet, without unreasonable interference from or discrimination by network operators, as has been the policy and history of the Internet and the basis of user expectations since its inception;

"(2) to ensure that the Internet remains a vital force in the United States economy, thereby enabling the Nation to preserve its global leadership in online commerce and technological innovation;

"(3) to preserve and promote the open and interconnected nature of broadband networks that enable consumers to reach, and service providers to offer, lawful content, applications, and services of their choosing, using their selection of devices, as long as such devices do not harm the network; and

"(4) to safeguard the open marketplace of ideas on the Internet by adopting and enforcing baseline protections to guard against unreasonable discriminatory favoritism for, or degradation of, content by network operators based upon its source, ownership, or destination on the Internet.".

SEC. 4. INTERNET FREEDOM ASSESSMENT.

(a) INTERNET FREEDOM ASSESSMENT REQUIRED.—

(1) IN GENERAL.—Within 90 days after the date of the enactment of this Act, the Federal Communications Commission (in this Act referred to as the "Commission") shall commence a proceeding on broadband services and consumer rights.

1 (2) SPECIFIC REQUIREMENTS.—As part of the
2 proceeding under this section, the Commission shall
3 assess—
4 (A) whether broadband network providers
5 adhere to the Commission's Broadband Policy
6 Statement of August, 2005 (FCC 05–151), in-
7 cluding whether, consistent with the needs of
8 law enforcement, such providers refrain from
9 blocking, thwarting, or unreasonably interfering
10 with the ability of consumers to—
11 (i) access, use, send, receive, or offer
12 lawful content, applications, or services
13 over broadband networks, including the
14 Internet;
15 (ii) use lawful applications and serv-
16 ices of their choice; and
17 (iii) attach or connect their choice of
18 legal devices to use in conjunction with
19 their broadband telecommunications or in-
20 formation services, provided such devices
21 do not harm the network;
22 (B) whether broadband network providers
23 add charges for quality of service, or other simi-
24 lar additional fees or surcharges, to certain
25 Internet applications and service providers, and

1 whether such pricing conflicts with the policies
2 of the United States stated in section 12 of the
3 Communications Act of 1934 (as added by sec-
4 tion 3 of this Act);
5 (C) whether broadband network providers
6 offer to consumers parental control protection
7 tools, services to combat unsolicited commercial
8 electronic mail, and other similar consumer
9 services, the manner in which such services are
10 offered, and the extent to which such services
11 are consistent with such policies of the United
12 States;
13 (D) practices by which network providers
14 manage or prioritize network traffic, including
15 prioritization for emergency communications,
16 and whether and in what instances such prac-
17 tices may be consistent with such policies of the
18 United States;
19 (E) with respect to content, applications,
20 and services—
21 (i) the historic economic benefits of an
22 open platform;
23 (ii) the relationship between competi-
24 tion in the broadband Internet access mar-
25 ket and an open platform; and

1 (iii) the policy choices and results of
2 global competitors with respect to access
3 competition and an open platform;
4 (F) whether the need for enforceable rules
5 governing openness, consumer rights, and con-
6 sumer protections or prohibiting unreasonable
7 discrimination is lessened if a broadband net-
8 work provider provides significantly high band-
9 width speeds to consumers; and
10 (G) the potential of policies promoting
11 openness in spectrum allocation, universal serv-
12 ice programs, and video franchising to expand
13 innovation through protection from unreason-
14 able interference by network owners of an open
15 marketplace for speech and commerce in con-
16 tent, applications, and services.
17 (b) PUBLIC BROADBAND SUMMITS REQUIRED.—
18 (1) IN GENERAL.—As part of the proceeding
19 required under subsection (a), and within 1 year
20 after the date of the enactment of this Act, the
21 Commission shall conduct a minimum of 8 public
22 broadband summits, in geographically diverse loca-
23 tions, around the United States. The Commission
24 shall publicly announce the time and location of each
25 such summit at least 30 days in advance.

1 (2) PURPOSE OF PUBLIC BROADBAND SUM-
2 MITS.—Such public broadband summits shall seek to
3 bring together, among others, consumers, consumer
4 advocates, small business owners, corporations, ven-
5 ture capitalists, State and local governments, aca-
6 demia, labor organizations, religious organizations,
7 representatives of higher education, primary and
8 secondary schools, public libraries, public safety, and
9 the technology sector to assess competition, con-
10 sumer protection, and consumer choice issues related
11 to broadband Internet access services.
12 (c) INTERNET INPUT.—As part of the proceeding re-
13 quired under subsection (a), the Commission shall seek to
14 utilize broadband technology to encourage input from and
15 communication with the people of the United States
16 through the Internet in a manner that will maximize the
17 ability of such people to participate in such proceeding.
18 (d) REPORT TO CONGRESS.—Within 90 days after
19 completing the summits under subsection (b), the Com-
20 mission shall submit a report to Congress—
21 (1) summarizing the results of the assessment
22 under subsection (a), including information gained
23 from the public summits under subsection (b); and
24 (2) providing recommendations on how to pro-
25 mote competition, safeguard free speech, and ensure

1 robust consumer protections and consumer choice re-
2 lating to broadband Internet access services.

○

OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. MARKEY. Since the beginning of this Congress, indeed since our first subcommittee witness, the inventor of the World Wide Web, Sir Tim Burners-Lee, testified, we have held a series of hearings that have given us a glimpse of the future of the Internet. We heard testimony from Chad Hurley, the founder of YouTube, as well as from top executives from TiVO, Real Networks, Sling Media, and others.

The commercial success of many of these companies and their future business plans are predicated upon openness in the Internet's architecture and the freedom to innovate that has marked the Internet since its inception. Sir Tim, the inventor of the World Wide Web, urged us to "make sure the Web itself is the blank sheet, the blank canvas," something that does not constrain the innovation around the corner.

The wonderful thing about the Internet, Sir Tim also reminded us, is that no one needs to ask anyone's permission to innovate, to get their voice heard, to launch a new service or business enterprise. In this sense, it is the most level playing field for commercial opportunity ever invented, and its worldwide scope has offered help to foster community and cultural communications across the planet.

Yet now we are faced with a choice. Can we preserve this wildly successful medium and the freedom it embodies, or do we permit network operators to fundamentally alter how the Internet has historically functioned? Do we retain a level playing field, Sir Tim's blank canvas or entrepreneurial entry? Or do we allow the imposition of new fees and the artificial creation of slow lanes and fast lanes for content providers on the Internet?

Some people might ask, well, at $500 a share, why can't Google pay for special treatment? The reality is that at $500 a share, Google can afford to pay. Yet the reality is that this is precisely the wrong question to ask. Instead, the question is whether Larry Page and Sergei Brin, the two young founders of Google, could have paid when they were mere grad students launching their idea. Same question for Jerry Yang at Yahoo! back in the late '90s or Jeff Bazos at Amazon.com or Mark Andresin who invented the mosaic browser, which later became Netscape, when he was at the University of Illinois at Urbana, Champlain in the early '90s. That is the question to ask.

And the answer, of course, is no. Those inventors and entrepreneurs could not have created the companies that have become part of Internet lore if they had had to pay cable or phone companies large sums of money up front just to get access to consumers.

This debate is not over whether carriers can or cannot perform network management. It is not about whether carriers can fight piracy or spam or help parents control content. It is not about whether some network traffic, such as emergency communications, can be prioritized. Neither is it about whether network neutrality is synonymous with copyright theft.

In each one of the instances that I just mentioned, it is not any of those things. And the legislation only extends Internet freedom

principles to lawful content, not unlawful content and not unlawful activity but only to lawful content. And so this whole idea that this legislation helps piracy is 100 percent wrong. It is a red herring. We should actually put an aquarium out here. There are so many red herrings floating around to mislead about what the intent of net neutrality is. It does not protect piracy at all, and I just wish people would stop saying it.

The question is whether, in the name of network management, policymakers permit carriers to act in unreasonable anti-competitive fashion. In a more perfect network, there would be such massive bandwidth to render these issues moot. In a more perfect marketplace, there would be four or five high speed broadband competitors offering consumers ample choice.

But until then, I strongly believe that we should enshrine basic principles of openness and fairness and ensure that the FCC is a cop on the beat, able to ensure these principles are upheld in the marketplace. In this way, we can preserve the best of what the Internet is, even as it evolves.

The bill is quite straightforward. It establishes overarching principles rather than regulations to guide policy in this area. It then requests an examination of the market and current practices, requires the FCC to hold several broadband summits around the country to solicit suggestions and opinions. And finally, task the FCC with reporting the results and any recommendations back to Congress.

I believe that this is an eminently reasonable path to pursue, and I thank all of our witnesses for coming today to give us their views on the bill. I thank you, and with that, the time of the chair has expired. And I recognize the gentleman from Florida, Mr. Stearns, for an opening statement.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Good morning, and thank you, Mr. Chairman. I think this is a very important hearing. H.R. 5353 is far-reaching; although, it is just a study. And I think it is vitally important that we have a hearing. And I appreciate the witnesses here, and I look forward to their opening statements and the questions we might ask.

Now, this bill, H.R. 5353, is billed as just a study; however, my colleagues, a closer examination demonstrates that it is more than just about a study. First, it establishes a specific broadband policy by amending Title I of the Communications Act to make it the policy of the United States of America to prohibit "unreasonable interference from or discrimination by network operators." It then requires the FCC to launch a proceeding into whether that policy has been violated.

Under this legislation, the FCC would have to commence a proceeding, not merely an inquiry but a proceeding, thus giving the FCC a green light to engage in rulemaking without further congressional action.

Now, this sort of procedure would cause numerous problems, in my opinion. Most troubling, of course, is that no one can agree on what constitutes unreasonable interference and discrimination. Yet

the bill provides no definitions, does not require examination of the status of competition before even imposing new restrictions. This bill creates vague and undefined regulations that frankly would chill investment and innovation at a time when there is tremendous growth.

Why would we seek to regulate a marketplace that is already advancing vigorously? You know, I think a lot of us remember the Ronald Reagan quote. If I moves, we tax it. If it is successful, we regulate it. And if it fails, we subsidize it.

My colleagues, the Internet is booming. North American communication providers invested in an estimated $70 billion in infrastructure just last year alone. And in the U.S. today, there are nearly 1,400 broadband providers competing to serve American consumers. The marketplace has never been more competitive. Why would we want to mess with success? Why would we regulate a rousing success into a potential failure?

Furthermore, this legislation does not allow for legitimate network management. Some proponents of network regulation believe that the networks that comprise the Internet should be treated no differently than telephones or even as we go back to the railroads or old time waterways. That view of the Internet does not provide comport with today's reality.

Today, Internet traffic has grown exponentially. Thirteen years ago, a loyal cadre of hobbyists sent e-mail to each other and engaged in some rudimentary Web surfing. Now, more than a billion people use the Internet to view and exchange audio and video files as well as play interactive games that involve sophisticated graphics.

In addition, the Internet is rapidly replacing traditional telephone and cable lines as a means of conducting voice conversation and distributing movies and other video programming. Network operators need to be able to manage Internet traffic, especially with bandwidth intensive video traffic, in order to ensure that the consumers just simply continue to enjoy the Internet experience.

Without network management, we would be faced with network congestion that would make rush hour on the 14th Street Bridge look like a Sunday drive in the country. For instance, if you were watching a single high-definition movie over the Internet consumes as much bandwidth as a Web surfer who loads 35,000 Web pages. At the current rate of growth, in the year 2010, 20 typical U.S. households will use as much Internet capacity as the entire world did in 1995.

Broadband networks will need to be sophisticated and agile, imposing network regulation either through legislation or at the FCC would prevent broadband providers from legitimately managing their networks.

Most importantly, there does not appear to be any need for this regulation. Broadband competition is increasing and coming from new medias such as wireless and satellite. Broadband prices are falling as speeds offered by providers are rising. Regulation would simply stifle the investment necessary to prepare for the continued growth in Internet traffic.

So in closing, common carrier principles such as nondiscrimination might have made sense for waterways, railroads, and tele-

phones. But if you want a 21st Century communications media, we should not rely on the old ways to achieve regulatory modeling.

Thank you, Mr. Chairman. I offer my time.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Pennsylvania, Mr. Doyle.

OPENING STATEMENT OF HON. MIKE DOYLE, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. DOYLE. Thank you, Mr. Chairman. Mr. Chairman, think about it. The Internet is the First Amendment come alive. Our media is no longer a one voice to many listeners. Instead, media begins with me, and I get to choose what I do, what I see, what I listen to, and what I read. The cost of a printing press or TV station no longer holds the speaker back from sharing their message with the world around us, the world that exists online. I think that all parties testifying here today would agree that the state of the Internet is very different today than it was a decade ago or even during the debate over the franchising bill.

As the Internet has changed, so have the reasons that my friends base their opposition to net neutrality. First they said it would be impossible to define that neutrality, much less write regulations about it. And secondly, that net neutrality was a solution in search of a problem.

Both of these presumptions are now wrong. When this issue came up 2 years ago, Congress was told that there are too many definitions about what net neutrality is. Today, the largest telecommunication company in the world, AT&T, is living under a workable definition of net neutrality that all parties agreed to when they merged with Bell South. There, the FCC wrote a definition that works for all sides. It was a big win for consumers, for innovators, and other entrepreneurs, and for AT&T.

And Congress was told that net neutrality is a solution in search of a problem. That too is no longer the case. We have documented cases now where network operators are telling consumers how they can and how they cannot fill the pipe they're buying with the content they want.

Wi-fi routers, telecommuting into their office, voice-over-the-Internet calls, peer-to-peer file sharing of legal, licensed content, including video programming are all examples of things that have been limited by Internet providers.

Now, it is true that consumers are uploading more content on the Internet and broadband companies offer slower upload speeds than download. But instead of investing in faster speeds, some have tried to limit uploads based on a particular kind of service. They claim that they need to manage congestion, to manage their networks, and I agree with that. Clearly they are managing their networks now. Some of that management is a good thing. Viruses and spam need to be eliminated.

But the question is, can they be managed in a way that doesn't hurt a particular protocol or application or content provider? I believe they can. That is net neutrality.

I believe this problem is misframed. Some people want the conversation to be about how they can manage Internet scarcity. We

should be talking about how to achieve abundance with the principles that made the Internet great. Anti-trust law is inadequate to deal with this question. A network operator could choose not to offer a small competing company better service and force it to take them to court, spending years in a protracted legal battle.

Instead, Mr. Chairman, the time has come for rules of the road, for predictably for those who own networks and for those who innovate on those networks. Mr. Chairman, I thank you, and I yield back.

Mr. MARKEY. Gentleman's time has expired. The chair recognizes the gentleman from Michigan, Mr. Upton.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Thank you, Mr. Chairman. I would first like to apologize to the panel and my colleagues that I will be unable to stay for this entire hearing due to an Energy and Air Quality Subcommittee hearing where I serve as ranking Republican, which will begin very soon. I do feel strongly about the issue, and I want to make an opening statement before I depart.

I don't quite understand why this is a legislative and not an oversight hearing. I think we can all agree that we have succeeded in our congressional oversight role. We first heard about the issue over 8 years ago, and there is no solid evidence of consumers being blocked from any content or application on the web.

And the very few times that consumers have been troubled rightly so with something, the issue has been resolved without imposing regulations or legislation indicating that the market forces indeed work. A mix of market forces, consumer demand, and oversight from this body has allowed the Internet economy to flourish.

One Web site, YouTube, took up the same bandwidth in '07 as the entire Internet did in 2002. That is an amazing story, and just as amazing is the network's ability to keep up with demand. There is competition at all levels of the Internet, and broadband employment and use continues to grow. Our hands-off policy is working.

Some say this bill just creates a study. Well, that is not quite true. It codifies network neutrality into the Communications Act and only then tells the FCC to study the implications. This bill takes us down a dangerous path. Adopting legislation like this now will short circuit the evolution of the Internet in my view. And to meet the growing capacity demands of advanced Internet services and applications, carriers need the flexibility to experiment with different business models as well as to manage network congestion and quality of service in the short term while they invest and innovate in the long term.

But as soon as we attempt to legislate or regulate, technology will evolve much too quickly for the policymakers to keep pace. The old axiom if it ain't broke, don't fix it certainly applies here. The proponents of H.R. 5353 claim that the bill is just trying to restore nondiscriminatory requirements to the Internet. But we have been told that the Internet was built on principles of nondiscrimination and that network operators were required to abide by nondiscrimination requirements prior to 2005.

Well, that is not quite accurate. Internet backbone services have never been regulated. They interact based on private peering relationships that are not subject to FCC or any other regulation. And cable and satellite broadband providers have never been subject to regulations. Wireless broadband services don't even really get off the ground until '05 and have never been regulated either.

Yet despite the unregulated environment, the sky has not fallen. Quite the opposite. Consumers are enjoying revolutionary technology, and the market will continue to evolve and deliver what consumers expect in service. Advocates of network regulation argue that all they really want to do is turn the clock back to before the FCC's decision in '05 that classified wireline broadband Internet access services as information services.

Proponents of H.R. 5353 do want to turn back the clock. They do, but not to how the Internet was regulated in 1995. They want to turn back the clock to the 19th Century, when waterways and railways operated under common carrier requirements. That defies common sense if we are trying to foster a 21st Century communications medium.

We hear a lot about how the world came to an end when the FCC declared in '05 that wireline Internet access services were information services just like cable modem services. Well, that is based on a fundamentally faulty premise, that the Internet operated under a nondiscrimination regime from its inception until '05. That would be news to Internet backbone providers, which have never been subject to FCC regulation. It also would be news to cable modem and satellite broadband providers, which were not subject to FCC regulation.

Sweeping, nondiscrimination requirements would be new, and they would be bad for network management and broadband deployment. I think that everyone here today would argue that a consumer-driven model has worked quite well thus far. Folks have come to expect unfettered access, and they will tolerate nothing less.

In closing, I would like to make one final point. While I clearly oppose this legislation, I do applaud you, Mr. Chairman, for distinguishing between legal and illegal content. I yield back.

Mr. MARKEY. Thank you. I very much appreciate that.

Mr. UPTON. First base.

Mr. MARKEY. Well, I appreciate that. It is like the difference between unlawful and illegal. Many people don't know unlawful is when there is an actual statute or regulation that has been passed against something, and illegal is a sick bird.

Ms. UPTON. Yeah.

Mr. MARKEY. That is an old fourth grade joke. The chair recognizes the gentlelady from California, Ms. Harman.

OPENING STATEMENT OF HON. JANE HARMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. HARMAN. Thank you, Mr. Chairman. I was educated in Massachusetts, but sometimes some of this stuff just flies by me.

Mr. Chairman, I am proud to be a cosponsor of your bill. I think it is better than the last version of your bill, which I also cosponsored. And I want to salute you for working closely with Mr. Pick-

ering, an estimable member of our committee, and making this a bipartisan issue. This committee is bipartisan, and I think our best legislation comes when we act in a bipartisan fashion. So I salute you for that.

Like most participants in the net neutrality debate, I believe that not all network management is bad. In Los Angeles, our freeway networks are hopelessly congested, and on-ramps have traffic lights to control the flow of cars and trucks. These traffic meters reduce congestion and are in the public interest, but they do not keep motorists from driving a car of his or her choice and from going anywhere that motorist wants to go on the freeway.

I am skeptical that market forces alone can preserve the open vibrant and always improving Internet that everyone wants. Government should have a role in ensuring that network operators do not discriminate among content providers or especially against particular content. I deplore piracy of copyrighted material and the spam epidemic, as has been mentioned by several colleagues. I am also concerned about network security and the need to protect communications for public safety purposes.

But the challenge is to strike the appropriate balance. I therefore thank you for assembling this diverse panel of experts, for changing your legislation so that it is information-driven and will give us a better understanding of this marketplace and this technology. And I look forward to learning with you and other members of the Committee about how to get this balance right. Thank you, Mr. Chairman.

Mr. MARKEY. The gentlelady's time has expired. The chair recognizes the gentleman from Nebraska. I do not see him. Chair recognizes the gentleman from New Jersey, Mr. Ferguson, for an opening statement.

OPENING STATEMENT OF HON. MIKE FERGUSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. FERGUSON. Thank you, Mr. Chairman. Thank you and Mr. Stearns for holding this hearing on the Internet Freedom Preservation Act. Welcome to our witnesses, many of whom are well known to us. This panel represents a real strong cross section of interests in the industry, and we look forward to hearing the various perspectives.

Anytime the subject of net neutrality comes up, I can't help but think of a few years back and a hearing of this committee as well. And with all due respect to my friend, Mr. Doyle, I have a different view of his characterization of the last couple of years. At the time, witnesses were asked—we went right down the row. Everyone was asked if they could define net neutrality, and everybody had a different answer to that question. To a person—nobody could provide a clear and definitive answer to the subcommittee.

And in the years since then, instead of really trying to truly define net neutrality and determining whether and how any problem might actually exist, advocates have attempted to broaden the scope of this term and have started using these hot button tag lines that would probably make any PR firm proud.

Unfortunately throughout the process, some Internet service providers focused on consumer satisfaction have been scapegoated, not only by interest groups but by the FCC, which seems determined to pursue regulation in lieu of private sector solutions. Responsible network management necessary on shared networks to ensure the flow of network traffic has been opportunistically mischaracterized as calculated ISP interference.

And now with unprecedented broadband investment, industry, innovation, and consumer consumption, we have before us a piece of legislation that is an attempt to expand the potential of broadband that can actually stifle deployment. Ignoring a healthy broadband market, this legislation exacts a prescription that is simply not needed. And the side effects could be crippling to innovation and to investment and ultimately to the services provided to our constituents. In the face of undeniable free market growth, this committee should refrain from inserting the hand of government into the equation.

But looking at the draft of this legislation, it seems that it attempts to go in precisely the opposite direction. Many of its principles effectively constitute a dangerously over-broad legislative dragnet that can frankly do much more harm than good.

It is my recommendation that before legislating in this area, the committee carefully consider the consequences of imposing a government solution where, frankly, it is unwarranted.

And finally I would like to touch on the problem of Internet piracy, which goes hand-in-hand with many of the network problems, and the providers are responsibly trying to solve. I know, Mr. Chairman, your reference of having an aquarium of red herrings. This is not a red herring. This is a very serious problem, and the problems of piracy are being felt in a very direct and a very substantial way by a major segment of our economy.

Internet piracy has devastated America's creative industries, and it has adversely affected economic growth in the process. Incidentally, most of the congestion piracy causes results from the same peer-to-peer downloads that have made the job of network operator so difficult. I encourage the content industry and the ISPs to continue to work together in the private sector to reduce and eliminate the availability of illegal content or unlawful content that confuses consumers, attracts viruses, and ultimately hurts an important growth engine of our economy.

Thank you again, Mr. Chairman, for this hearing. I look forward to hearing from our witnesses.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Texas, Mr. Gonzalez. The chair recognizes the gentlelady from California, Ms. Solis.

OPENING STATEMENT OF HON. HILDA L. SOLIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. SOLIS. Thank you, Mr. Chairman, and thank you, Ranking Member Stearns for holding this important meeting. Net neutrality is crucial to the future of the Internet. The question of whether we adopt a market-based approach or lay our principles for net neu-

trality and fairness in network management is central to the evolution of the Internet.

Over the past few years, we have seen incredible growth in the use of the Internet for a host of applications. This includes telemedicine, telecommuting, online education, and entertainment with video and music applications.

Net neutrality and network management have become even more relevant as we rely more and more on Internet in our daily lives. Questions of unfair practices by Internet service providers, especially when dealing with peer-to-peer file transfers, has raised serious concern.

As a member of the Los Angeles delegation, piracy of entertainment including music and video files are harmful to our local workforce and economy. While we should not underestimate the importance of stemming the flow of pirated material online, we also need more transparency of management practices that affect all constituents, not just those who download pirated songs or video. For example, high bandwidth applications in areas such as telecommuting, online education, telemedicine, are very important to many of my constituents. These applications will grow, as you know, in the coming years. We need to know how such traffic will be treated or prioritized by Internet service providers to ensure that these and other positive but not necessarily profitable uses are not negatively impacted.

We also need to ensure that the innovation that has driven the Internet continues unabated. New and diverse innovators should have as level a playing field as possible with incumbent and more established Internet companies. And net neutrality is key to posturing diversity online.

As policymakers, we need to find the balance between keeping the Internet traffic moving and promoting innovation, while also ensuring transparency in network management practices that benefit all users. I would like to thank the witnesses for being here today, and I look forward to hearing your comments. And I yield back the balance of my time.

Mr. MARKEY. The gentlelady's time has expired. The chair recognizes the gentleman from Mississippi, Mr. Pickering.

OPENING STATEMENT OF HON. CHARLES W. "CHIP" PICKERING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI

Mr. PICKERING. Thank you, Mr. Chairman. And what I would like to do today is to put today's hearing in context, the history that this committee has had dealing with and confronting this issue, what we have seen in the private sector, and the principles as we go forward on this legislation.

The Internet has been a great American success story, probably one of the greatest examples of free market capitalism that we have ever seen in the entire history of the world. And it has been driven by a number of principles that characterize it. One, it has been private-sector led. It was not regulated by the government, and this Congress has taken a position that we would not tax Internet. So no taxation, openness, private-sector led.

Commissioner Powell back in the early days of the Bush administration set out principles for how we would see network neutrality and define network neutrality. Now, Commissioner and Chairman Powell is probably one of the most recognized free market advocates, de-regulatory advocates. But he saw the purpose of having an open network so he set the principles out.

It has been maintained by another Republican chairman, Kevin Martin. And this committee last year, in the last Congress, excuse me, as we have laid out the COPE Act, we reaffirmed in that legislation network neutrality principles. In fact, we codified them, and in some of the negotiations, we had agreed to do a proceeding much further than where this bill is. This bill does codify those principles first expressed in most part by Chairman Powell, then reaffirmed by Kevin Martin. And it has been a successful approach of setting what the principles are and then being able to have enforcement on a case-by-case basis.

Now there are some who question whether the FCC has the authority to enforce on a case-by-case basis these principles of network neutrality, the principles of openness, which have given us the greatest free market capitalist example and telecommunications policy in this century.

So I think that this legislation is very helpful that it says very clearly we will codify these principles, but I do not want the government intervention and regulation to try to define in a very intrusive way some type of regulatory framework on network neutrality. The case-by-case is working.

If we call for, and this bill does call for, additional hearings and comments from around the country, I believe it is a good way to have accountability, as we see the context of pretty intense concentration of the industry of telecommunications. Are we going to maintain a private-sector led openness for the Internet and for consumers and a bedrock of the freedom that everybody can get anything on the Internet that they so choose? Or will we see exclusives on content? We are now seeing exclusives on devices in the telecommunications industry and the iPhone. What does it take for one step to say we are not only going to have an exclusive arrangement on a device, but we then do exclusives on content? And then upsetting the great principle of openness and freedom that we have had on the Internet.

So that is why we want to send a very strong signal that we do not want government intervention. We do not want government regulation, but we want the private sector to continue to take the leadership role in keeping an open policy and an open business model. And that is my purpose of joining with Chairman Markey on this legislation. And I thank you, Mr. Chair.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentlelady from California, Ms. Capps.

OPENING STATEMENT OF HON. LOIS CAPPS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. CAPPS. Thank you, Mr. Chairman, for holding this important and much anticipated hearing and for introducing your bill, to our witnesses for appearing today and their testimony, which we will enjoy hearing.

I expect that today we are going to hear many versions of what it means to have a truly open and neutral Internet. Like many of my colleagues, I understand that some form of reasonable network management is to be expected. However, I also believe that non-discrimination is paramount to ensuring free speech and commerce online. And that is why I support H.R. 5353 and its provisions to guard against discrimination and degradation of content.

The Internet is an incredible communications tool that has forever changed access to information and connectivity throughout the world. But it is also a tool for economic, social, and civic empowerment. So this hearing, to me, is about more than bytes and traffic. It is about more than packets and networks. It is about preserving the ingenuity and genius of this incredible platform, this touchstone of American innovation.

So I look forward to the testimony of our witnesses, and thank you again, Mr. Chairman, for holding this hearing.

Mr. MARKEY. Gentlelady's time has expired. The chair recognizes the gentleman from Oregon, Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman. I am going to waive my opening statement and issue an early apology. We have a competing hearing on energy downstairs. So I will be back.

Mr. MARKEY. The gentleman may reserve. The chair recognizes the gentlelady from California, Ms. Bono.

OPENING STATEMENT OF HON. MARY BONO MACK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. BONO MACK. I thank the chair. It is not necessary for me to give a list of examples of how the Internet has impacted our lives. We have all heard these stories before on this committee. Additionally, we are also all aware of the discussions surrounding network neutrality or network management or whatever title that each opposing side has tried to give the issue to gain an edge while making their argument.

This issue was highlighted in the hearings leading up to and the subsequent markup of the COPE Act in 2006, and the general talking points have not changed significantly since that time. What is clear to me is that H.R. 5353 would increase the government's hand in regulating the Internet. Both sides of this discussion make interesting points; however, like most arguments which turn political, the volume increases and each side begins to speak past one another. I think this is largely the case with the debate before us today. It is also why I continue to feel advocating for strong, intellectual property protections needs to remain at the forefront of all discussions related to the Internet.

I have been very outspoken about ISPs and their efforts to crack down on illegal downloading. Additionally, it is widely understood the theft of digital creations online, whether it be a movie, software, or a song, has a terrible impact on our economy. In short, digital piracy results in a loss of American jobs.

I approach the issue at hand, as I do most technological discussions, by asking myself what is best for the creators of content and the protection of intellectual property rights online. Today illegal downloading costs the creative community billions of dollars annu-

ally. It has also begun to take its toll on ISP networks. That is why I am pleased that ISPs and creative interests are acting in concert to take steps to combat online piracy.

Can more be done by ISPs? Of course. Can the creative community do more? Yes. However, at a time when industry is beginning to address this issue, I think it would be remiss for us as a body to interfere in these efforts. I think this bill would do that.

I would also like to express my concerns of relying on the FCC to combat piracy. We ask the Commission to do a lot. In my opinion, sometimes they get it, and other times, they don't. Regardless, most of the time, decisions take a while. In that context, I don't see how the FCC would be organizationally able to successfully combat something as complex as online piracy with an appropriate level of effectiveness.

I look forward to hearing the discussion today. Additionally I will closely follow the level of cooperation between ISPs and content creators in the fight against online piracy. While I am currently hopeful that industry can work together to tackle this problem, I will continue to ask what is best for the creators of content and the protection of intellectual property rights online.

Again, thank you, Mr. Chairman. And I yield back the balance of my time.

Mr. MARKEY. The time of the gentlelady has expired. The chair will now recognize the gentlelady, Anna Eshoo.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, for having this hearing. Welcome to the distinguished panel of witnesses. And I want you to know, Mr. Chairman, that I am proud to be a cosponsor of this legislation and like legislation that was in the last Congress.

I think that all of my colleagues have made very interesting points. I think Mr. Pickering's description of what the Internet is, what it represents, the enormity of it, the extraordinary changes that the Internet has brought not only on businesses but people in their personal lives, an entire education system, the blue chip reputation of the United States of America being the inventor of this, all of the technologies that are a part of it, the effect that it has had on our intelligence community. As a member of the House Intelligence Committee, and certainly Ms. Harman who served on that committee with distinction, we understand this and appreciate it in a very, very special way.

Now, what has made it successful? If there were choke points in the beginning, we wouldn't be able to say what we are saying, what we all acknowledge. And so this effort is very clearly, very simply and profoundly to keep it the way we just described it. I think that were it not this powerful tool in so many ways, in all of its manifestations, people wouldn't be laying claim to or want to keep or cut off some parts of it for themselves. I don't have anything against the companies and the people that are engaged in this and help with the broadband.

But we know—actually this room wouldn't be filled with most of the dark suits that are here today were it not for the fact that

there are huge dollars involved in this. And I want people to be able to make money and enjoy the market, but I think that it needs to be kept open. Open, open, open, accessible, accessible, accessible. It is not.

We know that it is not. There are all kinds of fancy words, but we want to keep it open. That is what this effort is about. It is the hallmark that really created the Internet or has made it successful and revolutionized the country and the world in the process. So I think that we have newfound problems with this. And if that were not the case, we wouldn't have the stakeholders here to kind of defend where they are. All good people, but we need to go back and appreciate what the democratization of the Internet was founded on. And that is what this effort is about.

And so I look forward to the debate. I think that this is a smart bill, and the language that the legal counsel draws up, I think it is consistent with the values of our country. And that is why it is as powerful as it is. We have the most powerful principles, and I think they need to be a part of this effort too.

So thank you, Mr. Chairman. Look forward to the testimony and the debate.

[The prepared statement of Ms. Eshoo follows:]

STATEMENT OF HON. ANNA G. ESHOO

Mr. Chairman, thank you for drafting this important legislation and for holding another hearing on preserving free and open communications networks.

Openness of the Internet has actually been its hallmark since it was created—the ability of any person anywhere in the world to reach out and access any content that someone else has made available on the Web. The openness of the Internet revolutionized business, it changed our economy, and it has transformed our everyday lives.

Despite this history of openness the FCC has allowed carriers to begin "walling" in the Internet. They want to control which sites consumers will be able to download music from, where they will be able to watch live video and which blogs will have full access to the best service. This threatens the very existence of today's Internet. That's why Net Neutrality legislation should be enacted.

The bill would establish for the first time a broadband policy for the country which includes the freedom to access the Internet without discriminatory interference and to promote open networks and access to applications and devices. The policy also would prohibit network owners from degrading content. This policy mirrors the same non-discriminatory rules which have always existed for our telephone networks and for the Internet prior to 2005.

If enacted, the bill would require the FCC to examine whether carriers are blocking access to lawful content, applications, or services.

Similar to the media ownership town hall meetings, the bill would mandate that within 1 year of enactment, the FCC must conduct eight broadband summits throughout the country. The purpose of the summits would be to bring together consumer advocates, small business owners, local governments, unions, academia, etc.

This is a well crafted bill that if enacted would preserve the Internet the way it was conceived, open, open, open, accessible, accessible, accessible. Thank you, Mr. Chairman for holding this important hearing.

Mr. MARKEY. The gentlelady's time has expired. The chair recognizes the gentleman from Illinois, Mr. Shimkus.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. SHIMKUS. Thank you, Mr. Chairman. I am going to be brief, but I disagree with a lot of what my colleague has said. I have two

issues. One is who manages the pipe and who makes a determination over lifesaving telemedicine information versus a movie download. Issue one.

Two, the FCC has a process. There is very limited complaints, and there is a dispute resolution process right now. I said two, and really three is—in rural America we need broadband. This delays broadband rollout to rural America. And the example we can use is the auction, the most recent auction in which we didn't get the value from the spectrum based upon the FCC putting open access as part of the criteria. There will be some who will disagree with that, but I truly believe that is what has happened.

And so if you want to make sure that you can have an availability of lifesaving telemedicine over a movie download in those critical times, if you want to deploy broadband to areas—I still have areas that have dialup in my congressional district. This process does not help rural America get to equality. We want to talk about equality, let us talk about equality for the people to access the World Wide Web at a high speed and not put additional constraints on it. Thank you, Mr. Chairman, I yield back.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Mr. Chairman, I will waive as I will be bouncing between the two hearings, and I want to use the extra time for questions.

[The prepared statement of Mr. Stupak follows:]

STATEMENT OF HON. BART STUPAK

Thank you, Chairman Markey, for holding this hearing on H.R. 5353, the "Internet Freedom Preservation Act of 2008".

This legislation would ensure that all lawful content on the Internet, no matter where it comes from, no matter where it goes, is treated equally by network providers.

Hospitals in Northern Michigan depend on equal access to high speed broadband networks to provide healthcare through the Upper Peninsula Telehealth Network (UPTN).

The Upper Peninsula Telehealth Network represents 42 sites consisting of 10 Critical Access Hospitals, 4 community hospitals, a tribal health center, a summer camp for handicap children, and many other healthcare facilities. It has significantly improved access to health care, provided education opportunities for health professionals, and increased overall efficiency of healthcare in the Upper Peninsula.

These Upper Peninsula hospitals would have difficulty affording any additional charges to ensure that they have the same reliable access to high speed broadband.

I support keeping the Internet open and ensuring that everyone has access to whatever lawful content they choose. However, there are challenges that we need to address to ensure open and equal quality access to all users.

Peer-to-Peer file sharing applications have proven to be powerful tools that slow down the network, using significant amounts of bandwidth to the detriment of other users. In addition, with the increase in distribution speeds, piracy has also grown.

Not only is copyright law being violated, but excessive amounts of bandwidth are also consumed in the process. This reduces the quality of service for other users of the network.

In order to confront these abuses, network providers need flexibility to manage their networks.

Congress also needs to take into account the capacity constraints that currently exist.

The Internet is a limited resource in constant need of private investment to expand. Since its founding, Internet usage has grown exponentially. Today, over 1 billion people in the world use the Internet. 10 million new people are logging on every month.

More music is sold today on iTunes than CDs. 90.4 billion e-mails were sent daily in 2007. Today, YouTube alone consumes as much bandwidth as the entire Internet did in the year 2000.

To keep up with this demand, private companies have been investing billions of dollars to provide faster connections to the network and expand its capacity. Private companies that are investing significant amounts of capital to provide a service should be able to seek fair compensation for it.

Congress must be sure that in recouping these investments, network providers are not restricting access to healthcare providers and other critical non-profit institutions that depend on reliable broadband access can continue at fair and reasonable prices.

Chairman Markey, thank you again for holding today's hearing. I look forward to working with you to address these challenges to ensure open and equal quality access to all users.

Mr. MARKEY. Gentleman's time is reserved. The chair recognizes the gentleman from Texas, Mr. Green.

OPENING STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GREEN. Thank you, Mr. Chairman. And like my colleague from Michigan, I will be bouncing between the two, but I don't know if I will be back in time to do my questions so I will give my statement.

First, I want to thank you for holding the hearing on the Internet Freedom Preservation Act. Today's panel represents a broad range of interests, and I look forward to hearing from the witnesses about the effects of the legislation if it becomes law.

One of the main goals of this subcommittee is to promote the expansion of broadband deployment. The benefits of broadband are far-reaching, and just as important is the ability of end-users to access the content and the services they are choosing. The FCC has successfully promoted and maintained open and nondiscriminatory practices and taken action when necessary to investigate and address alleged violations with its openness principles.

I strongly support the network openness principles adopted by the FCC in 2005 and feel the commission, as well as network operators, have adhered to these principles and successfully addressed issues that were not in line with the four principles. Last week, the Communication Workers Union of America sent a letter to members of our subcommittee expressing concern that, among other things, this legislation goes beyond the FCC's broadband policy statement and does not take into account the need for reasonable network management.

At the FCC hearing at MIT earlier this year, the FCC Commissioner Copp stated the FCC's job is to figure out when and where to draw the line between discrimination and reasonable network management. I share these concerns as some network management practices are necessary to ensure the maximum number of consumers have quality broadband service. And I hope to hear the views from today's panel on the language of Section 3 with regard to nondiscriminatory network management practices.

Use of network management practices is not exclusive to public network operations in the U.S. Internet to schools use management practices and network operators in Japan, which offer the highest residential broadband connections in the world. Buffering, queue-

ing, scheduling, marketing, marking, labeling, parsing, replicating, prioritizing, modifying, metering, policing, collision avoiding, packet resetting, and packet rescinding are all necessary traffic management practices that allow triple-play services, voice, data, and video, to be delivered reliably with efficiency over converged networks. Limiting the flexibility of network operators to respond to traffic and congestion issues by doing this would limit them from providing them the quality services the vast majority of users experience.

It would also impede investment in network infrastructure, which we explored in previous hearings, and much needed in this country to expand availability and speed of broadband service. The companies that would build these networks would be less likely to make these investments. They are not able to manage traffic on them to ensure that the vast majority of their customers are experiencing quality services. At a time when we need to be encouraging this investment, I want to make sure that we do not take steps that will hamper it.

Mr. Chairman, I strongly support the efforts to maintain the open Internet and the FCC policy on the principles, and Congress and the FCC should ensure that no legal Internet application service or content receives discriminatory treatment from network operators. But I am concerned this legislation may be too broad and will not allow for efficient management. And again I look forward to the hearings and look forward to our continuing consideration of the bill.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from California, Mr. Radanovich.

OPENING STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. RADANOVICH. Thank you, Mr. Chairman and Mr. Ranking Member. Market forces react more quickly and strongly than any government regulation could hope to do, and they are more effective. And that is why I don't see a need for the regulation before us today. In other words, the current system works, and we do not need to try to fix what is not broken.

We have seen the Internet come so far since its inception to places and uses that no one could have predicted and at a volume that was unimaginable. It would have been irresponsible for Congress to try to regulate the Internet based on what it looks like when it was created or based on where they thought it would go. And that is why Congress showed great foresight by resisting the urge to constrain the Internet with regulation that they deemed appropriate at that time. And instead recognizing its unique potential and allowing it to flourish within the free market.

The Internet today is a direct result of that decision. It would be just as irresponsible for us to act today, particularly given a lack of evidence of a need for such action. No one here can really know what the Internet is going to look like 10 years from now, but what we do know is that it will not reach its unimaginable potential if we make these drastic alternations to our nation's broadband pol-

icy. The Internet of tomorrow will be a direct result of how we proceed on this issue today.

And I would like to thank the witnesses for being here today and especially to discuss this legislation with us. And I do look forward to a productive hearing. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired.The chair recognizes the gentleman from Georgia, Mr. Deal. The gentleman waives his time. So the chair sees no other members seeking recognition at this time.

So we will turn to our very distinguished panel, and we will begin by recognizing Mr. Walter McCormick. Mr. McCormick is the president and chief executive officer of the United States Telecom Association, an organization consisting of the Nation's largest phone companies. We welcome you back, Mr. McCormick. Whenever you are ready, please begin.

STATEMENT OF WALTER MCCORMICK, PRESIDENT AND CHIEF EXECUTIVE OFFICER, UNITED STATES TELECOM ASSOCIATION

Mr. MCCORMICK. Thank you, Mr. Chairman. Mr. Chairman, Ranking Member Stearns, members of the subcommittee. Thank you for the opportunity to appear before you today. The United States Telecom Association represents broadband service providers, manufacturers, and suppliers. As such, we are committed to broadband investment and deployment, to increased broadband penetration, and to bringing the full promise of broadband to all Americans.

And what extraordinary promise that is. Broadband is bringing consumers new competition and choice in entertainment. It is advancing the economy. It is creating new jobs, particularly in rural areas. It is improving the environment through telecommuting. Broadband is bringing new innovations to healthcare. It is improving education, and broadband is improving personal security and emergency response.

So broadband deployment is important, vitally important. Speaker Pelosi recognized the importance of broadband deployment at the beginning of this Congress in announcing an innovation agenda. And I know, Mr. Chairman, that broadband deployment is an objective of yours. Indeed, your initiative early in this Congress to map where broadband is and is not available in an effort to help target investment to where it is most needed is in direct furtherance of this goal.

But H.R. 5353, in amending the Communications Act to establish a national broadband policy, does not establish a national policy that calls for broadband deployment. Nowhere does it call for increased investment or expanded penetration. And in fact, the language in this bill raises the kinds of uncertainties that could chill investment.

Mr. Chairman, we have three concerns with this bill. Our first concern is that it has been the longstanding practice of this subcommittee to study first and to legislate second. This bill takes the opposite approach. It establishes a national broadband policy first and then directs a circumscribed study aimed at determining whether this new policy is being met and how best to enforce it.

We believe the study should come first, and in that regard, there has been much work done by expert federal agencies and departments that is worth the subcommittee's review and analysis before legislating—work by the FCC, by the FTC, and work by the Department of Justice.

Indeed, the FCC currently has underway three separate proceedings on network practices, and in the past few weeks, the commission has held public hearings in Boston and at Palo Alto. As a result we respectfully suggest that this legislation is premature. The FCC in particular should be allowed to continue its examinations, conduct its work, and conclude its proceedings before Congress considers legislating.

Our second concern is that the terms used in the bill are ambiguous. Until the FCC defines what is and is not unreasonable and discriminatory with a high degree of precision, an exercise that may well lead to protracted litigation, those who are designing, constructing, and managing networks and those who are developing applications do so at some risk.

Our third concern is that this ambiguity, this uncertainty, this risk, will chill innovation, investment, broadband deployment, and job growth. This is something that our nation can ill afford. The weak state of the economy is front page news, yet one of the bright spots is broadband. There is growth in this sector with an estimated $70 billion invested in advanced communications infrastructure this past year.

Mr. Chairman, very creative people are taking the potential of broadband and turning it into incredible life-enhancing tools. Congress should be careful to do no harm to avoid taking the creativity and innovation and investment that is occurring and putting it all in limbo while the government argues over the meaning of words. Instead, let us keep the investment and ingenuity flowing.

I thank you for the invitation to join you and to share our perspective.

[The prepared statement of Mr. McCormick follows:]

STATEMENT OF HON. WALTER B. MCCORMICK, JR.

Chairman Markey, Ranking Member Stearns, Members of the Subcommittee: Thank you for the opportunity to appear before you today.

The United States Telecom Association represents broadband service providers, manufacturers, and suppliers. Our member companies provide broadband on a fixed and mobile basis, and offer a wide array of voice, data and video services. You might say that "we are broadband" in that we design, build and, manage the advanced networks that make broadband communications possible.

As such, we are committed to broadband investment and deployment, to increased broadband penetration, and to bringing the full promise of broadband to all Americans.

And what extraordinary promise that is.

- Broadband is bringing consumers new competition and choice in entertainment;
- It is advancing the economy;
- It is creating new jobs, especially in rural areas;
- It is improving the environment, through telecommuting;
- Broadband is bringing new innovations to healthcare, like those in your state of Massachusetts, through the Connected Health Initiative; and in Virginia, where through broadband, ICU nurses who could only watch three patients at a time can now monitor the health of up to 50;
- It is improving education, by allowing students who are ill to continue to participate in classes through broadband connections so that they do not fall behind;

• And broadband is improving personal security and emergency response, with innovations like the "Be Safe" program—again in Massachusetts—which is now operating at schools throughout the state, and provides first responders with on-site access to detailed, individualized information about local school schematics when lives are at stake and every second counts.

So broadband deployment is important. Vitally important. Speaker Pelosi recognized this at the beginning of the 110th Congress by announcing an "Innovation Agenda" calling for increased broadband deployment. The 170-member Congressional Internet Caucus recognized this in making its number one objective "promoting the growth and advancement of the Internet." The House Republican High-Tech working group recognized this in its call "to remove regulatory barriers, and to promote new technologies to help make broadband more affordable for all Americans." It is clear that bringing broadband to every American is a bipartisan objective. And we know, Mr. Chairman, that broadband deployment is an objective of yours. Indeed, your initiative early in this Congress to map where broadband is and is not available, in an effort to help target investment to where it is most needed, is in direct furtherance of this goal.

But H.R. 5353, in amending the Communications Act to establish a national "Broadband Policy," does not establish a national policy that calls for broadband deployment. Nowhere does it call for increased investment, or expanded penetration. And, in fact, the language in this bill raises uncertainties that could chill investment, and bring to a grinding halt the development of creative and innovative uses of broadband that today are showing extraordinary promise.

What does the bill language mean when it calls for the adoption and enforcement of protections against unreasonable discriminatory favoritism for content based upon its source, ownership, or destination? Would it be "unreasonably discriminatory" for a network operator to construct and manage its networks to assure the reliability of a healthcare application? A personal security application? What is and is not allowed? No one will, or can, know until the FCC defines these terms. And how is this to take place? Prospectively, through rulemaking? Retroactively, through adjudication?

Mr. Chairman, we have three concerns with this bill:

Our first concern is that it has been the longstanding practice of this Subcommittee to study first, and legislate second. This bill takes the opposite approach. It establishes a national broadband policy first, and then directs a circumscribed study aimed at determining whether this new policy is being met and how best to enforce it. We believe the study should come first. And in that regard, there has been much work by expert federal agencies and departments that is worth the Subcommittee's review and analysis before legislating:

• The FCC currently has underway three separate proceedings on network practices, and in the past few weeks the Commission has held public hearings in Boston and Palo Alto. The Chairman of the FCC recently told a Senate Committee that the Commission has the authority to address any network management practices that violate the broadband principles that the Commission has already adopted to "preserve the open and interconnected nature of the public Internet."

• The Federal Trade Commission has conducted an extensive investigation into the state of broadband competition and determined that the marketplace is moving toward more, not less, competition in broadband services, and it warned against "the unintended side effects" of legislation.

• The U.S. Department of Justice recently echoed the findings of this Federal Trade Commission report in its own filing of comments with the FCC.

As a result, we respectfully suggest that this legislation is premature. The FCC should be allowed to continue its examinations, conduct its work, and conclude its proceedings before the Congress considers legislation.

Our second concern is that the terms used in the bill are ambiguous. For example, the new national policy would prohibit "unreasonable interference from and discrimination by network operators." Unreasonable and discriminatory in the eyes of whom? As previously stated, until the FCC defines what is and is not "unreasonable" and "discriminatory" with a high degree of precision, an exercise that may well lead to protracted litigation, those who are designing, constructing and managing networks, and those who are developing applications, do so at some risk.

Our third concern is that this ambiguity, this uncertainty, this risk will chill innovation, investment, broadband deployment, and job growth.

This is something that our nation can ill afford. The weak state of the economy is front page news. Yet, one of the bright spots is broadband. There is growth in this sector, with an estimated $70 billion invested in advanced communications infrastructure this past year. This is an extraordinary sum. By way of comparison, when President Kennedy committed the United States to landing a man on the

moon in ten years, the government spent approximately $10 billion per year—in today's dollars—on the Apollo program. When President Eisenhower committed the Nation to building an Interstate Highway System, the government spent approximately $25 billion per year—in today's dollars. This past year, broadband service providers invested approximately $70 billion. And, this is private sector investment, not taxpayer funds.

This investment has broad benefits. A new report by Connected Nation suggests that just a modest 7% increase in U.S. broadband adoption could create 2.4 million new American jobs and generate $134 billion in annual economic stimulus.

There is much that we can do together. Congress can enact the Rural Utilities Service reforms that are part of the Farm Bill that would accelerate the deployment of broadband in unserved areas; it can advance public-private partnerships like those in the Connected Nation program which, in Kentucky, led to an increase in broadband penetration from 60% to 94% in just 3 years; and it can provide for broadband mapping along the lines of your legislation, Mr. Chairman. Indeed, the Committee's leadership on this issue has already resulted in the FCC voting to improve its approach to data collection by putting in place a system to gather more and better targeted information on broadband adoption.

Mr. Chairman, very creative people are taking the potential of broadband and turning it into incredible, life-enhancing tools—remote medical monitoring, online education, and new applications for first-responders. Congress should be careful to do no harm—to avoid taking the creativity and experimentation and innovation and investment that is occurring and putting it all into limbo while the government argues over the meaning of words. Let's not say to these innovative and creative thinkers: "Hold on a minute, let's just slow down until the government has the chance to get a handle on all this and can develop a national policy to govern the management of the Internet." Instead, let's keep the investment and ingenuity flowing.

Mr. Chairman, I thank you for the invitation to join you and to share our perspective. We look forward to working with you and the members of the Committee on policies aimed at bringing the full promise of broadband to all Americans.

Mr. MARKEY. Thank you very much, Mr. McCormick. Our second witness is Ms. Michele Combs, who is the vice president for communication for the Christian Coalition of America. The Christian Coalition is the largest conservative grassroots organization in the United States. We welcome you.

STATEMENT OF MICHELE COMBS, VICE PRESIDENT, COMMUNICATIONS, CHRISTIAN COALITION OF AMERICA

Ms. COMBS. Thank you, Mr. Chairman, and thank you, distinguished members of the committee. I also want to thank the chairman and Representative Pickering for their leadership in introducing H.R. 5353, The Internet Freedom Preservation Act and for standing up for millions of Americans who don't want to see the Internet turned into something more like cable television.

Use of the Internet has allowed the Christian Coalition to amplify the voices of millions of hard-working, pro-family Americans in a way that has revolutionized their ability to be heard and to engage in the political process.

Consequently, the reason the Christian Coalition supports net neutrality is simple. We believe that all organization, such as the Christian Coalition, should be able to continue to use the Internet to communicate with our members and with the worldwide audience without a phone or cable company snooping in our communications and deciding whether to allow a particular communication to proceed, slow it down, block it, or offer to speed it up only if the author pays to be on the fast lane.

Unfortunately, in the last 6 months, we have seen network operators block political speech, block content, and block the most pop-

ular applications on the Internet. In every incident, the network operators have claimed that these actions were for network management purposes.

As you know, in October 2007, the news organization Associated Press reported that Comcast was blocking consumers' ability to download the King James Bible using a BitTorrent technology. It has also been pointed out that Comcast's behavior just so happens to block access to video distribution applications that compete with Comcast's own programming.

If Comcast were to create a Christian family channel, would the FCC allow it to block access to a competing product from the Christian Coalition that was distributed by a BitTorrent application? I have heard the cable companies argue that network neutrality rules would prevent them from protecting consumers from child pornography and other illegal content. I am not a network engineer, but it is my understanding that every major net neutrality proposal would allow the network operators to block illegal content. No one I know opposes that.

The cable company's argument is disingenuous, and frankly it offends me as I respectfully suggest that it ought to offend you. Right now, the cable companies are not subject to a network neutrality regulation. Yet child pornography continues to be available over the Internet. Why should we believe that network neutrality would impede their ability to block this content when they aren't even stopping it now?

The cable companies aren't making stopping illegal content a priority. What is worse, they are using network neutrality as an excuse for their inaction. Let us remember it was the King James Bible that Comcast blocked which caused the current controversy.

At the FCC field hearing in Palo Alto 2 weeks ago, one witness noticed that if Comcast removed just two pay-per-view pornography channels and allocated that space for the public Internet, it would solve their so-called bandwidth problems.

Why do you think the pornography industry has not supported net neutrality? I suggest the answer is that the pornography industry knows it will be able to pay premium prices to be on the fast lane with exceptional quality of service provided by the cable industry. You know who won't have the deep pockets to compete in this non-neutral world? Non-profit family organizations like the Christian Coalition.

The Christian Coalition does not seek burdensome regulations. We generally believe that less government is better than more government, and we do not believe that government should censor speech. But let us be clear. Right now, the telephone and cable companies are investing and using the exact same censorship and content discrimination technologies that are being used by the Chinese government to censor speech.

In fact, the Chinese government is currently using these same technologies to block the Christian Coalition speech from being received by its citizens. The FCC should make it clear that it will not allow cable and phone companies to use these technologies to block the lawful speech rights of the Christian Coalition and others.

Increasingly, faith-based groups are turning to the Internet to promote their political rights and to engage in what Ronald Reagan

called the hard work of freedom. We should not let the phone and cable companies interfere with that work. Thank you.

[The prepared statement of Ms. Combs follows:]

STATEMENT OF
MICHELE COMBS
VICE PRESIDENT OF COMMUNICATIONS
THE CHRISTIAN COALITION OF AMERICA

HEARING ON:
H.R. 5353, THE INTERNET FREEDOM PRESERVATION ACT OF 2008

BEFORE THE HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

MAY 6, 2008

Good morning Mr. Chairman and distinguished members of the Subcommittee on Telecommunications and the Internet, my name is Michele Combs, and I am the Vice President of Communications for the Christian Coalition of America. Thank you for inviting my organization to testify at this important hearing. I also want to thank the Chairman and Representative Pickering for their leadership in introducing H.R. 5353, the "Internet Freedom Preservation Act."

The Christian Coalition of America is the largest and most active conservative grassroots political organization in the United States. We offer people of faith a vehicle to be actively involved in shaping their government. Christian Coalition of America is a political organization, which is made up of pro-family Americans who care deeply about becoming active citizens for the purpose of guaranteeing that government acts in ways that strengthen, rather than threaten, families.

Our hallmark work lies in voter education. Prior to the last election, the Christian Coalition of America distributed a record 70 million voter guides throughout all 50 states. These non-partisan guides gave voters a clear understanding of where various candidates stood on the issues important to them. With this knowledge, millions of voters went to the polls to make their voices heard.

Use of the Internet has allowed the Christian Coalition to amplify the voices of millions of hard-working, pro-family Americans in a way that has revolutionized their ability to be heard and to engage in the political process.

The Internet connects people all over the world in a manner, scope, and ease of use that would be impossible anywhere but online. It provides a voice for even the most modest members of society to disseminate ideas on a scale traditionally reserved only for the most powerful.

Consequently, the reason the Christian Coalition supports Net Neutrality and H.R. 5353 is simple. We believe that organizations such as the Christian Coalition should be

able to continue to use the Internet to communicate with our members and with a worldwide audience without a phone or cable company snooping in on our communications and deciding whether to allow a particular communication to proceed, slow it down, block it, or offer to speed it up if the author pays extra to be on the "fast lane."

Unfortunately, in the last six months, we have seen network operators block political speech, block content, and block the most popular applications on the Internet. In every instance, the network operators have claimed that these actions were for "network management" purposes.

Verizon Wireless Blocking Political Speech. Last fall, Verizon Wireless censored text messages sent by the pro-choice advocacy group, NARAL, to its own members who had voluntarily signed up to receive them. When NARAL protested, the phone company claimed the right to block any content "that, in its discretion, may be seen as controversial or unsavory." When this did not satisfy the concerned, Verizon Wireless said not to worry, because the company would also block the speech of pro-life advocates such as the Christian Coalition.

After news of Verizon's censorship hit the front-page of the *New York Times* -- sparking a loud public outcry -- the company quickly backpedaled, issuing an apology and blaming the blocking on a "dusty internal policy," -- while still reserving the right to block text messages in the future at its own discretion.

AT&T Blocking Political Speech. In August 2007, AT&T censored a webcast of a concert by the rock band Pearl Jam just as lead singer Eddie Vedder started talking about politics. The company claimed it was a glitch -- as were at least three other instances when AT&T cut off political speech during live concerts.

Comcast Blocking Access to the King James Bible. In October 2007, the news organization Associated Press reported that Comcast was blocking consumers' ability to download the King James Bible using a popular file-sharing technology. Comcast at first denied that it was engaging in such discrimination. After independent tests confirmed that Comcast was indeed engaging in this behavior, Comcast claimed that it was simply conducting routine network management. This "routine network management" has launched two petitions at the Federal Communications Commission, a consumer complaint at the FCC, at least two class action lawsuits, an investigation by a state attorney general, and countless complaints in the blogosphere. Yet Comcast continues to argue it has the right to discriminate against such applications. It is my understanding that it now argues that the FCC has no legal authority to do anything about it. And, I understand that some cable companies have argued to the FCC that not even Congress has the Constitutional authority to protect consumers from such bad behavior.

It has also been pointed out that Comcast's discriminatory conduct just so happens to block access to video distribution applications from companies like Vuze that compete with Comcast's own programming.

If Comcast were to create a Christian family channel, would Washington allow it to block access to competing programming distributed through the Christian Coalition website?

While the cable companies complain to the FCC about their rights to "manage their network" without interference, I ask you to consider the speech and commerce rights of organizations like the Christian Coalition, NARAL, consumer groups, technology companies, and millions of users of the Internet.

I have heard the cable companies argue that network neutrality rules would prevent them from protecting consumers from child pornography and other illegal content. I am not a network engineer, but it is my understanding that every major net neutrality proposal would allow the network operators to block illegal content. No one I know opposes that.

It seems that the cable companies' argument that they are merely engaging in "legitimate network management" is disingenuous, and frankly it offends me. And I respectfully suggest that it ought to offend the Subcommittee.

Right now, the cable companies are not subject to a network neutrality regulation, yet family groups continue to criticize the amount of pornography that cable companies make available on their systems and even profit from. Yet, the cable industry would have us believe that if you impose network neutrality rules, it will suddenly clean up the Internet?

Let's remember, it was the transmitting of the King James Bible that Comcast blocked, which caused the current controversy. It was not as if the company was trying to protect consumers from inappropriate content.

Why do you think that the pornography industry has not supported net neutrality? Arguably, any unsavory producer of content should be worried that its content could be disadvantaged in a non-neutral network. I suggest that the answer is that the pornography industry knows that it will be able to pay premium prices to be on the fast lane with exceptional quality of service provided by the cable industry.

You know who won't have the deep pockets to compete in this non-neutral world of special deals? Non-profit, family organizations like the Christian Coalition.

I further understand that if Comcast, which makes profits handsomely from the distribution of pornograpy, were to eliminate just two of its pay-per-view pornography channels and allocate that space to its public Internet offerings, it would address much of its so-called network congestions issues. As I have heard other witnesses mention, it seems that the real "bandwidth hog" is Comcast and not its customers.

The Christian Coalition does not seek burdensome regulations. We generally

believe that less government is better than more government. And, we do not believe that governments should censor speech. But let's be clear. Right now, the telephone and cable companies are investing in and using the exact same censorship and content discrimination technologies that are being used by the Chinese government to censor speech.

In fact, the Chinese government is currently using these same technologies to block the Christian Coalition's speech from being received by its citizens. The Christian Coalition is merely asking Congress to create simple rules of the road that make it clear that it will allow cable and phone companies to block the lawful speech rights of the Christian Coalition and others.

Increasingly, faith-based groups are turning to the Internet to promote their political rights, to engage in what Ronald Reagan called "the hard work of freedom." We should not let the phone and cable companies interfere with that work. I urge the Subcommittee to quickly approve H.R. 5353.

Mr. MARKEY. Thank you, Ms. Combs, very much. Our next witness is Mitch Bainwol. His is the chairman and chief executive officer of the Recording Industry Association of America. RIAA members create, manufacture, and distribute 90 percent of the sound recordings produced or sold in the United States. We welcome you, sir.

STATEMENT OF MITCH BAINWOL, CHAIRMAN AND CEO, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Mr. BAINWOL. Thank you, Mr. Chairman, Ranking Member Stearns, members of the subcommittee. I appreciate the opportunity today to share our perspective. The music industry is in the midst of profound change. The digital era has produced huge losses yet affords opportunity for our brightest days. Music powers the most popular TV, "American Idol," the most popular games, "Guitar Hero," and the most popular device, the iPod.

Content is king. Speedy gadgets are literally empty without tunes. During these past 2 years, the acquisition of music has jumped 15 percent. But even as music becomes even more central to our lives, the legal share of acquisition has plummeted from 56 percent to 42 percent. Imagine that. It is pretty sobering. Less than half of our music is acquired legally.

The digital age is one where consumers want more and more music but are paying for less and less. The consequences of digital theft are real. Thousands of American job losses, hundreds of talented artists forced out of the business because investment capital is drying up. Half of the glorious songwriters in Nashville showed out of their love for creativity, all at a time when people want more and more music.

It is ironic, but no matter how you slice it, digital piracy has produced brutal human and creative consequences that make this debate anything but academic. Back in 1999, we hit a sales high of $14.6 billion, all physical. Physical sales last year totaled only $8 billion, down 45 percent. Digital sales—downloads, subscriptions, and mobile—generated $2.4 billion last year, making up about a third of our physical loss. So far in 2008, the physical digital net is down another 5 percent.

Clearly our future will be more complex than a model that relies on plastic or unit sales. Increasingly our economic foundation will be augmented by performance royalties and by payments for access to music through subscription services, mobile platforms, and potentially, ISPs. And that is why your hearing today is so significant.

We are heartened by your examination of these issues and the emerging consensus recognizing that Internet freedom is not synonymous with the Wild West in which the taking of our property is accepted or, at best, ignored.

Your distinction between lawful and unlawful, legal or illegal activity, must be the cornerstone about private market discussions that we will have with folks on this panel and public policy.

It wasn't that long ago that ISPs used piracy to drive broadband growth. In amazingly transparent language, we saw advertising effectively encouraging the purchase of broadband to steal music. But many ISPs thankfully are in a different spot. They want to address

the congestion problem that piracy yields and to work more closely with content to provide rich legal offerings with an amateur subscriber base.

While we are seeing signs of cooperation from many ISPs, others would just as soon pretend that congestion was not fundamentally a problem directly connected to theft. Some prefer to cure congestion with greater efficiency, solving their problem but compounding ours. And some go so far to say that they can be smart about dealing with spyware and viruses but need to stay dumb when it comes to pirated music.

If I leave you with one concept, this is it. The Internet ought not be a place where chaos in the name of freedom is allowed to reign supreme. Rather, the Internet should be a place where freedom coexists comfortably with respect for property, with a respect for order. Order means safety on the Internet. It means legitimate commerce. It means tools for parents raising their kids. It means consumers enjoy the high speed that they purchase without degradation because someone is downloading illegal porn.

We are at a vital crossroads for the creative industry. We prefer to work out these matters in the private marketplace with our business partners. We have begun to do so, but we are literally running out of time. Certainly the Markey-Pickering bill is one way to get ISPs to focus on the piracy problem. Its distinction between lawful and unlawful content is a necessary predicate to any discussion about network neutrality and network management.

We applaud you, Mr. Chairman and Congressman Pickering, for making this distinction the touchstone of your bill. Since we continue to believe, at least for now, that our marketplace solution with the ISPs is viable and certainly can be devised and implemented more quickly and flexibly than a regulatory proceeding, we think that the bill is a touch premature. We hope that the deliberations today on this legislation will help spur meaningful discussions and commitments to address the debilitating piracy challenge that we face. Thank you again for your leadership and for the opportunity to testify.

[The prepared statement of Mr. Bainwol follows:]

WRITTEN STATEMENT OF MITCH BAINWOL
CHAIRMAN AND CEO
RECORDING INDUSTRY ASSOCIATION OF AMERICA
BEFORE THE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES
ON
H.R. 5353, THE INTERNET FREEDOM PRESERVATION ACT OF 2008
May 6, 2008

Thank you Chairman Markey and Members of the Subcommittee for the opportunity to testify here today regarding H.R. 5353, the Internet Freedom Preservation Act of 2008.

My name is Mitch Bainwol. I am the Chairman and CEO of the Recording Industry Association of America, the trade association representing the U.S. recording industry. RIAA members create, manufacture and/or distribute 90 percent of all legitimate sound recordings in the United States.

We are pleased that we have been invited to testify on H.R. 5353. Chairman Markey and Congressman Pickering have properly recognized the important distinction between lawful and unlawful content, and we applaud them for making this distinction. Our view is that the marketplace is generally a better mechanism than regulation for addressing such complex issues as how to address online piracy, and we believe the marketplace should be given a chance to succeed. We are encouraged by some of the recent dialogue between content companies and ISPs about this problem. If effective marketplace solutions cannot be reached soon, however, then government regulation may well be necessary.

At the outset, let me stress that we are excited about the opportunities that the Internet provides to expose the public to new artists and offer consumers new choices in the way they get and consume our music. We encourage and applaud any innovation for the lawful consumption of music over different digital platforms, and caution against taking action that would stifle the innovation of legitimate business models. We agree with Chairman Markey and Congressman Pickering that "the Internet has had profound benefits for numerous aspects of daily life for millions of people throughout the United States and is increasingly vital to the economy of the United States."

However, the elephant in the room – piracy – cannot be ignored. Internet piracy of our music continues to have devastating effects on the entire music community. Let me give you a few statistics to illustrate this:

- During the past two years, music acquisition has jumped 15%. During the same two year period, the share of legal acquisition of music has

plummeted from 56% to 42% - now less than half of the music is acquired legally.

- In 1999, the recorded music industry had $14.6 billion in revenues – all from physical sales. By 2007, revenues had dropped to $10.4 billion, of which only $8 billion was from physical sales and $2.4 billion of this was from digital sales.
- In 2000, the ten top-selling albums in the United States sold a total of 60 million units. Last year, they totaled just 25 million, less than half of the 2000 sales.
- At any given moment, over 10 million users are online offering well over 1 billion files for copying through various peer-to-peer (p2p) networks or other online sources.
- As many as half of the staff songwriter jobs in Nashville have disappeared. Thousands of other artists, songwriters, musicians, and music retailers have been forced out of the business.

Online piracy has now spread to other copyright industries, such as movies, software and video games. This is a point of national importance, as the copyright industries constitute nearly seven percent of the Gross Domestic Product and copyrighted works are the single largest United States export.

Today, online piracy has become so severe that it is causing significant congestion over our broadband networks, degrading the online experience for consumers and imposing unnecessary costs on ISPs. Both AT&T and Time Warner Cable have acknowledged that the overwhelming majority of p2p traffic involves the unlawful transfer of music and video files. This piracy hurts all digital consumers by slowing down their networks, and law-abiding consumers are being forced to subsidize the users who abuse the network.

We, as a society, must address the root cause of these problems – piracy – and not just the current symptoms, such as traffic congestion. A strategy aimed only at congestion and not at piracy is just dealing with the symptom, not the disease. Sensible public policy mandates that any solution address the piracy problem.

Clearly, for the music industry, the digital era has produced huge losses, yet affords opportunity for our brightest day. Our future will be far more complex than a model that relies solely on unit sales. Increasingly, the economic foundation of the music industry will be augmented by performance royalties and by payments for bundled access to music through subscription services, mobile platforms, and even ISPs.

It is precisely because the digital environment has become so vital to our industry that we find today's hearing so significant. Net Neutrality and network management are critical issues not only to ISPs and technology companies, but to the men and women who create the content that make broadband and devices so desirable.

Thus, we are heartened by Chairman Markey's and Congressman Pickering's examination of these issues and by the emerging consensus recognizing that Internet freedom isn't synonymous with a Wild West in which the taking of our property is accepted or, at best, ignored. H.R. 5353's distinction between lawful and unlawful activity must be the cornerstone of both private market discussions and public policy.

If we leave you with only one concept, it is the following: The Internet ought not be a place where chaos in the name of freedom is allowed to reign supreme. Rather, the Internet should be a place where freedom coexists comfortably with respect for property – with respect for order. Order means safety on the Internet, it means tools for parents to do their job raising their kids, and it means consumers enjoy the high speed pipes they purchased without degradation because someone in their neighborhood is downloading obscenity or child pornography, or stealing huge amounts of music. It means having an online environment that encourages innovation for legitimate commerce and social discourse and at the same time also has appropriate deterrents for online theft and other illegal behavior.

As we have stated in the past, we strongly prefer that society address these problems through marketplace solutions. The marketplace is uniquely capable of responding quickly and flexibly to the problems posed by the rapidly-changing Internet. The music industry continues to work creatively with other companies to create legitimate online avenues for the dissemination of music. And in recent months, RIAA and our member companies have been engaged in constructive discussions with a number of ISPs about ways to address the piracy problem, including mechanisms like graduated response policies, longer-range technological approaches, and business solutions through negotiations between individual music companies and ISPs that can capture the value of the music being consumed by subscribers. We are cautiously optimistic that such discussions will lead to tangible results.

At the same time, however, we note that too many ISPs have turned a blind eye to online theft, all the while benefiting from the many subscribers who pay for broadband access primarily to steal music and other content. These ISPs would just as soon pretend that congestion was not fundamentally a problem directly connected to theft. And some prefer to cure congestion with greater efficiency – solving their problem but compounding ours.

As the Federal Communications Commission noted at the February hearing on network management practices, access to music was an early driver of broadband adoption. Unfortunately, this turned into massive, large scale piracy that is decimating the recording industry and leaving uncertain whether legitimate content distribution can survive on the Internet. We believe that policy makers in Washington should encourage all ISPs to step forward now and proactively address the issue of piracy.

Certainly, the Markey-Pickering bill is one such way to get ISPs to focus on the piracy problem. Its distinction between "lawful" and "unlawful" content is the necessary predicate to any discussion about net neutrality or network management. It is the

difference between right and wrong. And believe it or not, that important distinction has been overlooked or set aside too often in these kinds of discussions. It is good to see that Chairman Markey and Congressman Pickering have made it the touchstone of their bill, and we applaud them for that.

We continue to believe, at least right now, that a marketplace solution with the ISPs to the piracy problem is viable, and certainly such a solution could be devised and implemented far more quickly than a regulatory proceeding. As the numbers tell you, however, the state of our industry requires action. If we cannot resolve this problem quickly in the private sector, regulation may be a necessary alternative. And should that be necessary, then H.R. 5353 lays out a good, thoughtful framework for establishing such regulation.

If such regulation is necessary, a central tenet must be that the rule of law is respected online. Such regulation should give ISPS the latitude to discriminate against illegal content and other unlawful traffic, just as ISPs currently take action against viruses, malware and other harmful traffic. At the same time, however, actions taken by the ISPs to deter piracy should be applied evenly over all types of pirated content to the extent technologically feasible. Just as ISPs should not unfairly discriminate against lawful traffic for anticompetitive purposes, ISPs should not be able to target only certain forms of piracy that may compete with their legitimate content offerings and not other forms of piracy.

In sum, society should not accept the invitation of certain stakeholders to turn a blind eye to piracy, and only address some of its symptoms. Our policymakers should foster marketplace solutions to address piracy. However, if effective marketplace solutions do not become a reality in the near term, regulation may indeed be necessary to address the rampant piracy that is the cause of network congestion and ensure that ISPs take steps to reduce piracy in a non-discriminatory manner. Most important, any such regulation should be faithful to the distinction between lawful and unlawful content. The recording industry applauds the sponsors for this important recognition that we believe is central to both the underlying reasons for this debate and any ultimate solution.

Thank you.

Mr. MARKEY. Thank you, Mr. Bainwol, very much. Our next witness is Mr. Steve Peterman. He is a three-time Emmy winner and the executive producer of the very popular television show "Hannah Montana." He testifies today on behalf of the Writers Guild of America, West. We welcome you, sir. Whenever you are ready, please begin.

STATEMENT OF STEVE PETERMAN, EXECUTIVE PRODUCER, HANNAH MONTANA, WRITERS GUILD OF AMERICA, WEST

Mr. PETERMAN. Thank you, Chairman Markey, Ranking Member Stearns, Vice Chair Doyle, and the distinguished members of the Telecommunications and Internet Subcommittee. Yes, I am the executive producer, one of the executive producers of "Hannah Montana." I am also a member of the Writers Guild, and I am here today to explain why ensuring an open online marketplace is critical to this country and why the Writers Guild of America supports H.R. 5353, The Internet Freedom and Preservation Act.

When I began my writing career 20 years ago, you could watch "Roseanne", "Cosby", "Cheers", "The Wonder Years", and the series that I was lucky enough to be one of the original writers on: "Murphy Brown." Those shows were considered smart, funny, sometimes touching, and even thought provoking. And they were all made by independent production companies. Unfortunately, in the years since then, those companies have disappeared. The unraveling of the financial interest and syndication rules which began in 1992 has allowed for the greatest consolidation of media we have ever seen.

Instead of a rich marketplace of ideas, today we have seven conglomerates controlling nearly all of the information and content that we see. Because this small group now acts as producer, studio, and network, there has been an inevitable stifling of creativity and diversity. And because they maintain a chokehold over distribution, there has been nowhere else for the creative community to go until the Internet.

It is now abundantly clear that the Internet is the new television. Today you can watch episodes of almost any series you want, anytime you want, on your computer or your phone. And tomorrow you will be downloading first-run movies. We in the Writers Guild are determined not to repeat the old media experience.

During our recent strike, many writers became interested in creating original content for the Web. Some have already signed deals with new media providers, while others aren't even waiting for a deal. They are posting original content for free for the sheer joy of being able to work without getting notes from 30 executives with no sense of humor.

Because, unlike the current studio system, the Internet makes it possible for content creators to retain both ownership and control of the quality of what they create. The Internet also provides the American public with a virtually unlimited menu of news, information, and entertainment content from which to choose.

But all of these bold new possibilities rely on net neutrality. In order for writers to reintroduce diversity back into media and entertainment, we must have a level playing field on an Internet without gatekeepers, a system that is not at the mercy of those

who control distribution and who seek to leverage that control to create a fee system or worse, as we currently experience, to own and control content.

I commend the FCC and Chairman Martin for their diligent work to hold ISPs accountable to the policy principles as adopted by the commission in 2005. ISPs should not have the unilateral authority to disable program applications or to block or discriminate against access to legal Web sites, especially without appropriate transparency to content providers and consumers.

I also strongly support codifying these principles into the law of the land as H.R. 5353 would do. Only with a federal law will we have the legal standing to demand that the Internet remain the open and vibrant marketplace that it is today. And when we talk about an open marketplace, we do not mean a thieves' marketplace. The Guild, believe me, recognizes piracy as a major problem. Just look for "Hannah Montana" on YouTube. You will find more than 110,000 results, most of which were stolen and none of which provide any income to me, the other writers on the show, or the studio.

The two bills that have been introduced during this session of Congress, Senate Bill 215 introduced by Senators Dorgan and Snow, and H.R. 5353 introduced by Chairman Markey and Congressman Pickering, specifically reference the right of consumers to access lawful content. Piracy is and should remain illegal. I applaud the work of the Motion Picture Association of America, the networks, the Copyright Alliance, and everyone else working to ensure creators and copyrights are protected.

But the solution is not establishing new rules that may prevent writers and other content creators from competing at all. The Internet from its inception has been about innovation, and I am confident that innovative technology and innovative strategies will help to confront the problems of piracy.

In conclusion, I have been incredibly blessed in my career. I grew up in a working class family in Milwaukee. My parents ran a mom-and-pop restaurant. They took out loans to send me to Harvard, hoping I would become a lawyer. I terrified them by becoming an actor and then a writer, but my dad lived long enough to see me win an Emmy. And now I am on a show that has made my 16-year-old son say Dad, you have made me a legend. And that is very cool.

I want other writers to have the same opportunities I had, and even more importantly, I want my son and his children to have free and open access to the greatest repository of information in the history of the world. Thank you very much.

[The prepared statement of Mr. Peterman follows:]

STATEMENT OF STEVE PETERMAN

Thank you Chairman Markey, Ranking Member Stearns, Vice Chair Doyle, and other distinguished members of the Telecommunications and the Internet Subcommittee.

My name is Steven Peterman and I'm an executive producer and one of the writers of the Emmy-nominated series "Hannah Montana." I'm also a member of the Writers Guild of America, West. I'm here today to explain why ensuring an open online marketplace is critical and why the Writers Guild of America supports H.R. 5353, the Internet Freedom and Preservation Act.

When I began my writing career twenty years ago you could watch "Roseanne," "Cosby," "Cheers," "The Wonder Years" and the series on which I was lucky enough to be one of the original writers: "Murphy Brown." These shows were all considered smart, funny, sometimes touching and even thought provoking. And they were all made by independent production companies.

Unfortunately, over the years since, those companies have disappeared. The unraveling of the financial interest and syndication rules, a process that began in 1992, has allowed for the greatest consolidation of media we have ever seen. Instead of a rich marketplace of ideas, today we have seven conglomerates controlling nearly all of the information and content we see. Because this small group now acts as producer, studio and network, there has been an inevitable stifling of creativity, and diversity, and because they maintain a chokehold over distribution there has been nowhere else for the creative community to go. They've been the only game in town. Until the Internet.

It is now abundantly clear that the Internet is the new television. Today you can watch episodes of almost any series you want, any time you want, on your computer or phone. Tomorrow, you'll be downloading first-run movies. And we in the Writers Guild are determined not to repeat the "Old Media" experience.

During our recent 100-day strike, many writers, became interested in creating original content for the Web. Some have already signed deals with new media providers, while other aren't even waiting for a deal, they're posting original content for free, for the sheer joy of being able to work without notes from thirty executives with no sense of humor. Because unlike the current studio system, the Internet makes it possible for content creators to retain both ownership and control of the quality of what they create. The Internet also provides the audience—the American public— with a virtually unlimited menu of news, information, and entertainment content from which to choose.

But all of these bold new possibilities rely on "net neutrality." In order for writers to reintroduce diversity back into media and entertainment, we must have a level playing field on an Internet without gate keepers; a system that is not at the mercy of those who control distribution, and who seek to leverage that control to create a fee system or, worse, as we currently experience, to own and control content.

I commend the FCC and Chairman Kevin Martin for their diligent work to hold ISPs accountable to the policy principles adopted by the Commission in 2005. ISPs should not have the unilateral authority to disable program applications or to block or discriminate against access to legal Web sites, especially without appropriate transparency to consumers, content providers, and the general public. I also strongly support codifying these principles into the law of the land, as HR 5353 would do. Only with a federal law will we have the legal standing to demand that the Internet remain the open and vibrant marketplace of ideas it is today.

But when we talk about an open marketplace we don't mean a thieves marketplace. The Guild recognizes that piracy is a major problem. I've experienced this first hand—just look for Hannah Montana on You Tube; you'll find more than 110,000 results, many of which were stolen, and none of which provide any income to me, the other writers of the show, or the studio. The two bills on Internet preservation that have been introduced during this session of Congress—Senate Bill 215, introduced by Senators Dorgan and Snowe, and H.R. 5353 introduced by Chairman Markey and Congressman Pickering, specifically reference the right of consumers to access lawful content. Piracy is and will remain illegal. I applaud the work of the Motion Picture Association of America, the networks, the Copyright Alliance, and everyone else working to ensure creators and copyrights are protected.

But the solution is not establishing new rules that may prevent writers and other content creators from competing at all.

The Internet, from its inception, has been about innovation, and I am confident innovative technology and innovative strategies will help us confront the problems of piracy.

I've been incredibly blessed in my career. I grew up in a working class family in Milwaukee. My parents ran a 'mom and pop' restaurant. They took out loans to send me to Harvard hoping I'd become a lawyer and I terrified them by becoming an actor and then a writer. But my dad lived long enough to see me win an Emmy and now I'm on a show that has made my 16-year-old son tell me, "Dad, you've made me a legend." I want other writers to have the opportunities I had. But even more importantly, I want my son and his children to have free and open access to the greatest repository of information in the history of the world.

In conclusion, we have seen this movie before. We content creators live everyday with the effects of the repeal of the financial and syndication rules and the resulting consolidation of the Nation's media outlets. Unless content creators and consumers have the freedom to create and access lawful content and services without discrimi-

nation by the Internet service providers who, like the television networks in Old Media, have a chokehold over distribution, we will be doomed to repeat our own history. We need rules that protect both creators and consumers, and ensure that the Internet is a level playing field for all; that consumers have the freedom to choose the content and services they want; and that the Internet remains the diverse, independent, vibrant and competitive marketplace of voices and visions that it is today.

Thank You.

SUMMARY OF STATEMENT:

Over the past 15 years, due to the unraveling of the financial and interest and syndication rules, the country has experienced the largest consolidation of media in its history. The media conglomerates have become 'vertically integrated'—meaning they control both the production and distribution of the country's news and entertainment content. This consolidation has stifled creativity and diversity in the entertainment industry and has left content creators with virtually no opportunities for owning their content. Writers and other content creators are excited by the possibility of producing new content directly for the Internet, where they may own and control the content they create. However, in order for them to be able to compete, they need an open online marketplace, free from gatekeepers that may use distribution in order to own, control or favor specific content or content providers.

Mr. MARKEY. Thank you, Mr. Peterman, very much. Our next witness is Mr. Kyle McSlarrow. He is the president and chief executive officer of the National Cable and Telecommunications Association, an organization consisting of the Nation's largest cable companies. We welcome you back, Mr. McSlarrow. Whenever you are ready, please begin.

STATEMENT OF KYLE MCSLARROW, PRESIDENT AND CEO, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Mr. MCSLARROW. Thank you, Mr. Chairman, Ranking Member Stearns, distinguished members of the subcommittee. I think this may be the sixth time I have been before the subcommittee to talk about net neutrality, and ordinarily it would be difficult to find something new. But Internet regulations is the gift that keeps on giving and it morphs from year to year.

Mr. Chairman, before I took this job representing the cable industry and no, my son does not think I am a legend for that. Before even I appeared before many of you to engaged in spirited discussions about energy policy, I and about 15 or 20 others founded an Internet startup. It was out in Silicon Valley late 1999 into 2000. And the idea was to create a destination site, a social networking site, that probably would be a less sophisticated version of what we now think of as a MySpace or a FaceBook.

And this was a world, of course, that was completely a dialup world. And at the time, the last thing in the world we were worried about was whether or not the cable companies were going to block our ability to launch an Internet startup and reach our putative customers.

In fact, we were cheering the cable industry on because we knew at that time that the cable industry was the only industry in America that had launched a huge infrastructure upgrade to deploy broadband nationwide. We just wanted it to go faster, and we wanted people to adopt broadband more quickly.

At about the same time, of course many of you will remember, immediately with the advent of cable's rollout of broadband, came calls for Internet regulation. Back then it was called open access.

And the FCC wisely, in my view, under then Democratic chairman Bill Canard, refrained from regulating cable. A couple years later in 2002, a Republican chairman, Michael Powell, affirmatively in the cable modem decision made it a Title I information service and thus not subject to economic regulation, a decision that was upheld by the Supreme Court in 2005 in the Brand X decision.

I say all this because I think every one of you, in one form or another, has recognized that the Internet and broadband has been a huge success story. And everybody's vision is how do we keep it going. It is not irrelevant, as Mr. Upton and others have pointed out, that during that entire period—and I think we need to fix on this point because others will tell you a different story—cable's broadband service has never been regulated and has provided the platform now joined by the telephone companies and wireless providers that has enabled the creative genius of all these applications, services, and Web sites that we enjoy.

So I think as we think about what the next steps are—and I don't dispute the policies that people have talked about and the vision. All of that, I think, reflects our business and what we want our consumers to experience as Internet, high-speed Internet, consumers. The question is what do we do about regulation.

Mr. Chairman, as you pointed out in your opening statement, the distinction between lawful and unlawful content is an important one. And as I say in my written testimony, I recognize that. I congratulate you for that.

It is interesting that out of the billions of transactions that have taken place on the Internet, there are four episodes that people cite to of malfeasance. One was swiftly dealt with by the FCC. Two of them, so far as I could tell, actually had nothing to do with Internet access. And the fourth, which I am happy to get into in more detail during the Q and A, involves peer-to-peer networking, which is a huge challenge. And I am not in the least bit defensive about it. I think it is a very complicated subject, but none of those, and certainly none of those in the aggregate, suggest to me, given the success that we have had to date, that this is the time to change course in a regulatory direction.

I think what I like about the bill is the concept of having a study, doing the analysis, and then reporting back to Congress. That part of the bill seems to me an eminently sensible approach. And I thank you for your time, Mr. Chairman.

[The prepared statement of Mr. McSlarrow follows:]

TESTIMONY OF KYLE McSLARROW
PRESIDENT AND CEO
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

on

H.R. 5353
"Internet Freedom Preservation Act"

before the

Subcommittee on Telecommunications and the Internet

UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

May 6, 2008

TESTIMONY OF KYLE MCSLARROW

PRESIDENT & CEO, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Good morning, Chairman Markey, Ranking Member Stearns and Members of the Subcommittee. My name is Kyle McSlarrow and I am the President and Chief Executive Officer of the National Cable & Telecommunications Association. Thank you for inviting me today to testify on the "Internet Freedom Preservation Act of 2008."

NCTA represents cable operators serving more than 90 percent of the nation's cable TV households and more than 200 cable program networks. The cable industry is the nation's largest provider of high speed Internet access, making cable broadband service available to 92 percent of Americans, and has invested $130 billion to build a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art digital telephone service to more than 15 million American consumers. Cable operators are committed to delivering an open and satisfying Internet experience to their customers, and the dramatic growth in cable broadband subscribers is evidence of their success in doing so.

The cable industry has consistently demonstrated its commitment to policies that ensure all Americans have access to affordable broadband. We support the Broadband Census of America Act, introduced by Chairman Markey and approved by this Committee and the House on a bipartisan basis, because we believe that improving federal data collection and dissemination regarding where broadband services have been deployed in the United States is necessary in order to achieve the goal of ubiquitous broadband availability for all Americans. We have supported proposals to create a fund tailored to expanding broadband into unserved areas. And we continue to support:

- Tax credits or other tax incentives to providers that build out in rural areas that are unserved by an existing broadband provider.
- Reform of the RUS broadband loan program so that funding is targeted specifically to unserved areas.
- Expansion of the FCC's Lifeline and Link-Up Programs to help ensure that broadband access is extended to low-income households.
- Public-private partnerships to provide broadband in unserved areas.

We support these initiatives because we recognize that the government can play an important role in making certain that the economic and social benefits of broadband connectivity are extended to all areas of this country, and we look forward to working with you further to achieve these goals.

But while broadband deployment to every community in America merits the full attention of policymakers, we believe strongly that a "net neutrality" mandate or government intervention in the operation of networks is unnecessary and would undermine the goals of broadband deployment and adoption. The development of the Internet, expansion of broadband networks, and creation of innovative Internet applications we have seen would not have occurred at such a rapid pace if providers were restricted in how they could engineer their networks to accommodate these dynamic developments.

That said, we recognize, in the words of H.R. 5353, that "the Internet has had profound benefits for numerous aspects of daily life for millions of people throughout the United States and is increasingly vital to the economy of the United States," and that Congress therefore has and will retain a keen interest in the growth and development of this critical infrastructure. It is altogether appropriate that this Subcommittee continue to review and assess the status, progress, and openness of the broadband marketplace. NCTA fully supports this effort. We are confident

that you will find that the marketplace is functioning well and is providing consumers the services, content, speeds, and functions they want.

For the same reasons, we support H.R. 5353's objective of a fair and open assessment by the FCC of network provider practices, and acknowledge that this examination of the marketplace is an approach that differs from other alternative proposals which simply prescribe highly regulatory outcomes. We do not believe it is either necessary or particularly useful, in this or any other proposals, to reach regulatory conclusions at this time that would suggest a change from the policies in place today. The government's consistent light regulatory touch since the introduction of broadband has worked. Only continued regulatory freedom is likely to spur the investment and innovation that consumers have come to expect.

I would like to focus on three points that illustrate why the Internet and broadband services should not be subject to greater government regulation.

First, cable broadband providers have demonstrated and remain committed to providing Americans the very best broadband service available.

Second, every cable modem subscriber today can access the content he or she seeks over the Internet. Broadband providers do not block access to content. Reasonable network optimization techniques not only enable the growth and development of the Internet, they protect consumers and their legitimate expectations.

Finally, the national policy of leaving the Internet unregulated has been a resounding success. Government intervention in broadband network management would only slow the pace of innovation and prevent the natural development of traffic solutions that is already occurring today.

I. Cable Brought Broadband to America

The industry's commitment to the deployment of broadband is reflected in the plain statistics. By any benchmark, the cable industry is leading efforts to spur broadband use and deployment.

Investment. The cable industry has done more to stimulate broadband growth and innovation than any other industry. Cable operators have invested $130 billion in private capital since the passage of the Telecommunications Act of 1996 to build broadband networks across the United States. Today 92% of American households, or about 117 million homes, have access to cable broadband service,[1/] including 96% of American homes to which cable television service is available.[2/] This investment and expansion took place without any government subsidies.

Competition. The cable industry's efforts to deploy broadband have stimulated tremendous investment in the provision of Internet access by competing providers, first by telephone companies and now wireless and satellite companies. This competition has spurred cable broadband providers and their competitors to develop better and better networks and applications to meet consumer demand and compete for their business. As former FTC Chairman Timothy Muris has explained, "competition [among providers] spurs producers to meet consumer expectations because the market generally imposes strict discipline on sellers who disappoint consumers and thus lose sales to producers who better meet consumer needs.

1/ National Cable & Telecommunications Association, Broadband Deployment Statistics (reporting that cable broadband had passed 117,700,000 U.S. housing units as of December 2007) *available at* http://www.ncta.com/Statistic/Statistic/CableBroadbandAvailability.aspx.

2/ *High-Speed Services for Internet Access: Status as of June 30, 2007*, Report, Industry Analysis & Tech. Division, Wireline Competition Bureau, at 3 (Mar. 2008) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.doc ("*2007 High Speed Internet Access Report*").

These same competitive pressures also encourage producers to provide truthful information about their offerings."[3/]

Most notably, as the availability of broadband service has grown, the price-per-megabit has fallen significantly, and the speeds cable broadband offers have shot up dramatically. When cable first offered high-speed broadband service as an alternative to dial-up access in the mid-90s, the speeds were approximately 1-1.5 Mbps. Today, most cable operators offer broadband speeds topping 5 Mbps and some operators, such as Cablevision and Comcast, offer speeds up to 50 Mbps. Comcast and Cox Communications also offer a service that provides for "boosts" of higher speeds that double the throughput on an on-demand, capacity-available basis.

Now the cable industry is on the verge of making the next leap -- from "broadband" to "wideband" -- with a technology which can enable dramatically higher download and upload speeds well above 100 Megabits per second. Several weeks ago, for example, Comcast launched a "wideband" service in Minneapolis-St. Paul that offers speeds of 50 Megabits per second. Comcast expects to have wideband available to 20% of its systems by year-end 2008 and to all homes passed by mid 2010.

Increased Use and Demand. The high quality and easy availability of cable broadband has led to the widespread adoption of broadband use. Today, the cable industry has more than

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[3/] Statement of Timothy J. Muris, Foundation Professor, The George Mason School of Law, before the Workshop on Broadband Connectivity Competition Policy, U.S. Federal Trade Commission, Feb. 28, 2007, at 12; *see id.* at 13 ("Introducing new sellers -- i.e., competition -- can only improve things from the consumer's perspective. Either the new producer offers the consumer a better deal (e.g., lower price, better quality), or it does not get the sale. This ability to shift expenditures imposes a rigorous discipline on each seller to satisfy consumer preferences."); *id.* at 14-15 ("Competition motivates sellers to provide truthful, useful information about their products and drives them to fulfill promises concerning price, quality, and other terms of sale...In a competitive market, a consumer deceived by one seller on one purchase can always turn to a different seller the next time.") (internal citations omitted); *id.* at 16-17 (noting significant competition in broadband access market).

35 million broadband customers.[4/] Overall, approximately 64 million broadband households nationwide have broadband service, and that number continues to grow.

New Content, Web Services, and Applications. The efforts of broadband network providers to build larger and faster networks have helped ensure the success of countless numbers of new Internet businesses and applications -- online video services, social networking websites, data-sharing services, and online interactive game services, to name a few. Despite concerns about alleged limited access to broadband, use of Internet video on demand has grown at the most dramatic rate. In July 2006, 107 million Americans watched video online and about 60% of Internet users downloaded more than 7 billion videos off the Internet.[5/] In February 2008, nearly 135 million U.S. Internet users spent an average of 204 minutes viewing 10.1 billion online videos. YouTube represented 34% of those online videos, or nearly 3.5 billion in total.[6/] To put it into context, in 2006, YouTube consumed as much bandwidth as the entire Internet consumed in the year 2000.[7/]

Television networks are now offering cable modem and other broadband customers video online, such as NBC Universal and News Corp.'s new Hulu service. Book retailers are now offering online digital novels; and music sales websites, such as iTunes, continue to grow. Social networking websites, where users share home videos, pictures, and music content, are also

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4/ National Cable & Telecommunications Association, Broadband Deployment Statistics (reporting that the total cable high-speed broadband customers reached 35,600,000 as of December 2007) *available at* http://www.ncta.com/Statistic/Statistic/Statistics.aspx.

5/ FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report, *News Release* at 4 (Nov. 27, 2007) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.

6/ Todd Spangler, Net Video Views Topped 10 Billion in February, MULTICHANNEL NEWS, Apr. 16, 2008.

7/ Michael Dell, Founder and Chairman, Dell Inc., Keynote Address at 2007 Consumer Electronics Show (Jan. 9, 2007) (transcript available at media.podtech.net/media/2007/01/PID_001851/Podtech_v_1875-ces-2007-dell-launches-.html).

on the rise -- in 2007, an estimated 126.5 million people in North America participated in an online social networking website.[8/] Internet commerce also continues to grow. Last year, over $135 billion was spent purchasing goods and services over the Internet.[9/]

For years, net neutrality proponents have argued that without government intervention, broadband providers would stifle competing services and content providers; Internet development and usage would stagnate; and consumers would be unable to use their broadband connections to download video or access other emerging applications. In fact, cable's investment in broadband has driven innovation and investment in new content and applications at the edge -- the exact opposite of what was predicted by advocates of net regulation.

There is no better proof that there presently exists no "problem" needing a "solution" than YouTube. YouTube would have been a pipe dream in 2002. Six years later, however, YouTube -- the proverbial "two guys in a garage" who allegedly could not survive, let alone thrive, unless the Internet were regulated -- has become a multi-billion dollar enterprise. And YouTube is now owned by Google, which itself has grown to become one of the largest companies in the world with a market capitalization of $169 billion.

The staggering growth of these companies would not have occurred without cable's investment in and deployment of the reliable high-speed broadband service that provides the ecosystem in which Google, YouTube, Yahoo! and other Internet services can flourish.

II. Network Optimization Enhances and Enables the Internet Experience

Cable operators do not and will not block subscribers' access to any lawful content. Cable modem subscribers have the ability to do anything they want to on the Internet. They can

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8/ Jon Swartz, *Social-networking sites going global*, USA TODAY, Feb. 10, 2008.

9/ *Quarterly Retail E-Commerce Sales, 4th Quarter 2007*, U.S. Census Bureau News Release (Feb. 15, 2008) *available at* http://www.census.gov/mrts/www/data/pdf/07Q4.pdf.

download or stream videos, upload and send pictures to friends, or call family across the world. They can also attach gaming devices, or any other computing device they want to use to the network. They can use file-sharing software from peer-to-peer networks. If they couldn't do what they wanted, they would soon not be cable modem subscribers. They would go to our competitors.

Cable subscribers can enjoy the most advanced and cutting-edge Internet sites and applications because of the extensive efforts cable operators constantly undertake to make all content and applications flow smoothly and work seamlessly together over the network. In 1999, there were only 2 million households with broadband service in the United States; today there are approximately 64 million. This is a great success story -- but with this success comes the need to manage the network so that every household has a good user experience.

Cable providers built a smart infrastructure that has the capability to evolve and meet the challenges of multimedia, file sharing, and other bandwidth-intensive applications. But cable broadband subscribers currently enjoy the full benefits of broadband only because cable operators manage their networks on a content-agnostic basis to provide seamless connectivity, deter spam and viruses, and make sure that a tiny minority of users don't slow down the Internet for everyone else. Various estimates are that as few as 5% of customers use from 50 to 90% of the total capacity of the network. In Japan, it is estimated that 1% of Internet users consume 47% of the total Internet traffic.[10/] Faced with these voracious bandwidth consumers, cable operators may engage in reasonable, content-agnostic network management practices -- triggered by objective criteria based upon network traffic levels -- to ensure that the relatively few customers who utilize bandwidth-heavy applications do not degrade or otherwise adversely

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10/ George Ou, citing Haruka Saito, Japanese Counselor for Telecom Policy, http://blogs.zdnet.com/Ou/?p=1063.

affect broadband Internet access for the vast majority of customers.

There have been some recent concerns that network management practices affecting certain high-bandwidth-consuming peer-to-peer (P2P) applications are "discriminatory." P2P traffic can consume a disproportionately large amount of network resources -- far, far more than any other Internet use. If even a small fraction of customers are using these bandwidth-intensive applications at the same time, it can interfere with the ability of the vast majority of all other customers in that area to surf the web, watch streaming video, make voice-over-IP calls, or engage in other routine uses of the Internet.

Providers can't build their way out of this problem -- in spite of increasing capacity, many P2P protocols are written specifically to commandeer as much bandwidth as is available. Instead, providers optimize their networks in order to balance the needs of all of their customers. Far from inhibiting access, smart network techniques protect the ability of our customers to make the greatest and most flexible use of the Internet. They are a reasonable response to an identified congestion problem that has the benefit of allowing all other applications -- particularly latency-sensitive applications like VoIP and streaming video -- to work better. As the Institute for Policy Innovation recently stated, "[i]n almost all cases, network management today is unnoticed by consumers. The opposite, a total lack of management, would not be true. If network operators were precluded from managing their networks, consumers would be negatively affected."[11/] Sound network management is essential to ensuring a stable broadband platform. Google, Yahoo!, Amazon, and service providers like Vonage could not carry on their businesses if bandwidth-consuming applications were allowed to block customers from accessing their Web sites or completing their transactions. Because of network management, such businesses can

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11/ *Broadband Industry Practices*, WC Docket No. 07-52, Institute for Policy Comments at 2 (filed Feb. 13, 2008).

develop business models that hinge on the expectation that their service will not be crowded out by congestion caused by heavy bandwidth-using software. Far from being "neutral," a network that is not managed simply allows those who want to demand all the bandwidth for themselves to do so unchecked.

Reasonable network management practices are also vital to combating the well-documented, illegal distribution of copyrighted material on the Internet. We cannot ignore the problem of piracy. It is a problem that affects not just broadband service providers, legitimate broadband application providers and content providers, but also law-abiding consumers. Ultimately they are the ones that bear the burden of congestion caused by those who abuse their network access to engage in the widespread distribution of infringing works. Technology is agnostic, but, according to one source, 90 percent of P2P downloads are pirated material.[12/] Broadband providers, content owners and others all have a stake in exploring technology solutions that address piracy in ways that respect our customers' expectations and respect the copyright owner's rights, not simply to curtail congestion but for reasons of fairness to those who invest in content and make an important contribution to our economy. Government action that would inhibit development of innovative approaches to thwarting piracy and enhancing the online experience for the vast majority of Internet users would harm content creation and ultimately consumers. In this regard, we appreciate that H.R. 5353 recognizes the distinction between lawful and unlawful content.

So, is there evidence that these challenges are insurmountable and require more government regulation? Quite the contrary. The same technological innovation that gives rise to some of these challenges has produced creative ways to fight spam and viruses. The same

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[12/] Associated Press, *Peer-to-peer networks go legit, but piracy is still rampant*, siliconvalley.com, March 14, 2008, available at http://www.siliconvalley.com/ latestheadlines/ci_8575851.

private sector collaboration that allowed the countless number of networks that make up the Internet to exchange traffic and engage in peering, has and continues to focus on new challenges.

Some P2P developers are creating new ways to make that technology more bandwidth-efficient and network-friendly, so that it may continue to emerge as a useful way to distribute legal content. Cable companies and other broadband providers are working hard to find ways to address concerns about network congestion and create consumer-friendly options that allow the majority of users to access content at the speeds needed. The "P4P Working Group" -- a collaborative industry effort to develop network management solutions that benefit cable and other broadband operators, P2P software firms, and consumers -- is one such effort. Broadband providers have also begun testing and dialogue with P2P applications providers to make networks and P2P applications friendlier to one another. For example, Verizon has been working with Pando Networks, a P2P software developer, and the P4P Working Group to develop a more bandwidth efficient file sharing protocol.[13/] And just last week, the Distributed Computing Industry Association (DCIA) announced a P2P Best Practices Initiative designed to promote the safe and efficient use of P2P services. A DCIA working group, that includes Comcast, Time Warner, Cox, Charter, Suddenlink, Bend Broadband, CableLabs, AT&T, and Verizon, as well as P2P service providers and content owners, will form by June and plans to complete its work by the end of the year.[14/] And Comcast and BitTorrent recently reached an agreement in which Comcast pledged to adopt a capacity management technique based on individual users' consumption during peak periods rather than based on a particular protocol.

Broadband providers and Internet content and service providers have mutual incentives to

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[13/] Peter Svensson, *Verizon Gets Cozy With P2P File-Sharers*, March 14, 2008, available at http://biz.yahoo.com/ap/080314/p2p_verizon.html.

[14/] *See* Communications Daily, May 2, 2008, at 11.

develop workable solutions that enhance customers' Internet experiences. Cable operators' tremendous investments have laid the foundation for robust broadband networks that have spurred the remarkable explosion of new services and innovations on the Internet. In turn, the vast array of applications and services now available on the Internet drive more and more people to become broadband users.

III. The Government Should Continue to Refrain From Regulation

Congress should resist calls to interfere with broadband providers' freedom to manage their respective networks in order to satisfy the evolving needs of American consumers. Cable modem service has never been subject to regulation. Six years after the FCC classified cable's broadband offering as an unregulated information service[15/] and nearly three years after the FCC determined that no regulation was needed to encourage broadband deployment and preserve and promote Internet usage and demand,[16/] there has been no evidence of any practices that would change those conclusions or warrant government intervention generally or specifically with respect to permissible network management activities. The disaster scenarios voiced by network neutrality proponents for many years have never happened. In fact, the opposite has happened -- the Internet is booming without regulation. There is quite simply no problem requiring a government solution.

Under the guise of preventing discrimination, proponents of government-mandated "net

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15/ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002), *aff'd sub nom. Brand X Internet Servs. v. FCC*, 545 U.S. 967 (2005).

16/ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, ¶ 4 (2005); FCC Press Release, *"FCC Adopts Policy Statement; New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet"* (rel. Aug. 5, 2005).

neutrality" would have the regulators determine which network management techniques are permissible. But putting every network management strategy up for debate before regulators would severely hamper the ability of network providers to ensure high-quality and reliable Internet access for their subscribers. Depriving network operators of certain bandwidth management tools only makes the network less efficient for everyone. Ultimately, interfering with an operator's ability to manage its network would harm consumers and prevent them from accessing the content they desire. Adept network optimization techniques are fundamental to creating and preserving the stable "ecosystem" for online service providers that ensures an optimal customer experience.

Government intervention in a fast-changing technological world could result in very real problems developing very quickly. Network management practices are constantly changing and evolving -- as networks grow, consumer usage patterns change, and new technologies emerge. It would be impossible for any regulation to keep up with these changes. Nor does the government have the expertise or resources to second-guess the thousands of network management decisions broadband network engineers must make every day. It is far more likely that government interference in the development of the market could foreclose or prevent the emergence of cross-industry efforts that are more likely to get the solutions right.

Precisely because this marketplace is evolving dynamically and quickly, it is very difficult to take a snapshot that fully captures emerging trends or anticipates the consequences of regulatory intervention. What we do know suggests there is no market failure warranting precipitous action. We believe that this Subcommittee and all policymakers would be best served by a complete examination of the broadband marketplace and the consumer experience, as suggested by H.R. 5353, without prejudging regulatory outcomes or imposing "regulatory

tests" against which an examination or assessment must be matched.

We would suggest that the Internet assessment and summits should include an objective analysis of the nature and variety of broadband services available to the public today; the trends in the growth and deployment of broadband networks; and a determination of the costs and burdens on future deployment of imposing new regulations. And any assessment should be completed before any Congressional decision is made about whether regulation is required.

CONCLUSION

Today's broadband Internet marketplace is intensely competitive, with a growing number of providers offering consumers improved services, ever-faster speeds, better prices and more value. This success is largely due to Congress's policy of leaving the Internet and broadband Internet access service unregulated, a decision that has encouraged billions of dollars in investment. We look forward to working with the Subcommittee to build on this record of success to bring the benefits of broadband to all Americans.

Mr. MARKEY. Thank you, Mr. McSlarrow. Our next witness is Mr. Scott Savitz, who is the chief executive officer of Shoebuy.com, the Nation's fastest growing online retailer for footwear. Mr. Savitz founded Shoebuy after serving as a director at Bank Boston Roberts and Stevens. We welcome you, sir.

STATEMENT OF SCOTT SAVITZ, CEO AND FOUNDER, SHOEBUY.COM

Mr. SAVITZ. Thank you. Good morning, Chairman Markey, Mr. Stearns, and the members of the subcommittee. My name is Scott Savitz. I am the CEO of Shoebuy.com The good thing about doing Shoebuy is my kids are fans, but my wife thinks I am a legend, which is pretty cool. At any rate, we are proudly headquartered in Boston, Massachusetts. And we are now part of the IAC family of businesses, which has grown in recent years to own and operate over 60 brands, including Ask.com, Match.com, Citysearch, Evite, and many others.

I appreciate you inviting me here today to share our company's story and to discuss the importance of preserving an open Internet and its implications for future entrepreneurship and innovation.

Mr. Chairman, as you probably already know, the Internet is a major growth engine for the overall economy and continues to propel innovation and empower individuals. In a slowing economic environment, online retailing continues to look strong and has to date been an impressive growth story.

Excluding online travel, in 2007, U.S. online sales grew 21 percent to $175 billion and are projected to total $204 billion in 2008. One million companies worldwide now rely on the Internet economy for more than 50 percent of their revenue.

I can tell you firsthand that my business fundamentally depends on an open Internet. We rely on consumers having unfettered access to our site and for us to be able to reach consumers whenever and wherever they live.

We must therefore preserve consumers' rights to access content and service, on a nondiscriminatory basis without interference from network operators. What is at stake in the net neutrality debate is nothing less than the future growth on the Internet economy, innovation, entrepreneurship, and consumer choice.

Mr. Chairman, in April 1999, we started Shoebuy.com, which is now one of the world's largest sites for shoes. Our initial business plan and strategy would have been quite different had there not been an open Internet. In a world where network operators would function as gatekeepers, we would have faced the prospect of first negotiating to buy access to consumers. So instead of having to raise immense institutional capital early on to gain access to consumers, we were able to bring a better mousetrap to the market by relying on hard work, savvy marketing, fiscal prudence, and a certain amount of luck.

At the heart of our success is Shoebuy's focus on providing the best in class consumer experience. Through dedication to the customer in our ability to keep marketing and overhead costs low, we have been to offer consumers the most popular brands available anywhere at great prices with free shipping and free returns.

With this concept and our dedication to the customer experience, Shoebuy has continued to grow and prosper. Shoebuy currently has over four-and-a-half million visitors a month, and what just started off as four people working out of 200 square foot office today employs 140 Bostonians.

We have grown our business to include partnerships with over 500 brands representing over 600,000 products, or what equates to over $3 billion in inventory available for purchase on the Shoebuy.com site. This is the equivalent of putting over 15,000 shoe stores within the reach of each consumer visiting Shoebuy.com. Said another way, the Shoebuy site now offers enough footwear to outfit the entire population of Massachusetts.

As part of our commitment to consumers, we continue to innovate and improve our offerings and capabilities. Notably, it was reported that Shoebuy is one of the Internet's top ten most visited apparel and accessory shopping sites. We were recognized by eTail as the number one eTailer for fulfillment, fulfilling at 99.6 percent with an average ship time out the door 1.3 days. And Shoebuy was lauded by BizRate as one of the top eTailers in the country for outstanding service, one of only three companies to win this award 5 years in a row. We continue to look for ways to provide customers with a better experience in order to maintain our status as an industry leader.

However, Mr. Chairman, without an open and neutral platform on which to innovate, where consumers' needs and demands are paramount, our business may not have flourished or even begun. We rely on the Internet to enable our customers to access the Shoebuy site independent of barriers or gatekeepers. Shoebuy collaborates with an assortment of marketing partners, which includes both very large advertising and media companies as well as thousands of small marketing affiliates.

These partners likewise depend on the Internet to remain a free-flowing medium. Each is integrated virtually with Shoebuy over the Internet and needs open access to continue the creativity and innovation behind their endeavors. Similarly, the Internet serves as a mediating platform to bring together product and other content from a diverse mix of over 500 brand partners ranging from global corporations to small entrepreneurial ventures. Unfettered access allows these diverse partners to all work with Shoebuy to serve the consumer. For consumers who are paying for Internet access, they have every right to expect to be able to choose the lawful content and services they want.

And to suggest that Internet companies are free-riding on others' investments is simply belied by the facts. Shoebuy and its colleague companies pay network operators millions of dollars a year for Internet access, proportionate to the amount of traffic coming to their sites. Further, it is because of the vast investment made to the incredible array of content and services offered online that consumers are enticed to purchase broadband access in the first place.

Ultimately, a consumer's enjoyment of the Internet has been and should remain based on their choice, not the consequence of a deal that a Web site makes with a network operator to receive enhanced treatment or prioritization.

If this is permitted, future entrepreneurs cannot be assured of having the same opportunity that we did in that 200 square foot office in Boston. Net neutrality from my perspective is someone who has been the little guy with the idea in 1999, to the CEO of one of the fastest growing Internet retailing sites, comes down to protecting innovation, opportunity, and consumer choice.

Mr. MARKEY. If you could summarize.

Mr. SAVITZ. Yes. In conclusion, I can tell you I sincerely believe maintaining an open Internet that rewards innovation and entrepreneurship is essential to stimulating economic growth and our ability to compete in international markets. I appreciate you having us here today, and I certainly do believe that the qualities of this legislation looks to do is certainly how we were able to go from being a small idea to reaching a worldwide marketplace in a fairly short period of time.

[The prepared statement of Mr. Savitz follows:]

STATEMENT OF SCOTT SAVITZ

Good morning Chairman Markey, Mr. Upton, and members of the Subcommittee. My name is Scott Savitz. I am the Chief Executive Officer of Shoebuy.com, which is proudly headquartered in Boston, Massachusetts. Shoebuy is part of the IAC family of businesses. IAC is the New York City headquartered Internet company which has grown in recent years to own and operate over 60 brands including Ask.com, Match.com, Citysearch, Evite, ServiceMagic, CollegeHumor, RushmoreDrive.com, Zwinky, and many others. Thank you for inviting me here today to share our company's story and to discuss the importance of preserving an open Internet and its implications for future entrepreneurship and innovation.

I. INTRODUCTION

Mr. Chairman, the Internet is a major growth engine for the overall economy and continues to empower individuals and propel innovation. In a slowing economic environment, online retailing continues to look strong and has to date been an impressive growth story. Excluding online travel, online sales grew 21% last year to $175 billion and are projected to total $204 billion in 2008. One million companies worldwide now rely on the Internet economy for more than 50% of their revenue. It's the universality and openness of the Internet that's made such growth possible.

I can tell you first hand that my business fundamentally depends on an open Internet. We rely on consumers having unfettered access to our site and for us to be able to reach consumers whenever and wherever they live.

We must, therefore, preserve consumers' rights to access content and services on a non-discriminatory basis, without interference from network operators. What's at stake in the net neutrality debate is nothing less than the future growth of the Internet economy, innovation, entrepreneurship, and consumer choice.

II. SHOEBUY.COM: ENTREPRENEURSHIP WITHOUT PERMISSION

Mr. Chairman, in April of 1999, we launched Shoebuy.com, which is now one of the world's largest sites for shoes. Our initial business plan and strategy would have been quite different had there not been an open Internet. In a world where network operators would function as gatekeepers, we would have faced the prospect of first negotiating to buy access to consumers, much as cable channels have had to run the gauntlet to gain carriage. So instead of having to spend capital early on to simply gain access to consumers, we were able to quickly bring a better mousetrap to the market by relying on hard work, savvy marketing, fiscal prudence, and a certain amount of luck.

At the heart of our success is Shoebuy's focus on providing the best in class experience for the customer. Through dedication to the customer and our ability to keep marketing and overhead costs low, we have been able to offer consumers the most popular brands available anywhere, at great prices, with free shipping and returns.

With this concept and our dedication to the customer experience, Shoebuy has continued to grow and prosper. Shoebuy currently has over 4.5 million visitors per

month, and what started off as just four people working out of a 200 square foot office, today employs 140 Bostonians.

We have grown our business to include partnerships with over 500 brands representing 600,000 products, or what equates to $3 billion in inventory available for purchase. This is the equivalent of putting over 15,000 shoe stores within the reach of each consumer visiting Shoebuy.com. To give you a more vivid example, we now offer enough footwear to outfit the entire population of Massachusetts.

As part of our commitment to consumers, we continue to innovate and improve our offerings and capabilities. Notably, Hitwise reported that Shoebuy is one of the Internet's Top Ten most visited apparel and accessory shopping sites. We were recognized by eTail as the "#1 e-tailer" for fulfillment at 99.6%, with an average ship time (out the door) of 1.3 days. And Shoebuy was lauded by BizRate as one of the top eTailers in the country for outstanding service—one of only three companies to win this award 5 years in a row. We continue to look for ways to provide customers a better experience, better service and better prices.

However, Mr. Chairman, without an open and neutral platform on which to innovate, where consumers' needs and demands are paramount, our business may not have flourished or even begun. We rely on the Internet to enable our customers to access the Shoebuy site independent of barriers or gatekeepers. Shoebuy collaborates with an assortment of marketing partners, which includes very large advertising and media companies as well as thousands of small marketing affiliates.

Our partners likewise depend on the Internet to remain a free-flowing medium. Each is integrated virtually with Shoebuy over the Internet and needs open access to continue the creativity and innovation behind their endeavors. Similarly, the Internet serves as a mediating platform to bring together product and other content from a diverse mix of over 500 brand partners, ranging from global corporations to small entrepreneurial ventures. An open Internet allows these diverse partners to seamlessly work with Shoebuy in serving customers.

Our customers, similarly, have every right to expect to be able to reach our store. Consumers pay for broadband access and should be free to choose the lawful content and services they want. Shoebuy and its colleague companies, likewise, pay network operators millions of dollars a year for Internet access proportionate to the amount of traffic coming to their sites. So to suggest that Internet companies are free-riding on other's investments is simply belied by the facts. To the contrary, it is because of the vast investment made in the incredible array of content and services offered online that consumers are enticed to purchase broadband access in the first place.

Ultimately, a consumer's enjoyment of the Internet has been, and should remain, based on their choice, not the consequence of a deal that a Web site makes with a network operator to receive enhanced treatment or prioritization.

If this is permitted, future entrepreneurs cannot be assured of having the same opportunity to do what we did in that 200 square foot office in Boston. Net neutrality, from my perspective, as someone who has been the "little guy" with the idea in 1999, to the CEO of one of the fastest growing Internet retailing sites, comes down to protecting innovation, opportunity and consumer choice.

III. CONCLUSION

Maintaining an open Internet that rewards innovation and entrepreneurship is essential to stimulating economic growth and for our ability to compete in international markets. If it were not for this type of open platform, Shoebuy would have been even further challenged in its efforts to emerge 9 years ago. We might not exist today had it not been for some basic non-discrimination principles, and we would certainly not have been able to compete as we have against some of the largest retailers in the shoe industry. With the Internet as a frictionless space for connectivity, Shoebuy is able to bring maximum efficiency to streamlining supply chains and to satisfying the needs of its customers.

I want to thank the Chairman and Representative Pickering for their leadership in introducing H.R. 5353, the "Internet Freedom Preservation Act." It is my understanding that this legislation codifies a policy of promoting openness, competition, and innovation for consumers on the Internet. Certainly, these are the very qualities that have allowed Shoebuy to reach a worldwide marketplace in only a few short years. My colleagues at IAC and I look forward to continuing to work with Congress and the FCC to ensure we preserve an open Internet. Thank you.

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Mr. MARKEY. Thank you, Mr. Savitz, very much. Our next witness is Christopher Yoo, who is a professor of law and communications at the University of Pennsylvania Law School. He has written extensively on telecommunications policy matters and also clerked for the United States Supreme Court. We welcome you, sir.

STATEMENT OF CHRISTOPHER YOO, PROFESSOR OF LAW, FOUNDING DIRECTOR, CENTER FOR TECHNOLOGY, INNOVATION, AND COMPETITION, UNIVERSITY OF PENNSYLVANIA

Mr. YOO. Thank you, Mr. Chairman, Ranking Member Stearns, members of the subcommittee. I am grateful for the opportunity to be here before you today. In my testimony, I would like to highlight two larger themes that are often overlooked in the network neutrality debate.

First, the Internet is undergoing a fundamental transformation. During the Internet's early years, the Internet employed a fairly uniform technology to connect a fairly uniform group of end users who were running a fairly uniform set of applications. Specifically, the Internet relied almost exclusively on technologies developed by telephone companies to enable university-based researchers to share e-mail and text files.

All of that has begun to change. The Internet has become a mass market phenomenon that now reaches over 70 percent of all American adults and a growing number of people worldwide. As a result, Internet traffic has growth at a breathtaking rate, expanding almost 50 percent each year for the past several years. Internet traffic is not only growing in terms of size but also in variety and sophistication.

During the Internet's initial phase, the primary applications were e-mail and Web browsing. For these applications, delays of a fraction of a second were virtually unnoticeable. The current Internet is increasingly dominated by more sophisticated applications, such as streaming media, online gaming, telemedicine, and virtual worlds, which are much more bandwidth intensive and much less tolerant of delay. The most important development is the deployment of IP video, which some expert estimate will cause traffic to grow at a rate of 90 to 100 percent a year.

Network providers are pursuing a number of strategies to meet this rapidly increasing demand. Verizon is investing $23 billion to make its file system available to roughly half of its subscriber base. This system can support upload and download speeds up to 20 megabytes per second. AT&T is pursuing a different strategy, committing $6.5 billion to deploy its U-verse based system, which is centered on a telephone technology known as VDSL to 60 percent of its service areas. These developments have forced cable companies to respond with Comcast investing additional billions to upgrade portions of its network to DOCSIS 3.0, capable of supporting download speeds of up to 50 megabytes per second. Thus, technologies now vary widely from provider to provider, and because these technologies are not being deployed throughout any one provider service area, technologies even vary among the different geographic areas served by a single network provider.

But perhaps the most important and often overlooked development is the emergence of wireless as a major broadband compet-

itor. The most recent FCC data revealed that wireless has skyrocketed from having no subscribers at the beginning of 2005 to controlling 35 million subscribers and 35 percent of the market for high-speed lines as of June 2007. Published reports indicate that wireless broadband has continued to grow rapidly since that time.

The result is that the broadband industry is becoming increasingly competitive. Even network neutrality proponents can see that an increase in competition undercuts the justification for regulatory intervention. The industry also employs a wider variety of technologies than ever, with each technology being susceptible of different problems and different solutions. These considerations underscore the problems associated with any one-size-fits-all solution to the Internet.

Each provider must make decisions that involve difficult tradeoffs based on their best guess of what the future will bring. The difficulty of anticipating which of these solutions will prove best in each context is underscored dramatically by the AOL/Time Warner merger. When it was announced in 2001, many regarded the walled garden approach in which AOL gave preferential treatment to its own proprietary content as a profound threat to the Internet. These threats never materialized, demonstrated most eloquently by Time Warner's announcement that it was selling off AOL at a loss of over $200 billion.

My second point is to draw on the lessons of past regulatory efforts to impose access mandates similar to network neutrality. These past regulatory efforts have found that interconnection and nondiscrimination mandates only work when the interface and the product being regulated is relatively simple. As the Supreme Court recognized in its Trinko decision, the situation is quite different when the product and interface are complex. When that is the case, disputes over access are likely to be highly technical and extremely numerous given the incessant complex and constantly changing interaction between providers.

Thus, in order to protect against what the court called a death by 1,000 cuts, any regulator would have to undertake a fairly comprehensive oversight of essentially all facets of the business relationship between the parties. The challenge of doing so would be particularly demanding in industries like broadband, which are undergoing rapid technological change. This has led many commentators to conclude that any attempts to mandate access to such complex technologies are likely to prove futile.

Indeed, past efforts to impose similar access regimes, such as the controversy over protocol conversion and vertical switching services under the computer inquiries, leased access to cable television networks, and unbundled access to network elements under the 1996 Act have become bogged down in incessant controversies and litigation.

These problems demonstrate the potential dangers of regulatory intervention and underscore the importance of making sure that the scope of intervention is commensurate with the scope of the problem. It bears noting that the OECD, the Federal Communications Commission over multiple occasions over the past 2-and-a-half years, the Justice Department, the Federal Trade Commission, and leading Internet gurus David Farber and Bob Kahn have con-

cluded that the factual record does not justify the type of regulatory intervention that proponents seek.

Mr. MARKEY. Mr. Yoo, if you could summarize this.

Mr. YOO. There is a long history of the Internet adjusting to solve these problems by itself. The better solution is to pursue what I suggest, is what I have called network diversity in which providers are permitted to experiment with different approaches and let the choices of the consumers control the outcome. A case-by-case——

Mr. MARKEY. OK, thank you.

Mr. YOO [continuing]. After-the-fact approach would strike a better balance.

[The prepared statement of Mr. Yoo follows:]

STATEMENT OF CHRISTOPHER S. YOO

Mr. Chairman, Ranking Member Stearns, Members of the Subcommittee, I am grateful for the opportunity to appear before you today. In my testimony, I would like to highlight two larger themes that are often overlooked in the network neutrality debate.

First, the Internet is undergoing a fundamental transformation. During the Internet's early years, when the National Science Foundation initially supported civilian backbone services, the Internet employed a fairly uniform technology to connect a fairly uniform group of end users who were running a fairly uniform set of applications. Specifically, the Internet relied almost exclusively on technologies developed by telephone companies to enable university-based researchers to share e-mail and text files.

All of that has begun to change. The Internet has become a mass market phenomenon that now reaches over 70% of all American adults and a growing number of people worldwide. As a result, Internet traffic has grown at a breathtaking rate. From 1990 to 2002, the total volume of Internet traffic doubled each year except for 1995 and 1996, when the volume experienced an eight- or nine-fold increase each year. Starting in 2003, Internet traffic has grown roughly 50% to 60% each year, but even that rate still poses more than its share of challenges.

Internet traffic is growing not only in terms of size, but also in sophistication. During the Internet's initial phase, the primary applications were e-mail and Web browsing. For these applications, delays of a fraction of a second were virtually unnoticeable. The current Internet is increasingly dominated by more sophisticated applications such as streaming media, online gaming, telemedicine, and virtual worlds, which are often much more bandwidth intensive and much less tolerant of delay. The most important development is the deployment of IP video, which some experts estimate will cause that traffic to grow once again at a rate of 90% to 100% each year.

Network providers are pursuing a number of strategies to meet this rapidly increasing demand. Unlike the initial transition to broadband, which only required reconditioning existing cable and telephone technologies, the new strategies require significantly greater capital investments. Verizon is investing $23 billion to make its FiOS system available to roughly half of its subscriber base. This system can support upload and download speeds of up to 20 MB. AT&T is pursuing a different strategy, committing $6.5 billion to deploy its new U-verse system based on a telephone-based technology known as VDSL to 60% of its service area. These developments have forced cable companies to respond, with Comcast investing additional billions to upgrade portions of its network to DOCSIS 3.0. Thus, technologies now vary widely across providers and even across any particular provider's service area.

But perhaps the most important and most often overlooked development is the emergence of wireless as a major broadband competitor. The most recent FCC data reveal that wireless has skyrocketed from having no subscribers as of the beginning on of 2005 to controlling 35 million subscribers and 35% of the market for high-speed lines as of June 2007. Published reports indicate that wireless broadband has continued to grow rapidly.

The result is that the broadband industry is becoming increasingly competitive. Even network neutrality proponents concede that an increase in competition undercuts the justification for regulatory intervention.

The increasing heterogeneity of Internet usage has further increased the uncertainty of the business environment. For the past several years, the Internet appeared to have been shifting from a client-server architecture, in which files are hosted in central locations and downloaded to end users, toward a peer-to-peer architecture, in which files are stored throughout the network. For the past several years, peer-to-peer traffic exceeded client-server traffic. Last year, thanks to new download-based applications such as YouTube, client-server traffic once again regained the upper hand.

These developments underscore the challenges posed by the uncertainty of the technological environment. A network designed around a client-server allocates bandwidth asymmetrically, with more capacity committed to downloads than to uploads. A network designed around a peer-to-peer architecture allocates download and upload bandwidth more evenly.

Network providers must thus make decisions that involve difficult tradeoffs based on their best guess of what the future will bring. These considerations underscore the problems associated with any one-size-fits-all solution to the Internet. The network now consists of very different transmission technologies, each of which is susceptible to different problems and different solutions. In addition, the number of potential solutions is vast, including building additional bandwidth, storing content locally, and network management.

The difficulty of anticipating which of these solutions will prove best in each context is underscored dramatically by the AOL-Time Warner merger. When it was announced in 2001, many regarded the "walled garden" approach in which AOL gave preferential treatment to its own propriety content as a profound threat to the Internet. These threats never materialized, demonstrated most eloquently by Time Warner's recent announcement that it was selling off AOL at a loss of $200 billion.

My second point is to draw on the lessons of past efforts to implement access mandates similar to network neutrality. Past regulatory efforts have found that such interconnection and nondiscrimination mandates only work when the interface and the product being regulated is relatively simple. As the Supreme Court recognized in its Trinko decision, the situation is quite different when the interface is complex. When that is the case, disputes over access are likely to be "highly technical" and "extremely numerous, given the incessant, complex, and constantly changing interaction between providers."[1] Thus, in order to protect against "death by a thousand cuts," any regulator would have to undertake comprehensive oversight of essentially all facets of the business relationship between the parties. The challenge of doing so would be particularly demanding in industries like broadband, which are undergoing rapid technological change.[2] This has led many commentators to conclude that any attempts to mandate access to such complex technologies are likely to prove futile.[3] Indeed, past efforts to impose similar access regimes, such the controversy over protocol conversion and vertical switching services under the Computer Inquiries, leased access to cable television networks, and unbundled access to network elements under the 1996 Act, have become bogged down in incessant controversies and litigation.

These problems demonstrate the potential dangers of regulatory intervention and underscore the importance of making sure that the scope of intervention is commensurate with the scope of the problem. It bears noting that the OECD,[4] the FCC (on

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[1] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004).

[2] Christopher S. Yoo, Beyond Network Neutrality, 19 HARV. J.L. & TECH. 1, 39-45 (2005), available at http://ssrn.com/abstract=742404; Christopher S. Yoo, Network Neutrality and the Economics of Congestion, 94 GEO. L.J. 1847, 1896-97 (2006), available at http://ssrn.com/abstract=825669.

[3] See, e.g., Paul L. Joskow & Roger G. Noll, The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries, 51 STAN. L. REV. 1249 (1999); Gerald R. Faulhaber, Policy-Induced Competition: The Telecommunications Experiments, 15 INFO. ECON. & POL'Y 73 (2003).

[4] OECD Report, Internet Traffic Prioritisation: An Overview 5 (Apr. 6, 2007), available at http://www.oecd.org/dataoecd//43/63/38405781.pdf.

multiple occasions over the past two and one half years),[5] the Justice Department,[6] the FTC,[7] and leading Internet gurus David Farber and Bob Kahn[8] have concluded that the factual record did not justify the type of regulatory intervention that network neutrality proponents seek. The FCC's current Notice of Inquiry was haled as an opportunity for network neutrality proponents to demonstrate the types of harms wrought by the absence of mandated network neutrality.[9] The proceeding only turned up a few isolated instances that do not appear to support broadscale regulatory intervention.[10]

On the other hand, the Internet has a long history of adjusting to these types of problems by itself. Indeed, many examples to which network neutrality proponents point, such as network providers' initial resistance to virtual private networks (VPNs) and home networking equipment such as WiFi routers, are better regarded examples of how the private decisions of consumers and network providers can solve such problems without regulatory intervention. Comcast's recent accommodation of BitTorrent and Pando and Verizon's recent commitment to open networks represent more recent examples of the same phenomenon.

The better solution is to pursue what I have called "network diversity," in which different providers are permitted to experiment with different approaches and to let the choices of consumers control the ultimate outcome.[11] A case-by-case, after-the-fact approach would appear to strike a better would balance that preserves room for experimentation while simultaneously ensuring that any problems that may emerge will be addressed. The FCC's enforcement action against Madison River[12] and Chairman Kevin Martin's recent testimony before the Senate Commerce Committee[13]attest to the agency's readiness to play this role.

Mr. MARKEY. Thank you, Mr. Yoo, very much. And our final witness is Mr. Ben Scott. He is the policy director for Free Press. He testifies today on behalf of Free Press, Consumers Union, Public Knowledge, and the Consumer Federal of America. We welcome you back, Mr. Scott.

STATEMENT OF BEN SCOTT, POLICY DIRECTOR, FREE PRESS

Mr. SCOTT. Good morning, Mr. Chairman, members of the committee. I much appreciate the opportunity to testify today. As many of you know, for years the preservation of network neutrality has been a prior issue for consumer groups like mine. That is because

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[5] AT&T Inc and BellSouth Corp Application for Transfer of Control, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5724-27 pp. 116-20 & n 339, 5738-39 pp. 151-53 (2007); Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc, Assignees, et al, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8296-99 pp. 217-23 (2006); Verizon Communications, Inc and MCI, Inc Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18507-09 pp. 139-43 (2005); SBC Communications, Inc and AT&T Corp Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18366-68 pp. 140-44 (2005); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14904 p. 96 (2005).

[6] Ex parte Filing of the Department of Justice, Broadband Industry Practices Before the FCC, WC Docket No. 07-52 (filed Sept. 6, 2007), available at http://www.usdoj.gov/atr/public/comments/225767.pdf.

[7] Federal Trade Commission, Staff Report on Broadband Connectivity Competition Policy 10, 11 (June 2007), available at http://www.ftc.gov/reports/broadband/v070000report.pdf.

[8] David Farber & Michael Katz, Hold Off on Net Neutrality, WASHINGTON POST, January 19, 2007, at A19; Andrew Orlowski, Father of Internet Warns Against Net Neutrality, THE REGISTER, Jan. 18, 2007, available at http://www.theregister.co.uk/2007/01/18/kahn—net—neutrality—warning/ (quoting co-developer of TCP/IP Robert Kahn).

[9] Broadband Industry Practices, Notice of Inquiry, 22 FCC Rcd 7894 (2007).

[10] See Kara Rowland, FCC Set for Airwaves Auction, WASH. TIMES, Jan. 16, 2008, at C8 (quoting FCC Chairman Kevin Martin as calling network neutrality regulation unnecessary).

[11] Yoo, Beyond Network Neutrality, supra note 2; Network Neutrality and the Economics of Congestion, supra note 2; Christopher S. Yoo, Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate, 3 J. ON TELECOMM. & HIGH TECH. L. 23 (2004), available at http://ssrn.com/abstract=495502.

[12] Madison River Commc'ns, LLC, Order, 20 FCC Rcd 4295 (2005).

[13] Written Statement of Kevin Martin, Chairman, Federal Communications Commission, Before the United States Senate Committee on Commerce, Science and Transportation 4-5 (Apr. 22, 2008), available at http:// hraunfoss.fcc.gov/edocs—public/attachmatch/DOC-281690A1.pdf.

the consumer experience with the future of the Internet rides on this policy decision.

As you have heard today, two competing visions for that future stand before you. Will we embrace the openness that has shaped the Internet to the present day, or should we permit network owners to move to a closed system of content control, which we have had in cable television? It is a virtual clash of civilizations.

For consumers, this clash is about the rights of Internet users to seek and share the content of their choice online. Of course, net neutrality has been hotly debated by legions of lobbyists and millions of Americans. But in the last 3 years, Republicans and Democrats here in the Congress and at the FCC have actually come together on a few basic points. I have analyzed this history in my written testimony.

First, almost everyone agrees that consumers are entitled to access the lawful content applications and devices of their choice, and second that it is reasonable to establish these as principles in the law. FCC put this in a policy statement, and Congress has tried to codify it in numerous ways over the years.

This leads me to conclude that it is no longer a question of whether consumers will have laws guarding an open Internet but how those laws will be crafted. We strongly support this bill for rising to the occasion. This bill simply places these agreed-upon consumer rights at the base of the Communications Act. It clarifies the authority of the FCC to protect Internet users from discrimination, and it tells the agency what rights Congress wants consumers to expect in an open Internet marketplace.

It is a modernization of the principles that have long been in the Act. There are no regulations in this bill, simple and clear. However as we have heard today, this debate if often muddied by issues that are legitimate but not germane to the bill. I have a few fish for your aquarium, Mr. Chairman.

First, as you mentioned, the copyright issue. Net neutrality does not protect online piracy on peer-to-peer networks or anywhere else on the Internet. Neither this bill nor any bill in the history of this debate would have protected illegal activity. Not piracy, not child pornography, not spam, not viruses, none of it.

Second fish: misconceptions about peer-to-peer users. A small percentage of peer-to-peer users have been vilified as bandwidth hogs that force network owners to block consumer choice. Frankly, I have never heard of an industry complaining so loudly about people so eager to use their products. And sure, of course, networks should be able to manage traffic by heavy users, but that doesn't provide an excuse for blocking every user from running a particular program.

It is important to point out that p-to-p services do not use more bandwidth than consumers have already paid for, and they have paid hefty monthly bills. The Wall Street Journal reports that Comcast earned an 80 percent profit on its cable modem service. I would like a business like that myself. Actually lots of p-to-p programs are totally legitimate. They are used by ABC.com, PBS, and NASA to name a few. But probably the best example is Skype, a p-to-p program that allows Internet users to have voice conversations online with so little bandwidth that it works on a dialup con-

nection. Today it has over 300 million users in 28 different languages. This is the kind of popular innovation that this bill is designed to promote.

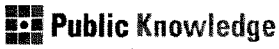
Now, the consequences of ignoring this bill are sharpening in clarity. There is an urgency here. Network neutrality was supposedly a solution in search of a problem, and yet over the last 2 years, the problems keep bubbling up. Right now, Comcast is under investigation at the FCC for blocking Internet applications. This, I suggest to you, is a bellwether case. FCC Chairman Kevin Martin has said he will enforce his network neutrality principles. The cable industry says that although they have always supported the FCC's principles, they reject the FCC's authority to enforce them. In other words, they were for net neutrality before they were against it.

The Comcast case may well end up in court where the market will endure more years of uncertainty. It would be far better if Congress passed this bill and settled the question. Make no mistake, this is a compromise bill. It is reasonably by almost any standard. I would prefer something stronger, but I think this bill represents a significant step in the right direction.

What amazes me is that it has not attracted broader support. The middle ground that opponents of net neutrality have called for is right here in this bill, and now they appear unwilling to stand on it.

Internet policymaking is premised on a simple idea: we will remove regulations from network operators, but we will draw a line to protect consumers in the access to an open Internet. Today we test this theory. A duopoly market of phone and cable companies will not discipline itself. This is a clear moment for Congress to act and pass The Internet Freedom and Preservation Act. The future of the Internet for everyone depends upon it. I thank you for your time, and I look forward to your questions.

[The prepared statement of Mr. Scott follows:]



Testimony of

Ben Scott
Policy Director
Free Press

before the

U.S. House of Representatives
Subcommittee on Telecommunications and the Internet of the
Committee on Energy and Commerce

on behalf of

Free Press
Consumers Union
Consumer Federation of America
Public Knowledge

Regarding

A Legislative Hearing on H.R. 5353,
The Internet Freedom Preservation Act of 2008

May 6, 2008

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Summary – Testimony of Ben Scott, Policy Director, Free Press, May 6, 2008

The Internet's open marketplace for speech and commerce is the hallmark of the most transformative communications technology since the printing press. Determining how to ensure an open Internet for consumers is the most important communications policy decision of the decade. It represents a pivotal moment for the future of the Internet -- a technology that is rapidly becoming the dominant communications infrastructure of our information society.

Two competing visions for the Internet stand before policymakers. The first is an open Internet with baseline rules to protect consumers' right to access the content and services of their choice. The second is a closed network that would permit experiments with content control and discriminatory service provisions that have been the hallmark of the old media world. It is a virtual clash of civilizations. Congress should choose the path of open markets for speech and commerce -- a path championed by virtually every consumer and innovator using the Internet.

The stakes of the debate have long been known. But the consequences of a closed Internet are sharpening in clarity. Comcast is currently under investigation by the Federal Communications Commission for allegations that it has secretly blocked consumers from using a popular Internet application. This case shows unequivocally that -- contrary to what telephone and cable companies said in 2006 -- consumer protection rules online are not a "solution in search of a problem." There is a very clear problem -- Comcast was just the first to cross the line and get caught. That case also demonstrates that the threat requires congressional action: Comcast disputes the FCC's legal authority to protect consumers.

The recent debate has been punctuated with misdirected concern about issues that are important in their own right but unrelated to this bill. To be clear, Network Neutrality is not mutually exclusive -- or even in tension -- with protecting copyright, network security or children. None of the proposed consumer protections safeguard illegal activity from prosecution. Further, this debate is not about file-sharing or peer-to-peer (P2P) programs. Far from being bad actors on the Internet, these technologies indicate a growing sector of innovation.

Reviewing the short history of debate over this issue demonstrates that everyone favors some kind of consumer protection principles or rules that guarantee an open Internet. It is not a question of *whether* consumers will have laws guarding against Internet gatekeepers, but *how* those laws will be crafted.

The last three years of legislative proposals and regulatory activity on the issue of Network Neutrality show remarkable unanimity of purpose and desired outcome. Republicans and Democrats in the legislature and at the FCC have all agreed that consumers are entitled to access the lawful content, applications and devices of their choice without interference from network owners. There is substantial precedent for establishing principles of nondiscrimination in the law and granting FCC authority to redress complaints brought by Internet users.

The Internet Freedom Preservation Act is a reasonable bill that includes elements of the legislative proposals and regulatory efforts that have preceded it. It draws from this consensus to establish consumer protections at the base of the Communications Act. It also directly clarifies the authority of the FCC to act in defense of consumers, an authority which is challenged by the cable industry in the Comcast case. Finally, this bill recognizes that we do not yet have all the answers. It calls for a broad public inquiry into the future of Internet policymaking on the backdrop of these baseline principles of consumer choice and open markets.

It is time for Congress to act. This is the right bill at the right time. The future of the Internet for everyone depends on it.

Background and Overview

For the last three years, the preservation of "Network Neutrality" has been a priority issue for nearly every major consumer organization in the country that works on communications policy. The reason is simple. We stand at a paradigm-shifting moment in the history of Internet policymaking.

The Internet is rapidly emerging as the dominant means of mass communication -- transforming traditional broadcasting and cable with new business models and decentralizing the tools of speech and commerce in the information society to all citizens. This critical moment is a singular opportunity to learn from the past. The Committee has spent years working to redress the problems in the current media system created by concentrated market power, gatekeepers and anti-competitive practices that reduce diversity, limit access and control the flow of content. Sitting on this Committee for a decade should make anyone an expert on what has gone wrong with traditional media.

Unfortunately, once the pie is baked; it is hard to un-bake it. The concentration of power in the broadcasting and cable industries is well-established -- and fiercely defended by legions of industry lobbyists. Policy decisions made at key points in the development of these technologies have played a central role in strengthening rather than weakening this consolidation. Now, this Committee spends a great deal of its time crafting reforms to create competition, lower consumer rates and foster more diverse content. But it is an uphill battle trying to undo outcomes in the communications market that were set in motion decades ago.

The Internet represents a new chapter in this history. What Congress and the Federal Communications Commission decide in the next few years of major technological change will determine how communication in the information society evolves. This is the time to learn from the mistakes of the past -- the time to undo cartels, promote free markets and guarantee consumer rights. Armed with the knowledge of what went wrong with the policies governing old media, we can make good policy decisions that protect the future of the Internet.

There are two competing schools of thought on how Internet policy should be made. One school suggests that Congress should permit the dominant financial interests in today's broadband networks -- generally a local duopoly of phone and cable companies -- to control the Internet market of the future. The opposing school of thought suggests that Congress should strive to keep the Internet open as a free marketplace of ideas and commerce -- the first media form in history without centralized gatekeepers.

This is a veritable "clash of civilizations" that has been stalemated for three years. The correct choice should be clear. Congress should opt for competition and free markets, resisting the logic of deregulation that would hand over new media to the titans of old media. Deregulation is not a free market policy in this context -- it is the handmaiden of a 21st century media cartel. Will we embrace the openness that has shaped the Internet to the present day? Or will we permit network owners to move to the closed systems of content control we have had with cable television and broadcasting?

From a consumer perspective, the clash over the future of the Internet is about user control. Put simply, consumers want to preserve their freedom to use the Internet as they wish -- without interference from gatekeepers. This user experience depends on establishing minimum baseline consumer protections that guarantee openness on the Internet. The Internet Freedom Preservation Act would do just that.

Let me say a few words about openness on the Internet -- probably a more apt term than "Network Neutrality." Openness does not mean an end to all network management. It does not mean every bit should be treated exactly alike on the Internet. Openness does <u>not</u> reject protecting children or copyright or security on the Internet. Openness simply means that Internet policy should promote free speech and

commerce in the online marketplace. Openness means faithfully guarding against interference from the cable and telephone companies who have the technical and market power to become bottlenecks between consumers and producers of Internet content. Openness means deliberately refusing to accept marketplace behaviors that seek to discriminate.

These are the stakes of this debate, this bill and this legislative hearing. History will record these years as the pivotal juncture when the policies that shaped the future of the Internet were made. It is the time for Congress and the FCC to send the correct signals to the market that openness on the Internet will be the future of the technology -- not a closed system of content control and gatekeepers. Passing the Markey-Pickering bill would be a timely and appropriate method to accomplish this worthy goal.

The Internet Freedom Preservation Act - A Reasonable Proposal to Protect Consumers

Urgency to Act – FCC and the Comcast Case

The Internet Freedom Preservation Act is the right bill at the right time. Moreover, the urgency to move on this bill is rising. It is now unequivocal that passing a bill to protect consumer access to lawful content on the Internet is not a "solution in search of a problem." This was the mantra of the cable and phone companies throughout the congressional debate over Network Neutrality in 2006. In hearing after hearing, executives and trade association presidents promised Congress that network operators would never interfere with consumers' access to content on the Internet. Here is one example from National Cable & Telecommunications Association President and CEO Kyle McSlarrow's testimony before the Senate Commerce Committee:

> "I think we can all agree that consumers should have reasonable expectations from the companies that deliver high-speed Internet service to them. So let me be clear. NCTA's members have not and will not block the ability of their high-speed Internet service customers to access any lawful content, application or services available over the public Internet."[1]

Despite the warnings of Net Neutrality supporters at the time, the 110th Congress ended without a resolution on legislation guarding openness on the Internet.

Network operators promised they would not block consumer access to Internet content in 2006. But they did exactly that in 2007. A bellwether case now sits before the FCC -- a case involving Comcast and allegations that it is using network technologies to block and degrade consumer access to content on the Internet. The facts of the case are straightforward. Not only was Comcast blocking consumer access to Internet content -- they were doing so secretly, using technologies that "spoof" the computers of its customers and disguise the practice of blocking.

Millions of dollars have already been spent litigating this case and prosecuting its arguments in the media. The FCC has conducted to *en banc* field hearings in which **Massachusetts Institute of Technology (MIT)** engineers and the nation's leading Internet law professors from Harvard, Columbia and Stanford universities confirmed that Comcast has been blocking consumer access to Internet content. It is a precedent-setting case.

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[1] National Cable and Telecommunications Association, President and CEO Kyle McSlarrow, Before the United States Senate Committee on Commerce, Science, and Transportation, Hearing on Net Neutrality, February 7, 2006, Available at http://commerce.senate.gov/pdf/mcslarrow-020706.pdf.

How was this momentous case kick-started? Was it Silicon Valley organizing its corporate might to challenge the telephone and cable companies in a battle of the titans? No. It was a barbershop quartet fan in Oregon. A network engineer named Robb Topolski began the network testing that ultimately triggered the FCC's Comcast case because he couldn't share his favorite non-copyrighted, 19th century barbershop tunes with his friends. Comcast first denied its interference. Months later, when the Associated Press confirmed Topolski's tests, Comcast acknowledged it but directly challenged the legitimacy of the FCC's authority to intervene. Finally, Comcast promised to stop at some undisclosed future time subject to an undefined agreement -- hoping the government would walk away.

Robb Topolski has proven what has always been obvious to those of us in the consumer groups working on this issue. This debate isn't about AT&T, Comcast, or Google or EBay. It's about every consumer wanting to seek or share information on the Internet. Even though very few of us can test networks like Topolski, and fewer still will see their attempt to share music become first-tier business for a federal agency, this is a singular case with historic implications for all consumers.

The Comcast case at the FCC demonstrates exactly why Congress should pass this bill. This bill establishes an important baseline protection for consumers -- one that is long overdue and much-needed given the behavior of network operators in the marketplace. This bill is also highly appropriate and timely given the debate over the FCC's authority to adjudicate this proceeding. In its filings and testimony before the agency, Comcast is directly challenging FCC authority to act on the complaint against them. "The Commission cannot lawfully issue an injunction against Comcast," the company wrote in its filing, "...even were it to conclude...that Comcast's behavior is inconsistent with the Internet Policy Statement."[2]

Notice how this statement is completely the opposite of what network owners claimed in 2006 -- that the FCC would act in the unlikely event of a consumer complaint. FCC Chairman Kevin Martin has been consistently firm in his belief that he does have authority. In April, he testified before the Senate Commerce Committee, reiterating what he has said for three years: "I also believe that the Commission has a responsibility to enforce the principles that it has already adopted. Indeed, on several occasions, the entire Commission has reiterated that it has the authority and will enforce these current principles."[3]

In light of this controversy and the likelihood of a judicial appeal of any FCC action drawing on Title I ancillary authority, it is perfectly reasonable for Congress to legislate -- reaffirming the FCC's authority and giving further guidance to the agency as to the character of the marketplace and the consumer rights the Congress intends to promote. In short, this bill would reaffirm the FCC's authority to act on behalf of consumers like Robb Topolski.

Copyright and Peer-to-Peer

The Comcast case highlights what this debate is all about. But it is important to clarify what this open-Internet debate over is *NOT* about. Too often, this question of open vs. closed Internet policy gets caught up in rhetorical sparring over issues that, while legitimate in their own right, have little or nothing to do with Network Neutrality or the legislation at hand.

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[2] Ex Parte Letter of Comcast Corporation, In the Matter of Broadband Industry Practices, WC Docket No. 07-52, March 11, 2008, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519866175.

[3] Written Statement of Federal Communication Chairman Kevin Martin, Before the United States Senate Committee on Commerce, Science and Transportation, April 22, 2008, p. 4, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281690A1.pdf.

First, Network Neutrality has nothing to do with excusing violators of intellectual property on the Internet. Online piracy is a huge and important issue of law enforcement. But the goals of Net Neutrality and copyright are not mutually exclusive in any way. The rights of consumers online that are protected by the Markey-Pickering bill apply exclusively to *lawful* content. Neither this bill nor any other Net Neutrality bill or regulation implemented or proposed in the history of this debate would in any way apply protections to illegal activity online.

Second, Net Neutrality is not strictly about peer-to-peer (P2P) applications. These technologies get a bad reputation because unfortunately some people use them for piracy. Those users can and should be prosecuted under existing copyright laws. But we shouldn't throw the baby out with the bathwater -- Congress should recognize that P2P is a flourishing field of application development on the Internet. It is a category of computer programs that is extending far and wide on the Internet -- becoming pervasive in many of the most popular things consumers do online.

The best example may be Skype. Skype is a P2P program than enables Internet users to have voice conversations online for free. The service can also do high definition video conferencing. Today, it has 308 million users worldwide that have had over 100 billion minutes of conversations in 28 languages. P2P services are also used by NASA to share images of the Earth from outer space; it's used by software developers to collaborate on new innovations. P2P is the standard used by ABC.com and, soon, NBC's online offering. Other than email, few programs are more ubiquitous.

Third, this debate is not about protecting the network from "bandwidth hogs." When Comcast was caught blocking P2P applications, the company tried to vilify P2P users as bad actors. Never have I heard of an industry complaining so loudly about people so eager to consume and buy their products. Can you imagine the oil companies scolding SUV drivers for using so much gas?

And it is important to point out that P2P services do *not* use more bandwidth than consumers have already paid for under the terms of their contracts. According to the *Wall Street Journal*, Comcast makes 80 percent profit margins on its broadband service, so consumers are paying a pretty penny for that bandwidth that Comcast doesn't want to deliver.[4] On top of that, many P2P applications hardly use any bandwidth at all. Skype, for example, uses just 8-20 kilobytes per second. That means you can use Skype on a dial-up connection just as easily as you can on a WiFi hotspot, a mobile device, a cable modem or a fiber line.

The bottom line is that guaranteeing an open Internet is not just about protecting these 308 million users of a P2P service -- it's about protecting the kind of innovation that creates a new medium of global communication.[5]

History and Context

Look at the legislative and regulatory efforts in the last three years on the question of Network Neutrality, and it is clear that we are no longer arguing about *whether* to have open Internet rules, but rather *how* to craft them. As this Committee attempts to build consensus around the right solution, it is critical to note that we all appear to be headed to the same outcome -- guaranteeing consumers access to the lawful Internet content of their choice without interference from network owners.

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[4] Vishesh Kumar, "Is it time to tune in to cable?," Wall Street Journal, April 3, 2008, Available at http://money.aol.com/news/articles/qp/ap/_a/is-it-time-to-tune-in-to-cable/rfid88603833.
[5] All facts about Skype taken from, "Q1 2008 Skype Fast Facts," http://news.ebay.com/fastfacts_skype.cfm

In this context, I submit that the Markey-Pickering bill (HR 5353) is a reasonable proposal that accomplishes this goal. I have included in this testimony an appendix of the relevant sections of existing law, major legislative proposals (in the House), and regulatory actions at the FCC. I will analyze them all here in order to demonstrate the point that Republicans and Democrats -- in two Congresses and at the FCC -- have shared the fundamental goals of Network Neutrality policy, differing only in degree and approach.

A review of recent history illustrates how Congress has moved toward agreement on policy that protects the free market on the Internet. In the wake of the *Brand X* case in the summer of 2005, the FCC shifted broadband Internet services from Title II jurisdiction to Title I in its Wireline Broadband Order[6], released in September of 2005. That action distanced these broadband networks from a wide variety of common carrier regulations, including the important provisions in Sections 201, 202 and 230 that had long carried the banner of open communications systems as the policy of the United States.

Right now, broadband over cable lines, phone lines, powerlines, and wireless spectrum are subject to Title I -- not mandatory Title II -- jurisdiction. The policy guidance and regulatory authority vested in these sections, however, is still available to the FCC for application through its ancillary authority under Title I. This authority was upheld by the *Brand X* case, which affirmed the FCC's option "to impose additional regulatory obligations under its Title I ancillary authority jurisdiction to regulate interstate and foreign communications."[7] That assertion is now strongly challenged by the cable industry[8] in the matter of the consumer complaint against Comcast even as it is defended by consumer groups.[9]

Simultaneous with the September 2005 order, the commission issued its *Internet Policy Statement*, outlining its "four principles" of Network Neutrality to clarify how it would enforce consumer protection under Title I.[10] That policy statement is printed in full in the appendix. The four principles are straightforward statements of consumer rights on the Internet. The first three protect consumers' right to access the lawful content, applications and devices of their choice. The fourth principle entitles consumers to competition among networks, applications, services and content online.

Policy statements are meant to guide market participants on how an agency will interpret and enforce the agency's statutory authority and obligations. The policy statement roots its ancillary authority at least partly in Section 230 of the statute, in which Congress stated that the policy of the United States is "to preserve the vibrant and competitive free market that presently exists for the Internet" and "to encourage the development of technologies that maximize user control over what information is received by individuals."[11] Further, the commission's policy statement specifically reaffirms the FCC's ancillary authority under Title I (citing *Brand X*) to take action to protect consumer rights on the Internet.

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[6] Federal Communications Commission, Report and Order, In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, August 5, 2005, Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf.

[7] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688, slip op. at 3-4 (2005).

[8] Ex Parte Letter of Comcast Corporation, In the Matter of Broadband Industry Practices, WC Docket No. 07-52, March 11, 2008, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519866175; Comments of Time Warner, In the Matter of Broadband Industry Practices, WC Docket No. 07-52, February 13, 2008, p. 26, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519841176.

[9] Reply Comments of Free Press et al., In the Matter of Broadband Industry Practices, WC Docket No. 07-52, February 28, 2008, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519856406.

[10] Cite to Internet Policy Statement - http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf

[11] 47 U.S.C. § 230(b)(2) and (3).

When the policy statement was issued, many consumer advocates -- myself included -- feared that handing over the legacy of an open communications systems to such an untested guardian as a policy statement was a dangerous business. Today, we are watching the FCC test the mettle of that guardian in the Comcast case. Ironically, some of the network operators that once assured Congress that no laws were necessary because the FCC's policy statement was an adequate safeguard against content discrimination are now arguing that it is a paper tiger with no teeth to stop them from behaving however they wish.

In recent testimony before the Senate Commerce Committee, NCTA's McSlarrow presented the contradictory position that the cable industry fully supports the FCC's policy statement, but it does not support its enforcement to protect consumers. When questioned by senators about whether the FCC could bring an enforcement action guided by its four principles, McSlarrow replied: "It's not even a close call, the answer is no."[12] We do believe he is wrong, but the FCC's policy statement represents the absolute floor of basic consumer protection on the Internet. In my view, it is not enough, but it appears to be the last defense available to consumers absent congressional action.

What does the policy statement do in essence? It seeks to modernize the openness principles once at the core of a larger set of common carrier regulations in Title II and then deploy them in Title I. No final resolution has been reached about whether this endeavor will succeed. Throughout the last three years of debate, the network owners have asserted their right to create a closed system for the Internet. In fact, it was network owners' comments in late 2005 and early 2006 that triggered the Net Neutrality debate in Congress in 2006.[13] Because the carriers claimed the right to discriminate amongst content on the Internet, many in Congress began to believe that the FCC's policy statement would not stick.

As a result, we got two main legislative responses -- both of which are excerpted in the appendix. The first was the Network Neutrality Act of 2006, introduced by Mr. Markey. The second was the Net Neutrality section of the Communications Opportunity, Promotion, and Enhancement (COPE) Act of 2006 Act, introduced by Mr. Barton. The 2006 Markey bill proposed to expand on the FCC's policy statement and direct the commission to establish enforceable rules to protect consumer rights on the Internet.

The bill captures all of the four principles and adds a so-called "fifth principle," which combines a nondiscrimination principle with a rule that bars the sale of services by network operators that privilege or degrade Internet content in a discriminatory manner. This is the specific provision that would prohibit pay-for-play "fast lanes" and "slow lanes" on the Internet. The Barton bill, by contrast, simply codifies the four principles in the FCC's policy statement. Beyond that, it gives the FCC explicit authority to enforce those principles through adjudication and fines. However, it strictly denies the FCC authority to adopt or implement rules based on the four principles. Neither bill became law; neither was reintroduced in the 110th Congress.

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[12] See Anne Broache, "Net Neutrality Battle Returns to US Senate," 22 April 2008, *CNet*, http://www.news.com/8301-10784_3-9925517-7.html

[13] "William L. Smith, chief technology officer for Atlanta-based BellSouth Corp., told reporters and analysts that an Internet service provider such as his firm should be able, for example, to charge Yahoo Inc. for the opportunity to have its search site load faster than that of Google Inc." Jonathan Krim, Executive Wants to Charge for Web Speed, Washington Post, Dec 1, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30/AR2005113002109.html; SBC CEO Edward Whitacre: "Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes?" At SBC, It's All About "Scale and Scope," BusinessWeek, Nov 7, 2005, http://www.businessweek.com/magazine/content/05_45/b3958092.htm.

The next action on Net Neutrality came at the end of 2006 when AT&T acquired BellSouth. As a condition of that acquisition, the new company agreed to abide by enforceable Net Neutrality rules. These rules included all of the FCC's four principles from the policy statement -- verbatim -- plus a fifth principle of nondiscrimination that also barred the sale of services that would allow the network owner to create fast lanes and slow lanes for Internet content. The details of the fifth principle differed slightly from the Markey Network Neutrality Act of 2006 -- but its impact was the same, except of course, that it only applied to the new, expanded AT&T. That condition expires at the end of 2008.

While there was no new legislative or regulatory activity in 2007, there were several incidents in the marketplace that demonstrated how the network operators can and do interfere with content on the Internet. It now appears that Comcast was secretly blocking consumer use of peer-to-peer technologies throughout 2007. In August, AT&T censored the political speech of a musician during a concert webcast.[14] In September, Verizon Wireless refused to send text messages carrying the political communication of NARAL Pro-Choice America to its membership.[15] Though both AT&T and Verizon hastened to reverse themselves under heavy media scrutiny, the specter of Internet gatekeepers was raised in the minds of consumers. And, of course, the Comcast case presents a paradigmatic Network Neutrality violation -- a company secretly blocking its innovative new competitors. The company has not backed down from this stance -- which is why it stands as a bellwether case at the FCC.

Finally, we move to 2008, when Mr. Markey and Mr. Pickering introduced HR 5353, the bill under discussion here today. This bill fits squarely in between the COPE Act and the AT&T/BellSouth merger condition. And it addresses directly the question of Title I authority for the FCC's four principles currently under dispute at the agency. It clarifies exactly what policies the Congress desires to guide the Commission to produce the desired outcome for protecting consumers online. It establishes a revised version of the four principles directly into Title I of the Communications Act. It captures the intent of all of the FCC's existing four principles -- protecting consumer access to content, applications, devices and competition. Beyond that it adds policy principles that seek to protect consumers against unreasonable discrimination and interference by network operators. These form a fifth principle similar to those that appeared in the Network Neutrality Act of 2006 and in the AT&T/BellSouth merger condition. However, unlike either of these, HR 5353 does not require enforcement of these principles.

The principles in HR 5353 establish a baseline consumer protection on the Internet as one of the basic congressional intentions of the Communications Act. Adoption and implementation of rules are left to the agency. As an immediate practical matter, it simply strengthens the hand of the FCC's principles and clarifies its authority in the adjudication of complaints based on the statute. Its purpose, in that sense, is similar to that of the COPE Act, though it does not go nearly as far in dictating an enforcement process or setting a penalty. Instead, it instructs the commission to conduct studies and public hearings to evaluate the core issues that will inform a national broadband policy in the future. It injects extremely valuable transparency and a public process into a complex debate over policymaking in the information society. This element of the bill should not be underappreciated. It is of signal importance.

Make no mistake, this is a compromise bill. It is such a compromise, to be honest, that some of our old allies were alarmed. While I would prefer something stronger -- I believe that this bill represents a very significant step in the right direction. What amazes and disappoints me is that it has not yet become the

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[14] K.C. Jones, "Pearl Jam Blasts AT&T for Cut Lyrics in Lollapalooza Webcast," InformationWeek, August 9, 2007, Available at http://www.informationweek.com/news/internet/showArticle.jhtml?articleID=201310731.
[15] Adam Liptak, "Verizon Blocks Messages of Abortion Rights Group," New York Times, September 27, 2007, Available at http://www.nytimes.com/2007/09/27/us/27verizon.html.

vehicle of general compromise that it deserves to be. The middle ground that opponents of Net Neutrality once called for is now available -- but they appear no longer willing to stand on it.

So what do we learn from this walk down memory lane? We have to evaluate what each of the preceding Net Neutrality bills and regulations tell us about the Internet Freedom Preservation Act. Is it moderate or extreme? Are we debating *whether* to have Net Neutrality protections consumers or *how* to have Net Neutrality protections? Here are the three take-home analytical points:

- All of the actions taken by FCC and Congress to protect consumer rights on the Internet contain some version of the FCC's "four principles" -- consumers are entitled to the lawful Internet content, applications and devices of their choice as well as to competitive markets.

- Some of the Net Neutrality actions contain a "fifth principle" of nondiscrimination in one form or another. In the case of the Markey bill from 2006 and the AT&T/BellSouth merger condition, that fifth principle of nondiscrimination is enforced as a rule and prohibits the sale of discriminatory quality of service. The Barton bill and the FCC's policy statement have no fifth principle at all. The Markey-Pickering bill has a fifth principle that authorizes the commission to guard broadly against unreasonable discrimination -- but it is does not establish a specific rule that the FCC must follow.

- Some of the Net Neutrality actions specify enforcement as rules or through adjudicatory proceedings. The FCC's policy statement draws broadly on its ancillary authority from Title I to make policy -- through rules or through adjudicating complaints -- but it does not specify a precise rule based on the exact language of the principles. The Barton bill codifies the FCC's authority to enforce the specific language of the four principles and specifies an adjudicatory process and penalties. The 2006 Markey bill specifies a precise rule and enforcement process. The AT&T merger condition functions as an enforceable rule, though it is temporary. The Markey-Pickering bill does not specify an enforceable rule, nor does it specify an adjudicatory process. It simply clarifies the intent of Congress and the authority of the commission to act to protect consumers' rights under Title I.

The Internet Freedom Preservation Act captures the intent of all of the Net Neutrality actions taken or proposed by Congress or the FCC in the last three years. It takes a substantially different approach to the issue than the Network Neutrality Act of 2006, hewing closer to the strategy of the COPE Act, in some ways going further (with a fifth principle) and in some ways not as far (it does not have specific enforcement provisions or penalties). Although recent developments in the marketplace bear out the concerns voiced by Net Neutrality advocates in 2006, this bill represents a substantial compromise -- meant to ensure consumer protection, free speech and free competition, while not overly specifying the actions of the FCC.

Conclusion

This debate is a clash between two competing visions for the Internet -- open or closed networks. Congress and the FCC have begun to turn the corner toward acting to ensure an open Internet -- in part because the network providers have begun blocking and discriminating. The recent history of Internet policymaking was premised on this idea: we will remove some regulations from the network operators, but we will draw a line on ensuring consumers' access to an open Internet and all of the content and applications on it. Deregulation has led us to the bright red line of basic consumer protection. We should not stray beyond it.

Now is the time to firmly establish that precedent. It is the moment to recognize that action for an open Internet is the best path toward redressing the problems of concentrated power in the old media marketplace. It is the path to protecting consumers' rights to access all lawful content of their choice online. It is the path to guaranteeing innovation and entrepreneurship in our information economy. It is a path to expanding public input in the process as we work toward shaping the broadband policies that will guide the nation in the coming decades.

At the end of the day, consumers are relying on Congress and the FCC to set a baseline standard to protect openness on the Internet. A duopoly market of access providers will not discipline itself. Nor can we expect that fans of barber shop quartets will always be the white knights that ride to the rescue. This is a clear moment for the Congress to act and pass the Internet Freedom and Preservation Act. The future of the Internet for everyone depends on it.

Appendix

Communications Act of 1934 as Amended

SEC. 201. [47 U.S.C. 201]

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities regulations for operating such through routes.
(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful...

SEC. 202. [47 U.S.C. 202] DISCRIMINATION AND PREFERENCES.

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.
(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.
(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

SEC. 230. [47 U.S.C. 230]

(a) FINDINGS.--The Congress finds the following:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY.--It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

FCC Internet Policy Statement (September 23, 2005)

To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet,

Consumers are entitled to access the lawful Internet content of their choice;

Consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;

Consumers are entitled to connect their choice of legal devices that do not harm the network;

Consumers are entitled to competition among network providers, application and service providers, and content providers.[16]

Network Neutrality Act of 2006 - HR 5273 (May 2, 2006)

SEC. 3. POLICY.

It is the policy of the United States--

(1) to maintain the freedom to use broadband telecommunications networks, including the Internet , without interference from network operators, as has been the policy for Internet commerce and the basis for user expectations since its inception;
(2) to ensure that the Internet , and its successors, remain a vital force in the United States economy, thereby enabling the country to preserve its global leadership in online commerce and technological innovation;
(3) to preserve and promote the open and interconnected nature of broadband networks that enable consumers to reach, and service providers to offer, lawful content, applications, and services of their choosing, using their selection of devices that do not harm the network;

[16] FCC Internet Policy Statement, September 23, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf

(4) to encourage escalating broadband transmission speeds and capabilities that reflect the evolving nature of the broadband networks, including the Internet , and improvements in access technology, which enables consumers to use and enjoy, and service providers to offer, a growing array of content, applications, and services;
(5) to provide for disclosure by broadband network operators of prices, terms, and conditions, and other relevant information, including information about the technical capabilities of broadband access provided to users, to inform their choices about services they rely on to communicate and to detect problems; and
(6) to ensure vigorous and prompt enforcement of this Act's requirements to safeguard and promote competition, innovation, market certainty, and consumer empowerment.

SEC. 4. NET NEUTRALITY SAFEGUARDS.
(a) In General- Each broadband network provider has the duty to--

(1) enable users to utilize their broadband service to access all lawful content, applications, and services available over broadband networks, including the Internet ;
(2) not block, impair, degrade, discriminate against, or interfere with the ability of any person to utilize their broadband service to--

(A) access, use, send, receive, or offer lawful content, applications, or services over broadband networks, including the Internet ; or
(B) attach any device to the provider's network and utilize such device in connection with broadband service, provided that any such device does not physically damage, or materially degrade other subscribers' use of, the network;

(3) clearly and conspicuously disclose to users, in plain language, accurate information about the speed, nature, and limitations of their broadband service;
(4) offer, upon reasonable request to any person, a broadband service for use by such person to offer or access unaffiliated content, applications, and services;
(5) not discriminate in favor of itself in the allocation, use, or quality of broadband services or interconnection with other broadband networks;
(6) offer a service such that content, applications, or service providers can offer unaffiliated content, applications, or services in a manner that is at least equal to the speed and quality of service that the operator's content, applications, or service is accessed and offered, and without interference or surcharges on the basis of such content, applications, or services;
(7) if the broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, prioritize or offer enhanced quality of service to all data of that type (regardless of the origin of such data) without imposing a surcharge or other consideration for such prioritization or quality of service; and
(8) not install network features, functions, or capabilities that thwart or frustrate compliance with the requirements or objectives of this section.

...

(c) Implementation- Within 180 days after the date of enactment of this Act, the Commission shall adopt rules that--

(1) permit any person to complain to the Commission of anything done or omitted to be done in violation of any duty, obligation, or requirement under this section;
(2) provide that any complaint filed at the Commission that alleges a violation of this section shall be deemed granted unless acted upon by the Commission within 90 days after its filing;
(3) require the Commission, upon prima facie showing by a complainant of a violation of this section, to issue within 48 hours of the filing of any such complaint, a cease-and-desist or other appropriate order against the violator until the complaint is fully resolved, and, if in the public interest, such order may affect classes of persons similarly situated to the complainant or the violator, and any such order shall be in effect until the Commission resolves the complaint with an order dismissing the complaint or imposing appropriate remedies to resolve such complaint; and
(4) enable the Commission to use mediation or arbitration or other means to resolve the dispute.

(d) Enforcement- This section shall be enforced under titles IV and V of the Communications Act of 1934 (47 U.S.C. 401, 501 et seq.). A violation of any provision of this section shall be treated as a violation of the Communications Act of 1934, except that the warning requirements of section 503(b) shall not apply. In addition to imposing fines under its title V authority, the Commission also is authorized to issue any order, including an order directing a broadband network operator to pay damages to a complaining party.

Communications Opportunity, Promotion, and Enhancement Act of 2006 - HR 5252 (passed by the House, June 8, 2006)

TITLE II—ENFORCEMENT OF BROADBAND POLICY STATEMENT

...

"SEC. 715. ENFORCEMENT OF BROADBAND POLICY STATEMENT.

"(a) AUTHORITY.—The Commission shall have the authority to enforce the Commission's broadband policy statement and the principles incorporated therein.

"(b) ENFORCEMENT.—

'(1) IN GENERAL.—This section shall be enforced by the Commission under titles IV and V. A violation of the Commission's broadband policy statement or the principles incorporated therein shall be treated as a violation of this Act.

"(2) MAXIMUM FORFEITURE PENALTY.—For purposes of section 503, the maximum forfeiture penalty applicable to a violation described in paragraph (1) of this subsection shall be $500,000 for each violation.

"(3) ADJUDICATORY AUTHORITY.—The Commission shall have exclusive authority to adjudicate any complaint alleging a violation of the broadband policy statement and the principles incorporated therein. The Commission shall complete an adjudicatory proceeding under this subsection not later than 90 days after receipt of the complaint. If, upon completion of an adjudicatory proceeding pursuant to this section, the Commission determines that such a violation has occurred, the Commission shall have authority to adopt an order to require the entity subject to the complaint to comply with the broadband policy statement and the principles incorporated therein. Such authority shall be in addition to the authority specified in paragraph (1) to enforce this section under titles IV and V. In addition, the Commission shall have authority to adopt procedures for the adjudication of complaints alleging a violation of the broadband policy statement or principles incorporated therein.

"(4) LIMITATION.—Notwithstanding paragraph (1), the Commission's authority to enforce the broadband policy statement and the principles incorporated therein does not include authorization for the Commission to adopt or implement rules or regulations regarding enforcement of the broadband policy statement and the principles incorporated therein, with the sole exception of the authority to adopt procedures for the adjudication of complaints, as provided in paragraph (3).[17]

AT&T/BellSouth Merger Commitments (December 28, 2006)

Net Neutrality

1. Effective on the Merger Closing Date, and continuing for 30 months thereafter, AT&T/BellSouth will conduct business in a manner that comports with the principles set forth in the Commission's Policy Statement, issued September 23, 2005 (FCC 05-151).

2. AT&T/BellSouth also commits that it will maintain a neutral network and neutral routing in its wireline broadband Internet access service. This commitment shall be satisfied by AT&T/BellSouth's agreement not to provide or to sell to Internet content, application, or service providers, including those affiliated with

[17] Communications Opportunity, Promotion, and Enhancement Act of 2006, HR 5252, 109th Congress.

AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination. This commitment shall apply to AT&T/BellSouth's wireline broadband Internet access service from the network side of the customer premise equipment up to and including the Internet Exchange Point closest to the customer's premise, defined as the point of interconnection that is logically, temporally or physically closest to the customer's premise where public or private Internet backbone networks freely exchange Internet packets.

This commitment does not apply to AT&T/BellSouth's enterprise managed IP services, defined as services available only to enterprise customers 16 that are separate services from, and can be purchased without, AT&T/BellSouth's wireline broadband Internet access service, including, but not limited to, virtual private network (VPN) services provided to enterprise customers. This commitment also does not apply to AT&T/BellSouth's Internet Protocol television (IPTV) service. These exclusions shall not result in the privileging, degradation, or prioritization of packets transmitted or received by AT&T/BellSouth's non-enterprise customers' wireline broadband Internet access service from the network side of the customer premise equipment up to and including the Internet Exchange Point closest to the customer's premise, as defined above.

This commitment shall sunset on the earlier of (1) two years from the Merger Closing Date, or (2) the effective date of any legislation enacted by Congress subsequent to the Merger Closing Date that substantially addresses "network neutrality" obligations of broadband Internet access providers, including, but not limited to, any legislation that substantially addresses the privileging, degradation, or prioritization of broadband Internet access traffic.[18]

Internet Freedom Preservation Act of 2008 - HR 5353 (introduced February 12, 2008)

SEC. 3. BROADBAND POLICY.

Title I of the Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by adding at the end the following new section:

`SEC. 12. BROADBAND POLICY.
`It is the policy of the United States--

`(1) to maintain the freedom to use for lawful purposes broadband telecommunications networks, including the Internet, without unreasonable interference from or discrimination by network operators, as has been the policy and history of the Internet and the basis of user expectations since its inception;

`(2) to ensure that the Internet remains a vital force in the United States economy, thereby enabling the Nation to preserve its global leadership in online commerce and technological innovation;

`(3) to preserve and promote the open and interconnected nature of broadband networks that enable consumers to reach, and service providers to offer, lawful content, applications, and services of their choosing, using their selection of devices, as long as such devices do not harm the network; and

`(4) to safeguard the open marketplace of ideas on the Internet by adopting and enforcing baseline protections to guard against unreasonable discriminatory favoritism for, or degradation of, content by network operators based upon its source, ownership, or destination on the Internet.'.[19]

[18] Letter of Commitment, AT&T, December 28, 2006, WC Docket No. 06-74.
[19] Internet Freedom Preservation Act of 2008, HR 5353, 110th Congress.

Mr. MARKEY. Thank you, Mr. Scott, very much. And now the chair will turn to recognize himself for a round of questions. And I will just begin by noting that 2 years ago this subcommittee voted for Mr. Barton's COPE bill, then the Republican chairman of this committee, which codified the FCC's net neutrality principles by authorizing the FCC to enforce them. The legislation Mr. Pickering and I offer similarly codifies overarching principles and then tasks the FCC to conduct an examination to access what is happening in the marketplace, to conduct field hearings, and to report back to Congress.

This process will permit the FCC to see whether the principles can be fulfilled through competition, through regulation, or through case-by-case enforcement. But the notion that codifying principles is the same as establishing regulations is no more true here than it was when the Barton bill authorized enforcement of the FCC principles 2 years ago.

So let me begin with you, Mr. Scott. Let us talk about network management and how reasonable management can be employed. Your concern is that if network management effectively trumps the Internet freedom, something very valuable about the Internet is lost in that management process as opposed to legitimate management that the large companies can engage in. Please explain.

Mr. SCOTT. Well, let me start by saying that we are not opposed to network management. I don't think anyone on the pro net neutrality side is opposed to network management. Network management has happened for years. It happens every day in every network.

What is different about this particular case that is before the FCC is network management that selects a particular piece of content or application and chooses to block or degrade that particular piece of content irrespective of the time of day, irrespective of the size of the file, irrespective of whether that user is a heavy user or a light user. That is the kind of targeting and the kind selectivity and the kind of choice making by the network operator that we think should be left with the consumer.

Mr. MARKEY. OK, great. Mr. Savitz, do you agree with that analysis?

Mr. SAVITZ. I would agree with it 100 percent. I mean I think the whole—exactly as Mr. Scott said. We don't—I don't disagree whatsoever with blocking unlawful content. I don't—we don't disagree at all with managing capacity. It would just be anything that sort of discriminates against origin source or destination and makes it sort of an unequal playing field that doesn't allow somebody to create a business like we were able to create. That is what would bother us.

Mr. MARKEY. OK, Mr. Peterman, do you agree with that analysis?

Mr. PETERMAN. Yes, absolutely.

Mr. MARKEY. OK, Ms. Combs?

Ms. COMBS. Yes, I do.

Mr. MARKEY. Yes, you do. And Mr. Bainwol?

Mr. BAINWOL. I am reflecting.

Mr. MARKEY. OK.

Mr. BAINWOL. I am a reflexive kind of guy.

Mr. MARKEY. I will come back to you. Mr. McSlarrow, in your testimony, you support the fair and open assessment of the FCC of network providers, and you acknowledge that the approach differs from other proposals that prescribed regulatory outcomes. And I thank you for noting the distinction.

Mr. Bainwol, you and Mr. McSlarrow both highlight that the Internet freedom principles only are accorded to consumers and entrepreneurs for lawful content, and I want to thank you both for seeing that in the bill and for saying that in your testimony.

Mr. Peterman, you also have an interest in fighting piracy. If you could, please give us your take on how support for network neutrality and fighting piracy are not mutually exclusive principles and why it is essential to your industry that piracy is fought vigorously and that this legislation would not inhibit that at all.

Mr. PETERMAN. Absolutely. We have examples. Last year, the nature of our show is we produce our episodes, and then the Disney Channels holds those episodes for a lot of the season, unlike adult programming where you generally have a new episode every week. As many of you who have kids know, your children have an amazing ability to watch the same show over and over and over. This is wonderful for me, and it is wonderful for Disney because it means that the same number of episodes that could last in a much shorter amount of time can be extended over a whole season.

We had a stockpile of episodes that had not aired yet, and somehow some of those episodes, the discs that contained those episodes made their way to private citizens. And those episodes, before they were on the air, were on YouTube. We are very opposed to piracy. What we are fighting for is the ability to own and control our content, and obviously piracy works directly against that. But we believe that this bill does not in any way inhibit the attempt to stop piracy. And we believe that innovation will continue to find alternative ways to protect copyrights.

Mr. MARKEY. Thank you, Mr. Peterman. My time has expired. The chair recognizes the gentleman from Florida, Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman. You mentioned the Barton bill 2 years ago that we passed. That bill was called the COPE Act. I just would probably point out that it only gave the FCC authority to enforce the four principles that were in the bill. It did not authorize a rulemaking. This bill not only authorized a rulemaking, it goes further and beyond the four FCC principles. And so, Mr. Chairman, if it turns out that you are supporting the COPE Bill, we would be very happy to move the entire COPE Bill in this Congress with you as a chairman.

That being said, Mr. Chairman, I ask unanimous consent to put into the record an editorial by the Wall Street Journal, April 12, entitled "An Alternative to Network Neutrality."

Mr. MARKEY. If that is the editorial attacking me by the Wall Street Journal editorial page—yes, it is. With great pride, I ask unanimous consent that it be placed in the record. I think on that day they actually had two editorials attacking me, the Wall Street Journal editorial page.

[The information appears at the the conclusion of the hearing.]

Mr. STEARNS. OK. Well, thanks for your magnanimous support here. I also ask unanimous consent, the two letters from various

groups be included with the record from the American Conservative Union, the National Taxpayers Union, Freedom Works, Citizens Against Government Waste, and Americans for Tax Reform, if I could, Mr. Chairman.

Mr. MARKEY. Without objection.

[The information appears at the the conclusion of the hearing.]

Mr. STEARNS. And I would say to Ms. Combs that we have that is going into the record is a letter talking about network management is critical to stop pornographers and pedophiles from having unfettered access to consumers' Internet connection, and this is signed by Gary Bower, the president of American Values; David Keen, of course, the president of the American Conservative Union; also the Catholic Family and Human Rights Austin Ruse; the Catholicvote.org; Traditional Family and Property, Mr. Preston Knoll; and then Derek Hunter, Media Freedom Project. So there obviously are some disagreements here.

They feel that network management is important. When you look at this debate and the difficulty understanding what net neutrality means, but I think after listening to Mr. Scott and others here, Mr. Peterman, that network management is fully understood. I am reminded of the Supreme Court's decision that in a theater, you don't have freedom of speech. You can't yell fire. So there is a sense of network management even with freedom of speech.

And so Ms. Combs mentioned that Comcast would not allow the downloading of the King James Version Bible. You know obviously if you were in a situation where your business and somebody was downloading peer-to-peer telemedicine, some x-rays, and some critical things that were needed for doctors for cancer research on a patient, you would have to make that decision if somebody was downloading Herodotus' 13 volumes of history. Or in this case, you can get a free copy of the King James Bible in any hotel, motel room in the country. And they might have to make this network decision just like in a theater—a person is network managed not to yell fire when there is no fire.

So my question is for Mr. McSlarrow. Isn't network management just simply like putting up a yield sign at an intersection? Periodically, we know as we come across the 14th Street Bridge, you know how much traffic there is, and sometimes one lane works over into another. But traffic in one direction—if you have all this traffic, don't you have to make a decision for network management? And you might answer the Christian Coalition's concern about this King James Version in which she said that it was discriminated against.

Mr. MCSLARROW. I mean—it is interesting in the same way, I guess, everybody has decided we are against illegal content being distributed, everybody says they are for network management. And then here we have a case, as was mentioned before, where you had essentially an artificial test of whether or not you could upload a King James Bible from one computer to another as if, and apparently they didn't, they didn't understand that peer-to-peer networks are by definition many multiple sessions across hundreds, even thousands or tens of thousands of PCs around the country or even the world.

The test was designed for failure. All you had to do was put the King James Bible on any Web hosting service that you get with

any broadband provider service, and you can stream it. You could do it today. So the point is no one was blocking a particular content. That is absurd.

There is a legitimate issue that at times of peak congestion, and different operators—and it is hard for me to get into a specific company's case. Different operators do it differently. But in general, at times of peak congestion, they will manage the traffic. The vast majority of that traffic is going to be peer-to-peer, and it is not irrelevant that the vast majority of the peer-to-peer traffic will in fact be pirated content. So it is, in my view, a reasonable method of not just managing the traffic but more importantly ensuring that all the other consumers you are serving get a superior experience perhaps to delay imperceptively some of the uploads. We are not even talking about downloads. But the real point here is I am not going to hang my hat on saying that the way someone does it today is absolutely, 100 percent the best way. The real point is the private sector is actually working together to see if we can do all of these things better.

Mr. STEARNS. OK. In the Wall Street Journal, in your article, the government's role here, as far as I understood it, is not to tell—but rather, to make sure consumers have alternatives to—now, to handle this, what we talk about here, from here to here, don't you think there is a possibility that—staggering rate of information that is effective to the broadband?

Mr. SCOTT. Here is how I think it should work. You can address people who are using high bandwidth by reducing the speed on that connection in a uniform basis agnostic to what is coming out of that connection, whether they are downloading a YouTube video or downloading peer-to-peer.

What is interesting about this particular case is that it was directed at a particular application regardless of whether that application was being used for a large file or a small file. Regardless of whether that user was a heavy bandwidth user or a light bandwidth user. That is the kind of network management, the specific targeting, that we are talking about that is inappropriate.

Mr. DOYLE [presiding]. The gentleman's time has expired. The chair now recognizes himself for 5 minutes. I would just say to my friends that say that this bill promulgates rules. You know my reading of the bill doesn't say anything about promulgating rules. It is a proceeding to conduct an assessment, conduct field hearings, and issue a report to Congress within 90 days. I mean, the FCC can do a rulemaking any time it chooses. It doesn't need Congress to do a rulemaking. So I don't know where that comes from.

Mr. McSlarrow, I want to talk—and maybe Mr. McCormick too—a little bit about the bandwidth hogs for a moment. These are people who really like your service and use a lot of it. And I understand Comcast has an acceptable use policy which allows the company to cut off service to customers who use the Internet too much. Now, they say that it is just 1/100 of a percent of their 11.5 million residential high speed Internet customers that fall into this category.

So if there is that tiny number that are bandwidth hogs, why would a broadband provider use a method that limits access to 100 percent of its customers regardless how much bandwidth they are

using or how little bandwidth they are using? Maybe Mr. McSlarrow first, and you could comment, Mr. McCormick.

Mr. MCSLARROW. Thank you. The answer is they wouldn't. We should be very clear here. All of these applications, whether it is BitTorrent, e-docking, intelli, or others, are applications that are used by our customers. There are cases at times of peak congestion where some of that traffic and the upstream, in order to ensure that the other customers aren't slowed down, might be delayed. But they can still use the service. And in most cases, it won't even be noticeable to them.

I think the point you raised is a perfectly valid one. There are different ways of trying to manage traffic. One could be just to focus on the individual user, and indeed Comcast has announced that they are going to move to a protocol agnostic network management system.

But I think it is still the case that even if you do that, you haven't actually solved the problem of peak congestion, and it is really that—I think when you talk to the engineers, it is that problem that is the most challenging one. And I am certainly no engineer, I really—the point here is that the engineers are experimenting today and ought to be trying to figure this out.

Mr. DOYLE. Mr. McSlarrow, I understand though that the founder of—the MIT professor David Reed and others at the Boston field hearing say that their tests show that Comcast engage in these practices all of the time, not just during certain times. Now, do you have any new evidence to that point?

Mr. MCSLARROW. No, I am just repeating what has been stated publicly by Comcast.

Mr. DOYLE. Let me ask another question. I want to talk about the peer-to-peer because it seems that a number of panelists here—Mr. Bainwol, Mr. McSlarrow, Mr. McCormick, Mr. Yoo—you are each seeking broad authority to manage network traffic the way you see fit. And in a recent instance, we saw managing and limiting a particular kind of traffic: peer-to-peer. So this is just a simple question. How much of the traffic on the Internet is peer-to-peer file sharing? Maybe start with Mr. Yoo. Percentage wise.

Mr. YOO. Published estimates vary, but many are on the order of 80 to 90 percent.

Mr. DOYLE. Eighty to 90 percent?

Mr. YOO. At peak times, which are the key times.

Mr. DOYLE. Yes, how about you, Mr. McCormick?

Mr. MCCORMICK. I know as a rule of thumb, about 20 percent of users utilize about 80 percent of the Internet.

Mr. DOYLE. You are saying 80 percent, and you are saying 20 percent?

Mr. MCCORMICK. Twenty percent of users.

Mr. DOYLE. So you are saying 20 percent of total Internet use is peer-to-peer file sharing?

Mr. MCCORMICK. No.

Mr. DOYLE. Eighty percent?

Mr. MCCORMICK. We have to provide that to you——

Mr. DOYLE. I see. Mr. Bainwol.

Mr. BAINWOL. I have seen reports anywhere from 60 to 80 percent, but let me make one other point here. We do not believe that

there should be an effort to go protocol-specific in terms of network management. So we would not suggest that that approach should be taken. But it is also important to note that when you look at a program or a protocol like LimeWire, I have seen a study where 98 percent of the searches on LimeWire are for pirated material, OK, are for copyrighted material, 98 percent. I mean, that is profound. And of the files that are available to be searched, it is something like 92 percent. So while we shouldn't be protocol specific in terms of our approach with network management, we should also understand in a pragmatic way that there are certain protocols that are particularly troublesome in terms of piracy.

Mr. DOYLE. Well, I think the point that I want to make is, Mr. McCormick, at your trade show last year, a company called Elacoil released a study that said that HTTP is approximately 46 percent of all traffic on the network and that peer-to-peer continues a strong second place at about 37 percent of local traffic. We saw an old study from Sprint, 2005, and I grant you that is very old data, that said less than 6 percent with regular Web traffic clocking in at more than 50 percent of the flow.

But I think it is important that when people say that a kind of Internet traffic is choking the network and that traffic happens to present a competitive threat to the ISP for other services, I think policymakers deserve to know how much choking is really going on. And it seems to me that when we are looking at—we are talking about this peer-to-peer file sharing as the big culprit, it is not the majority at least from the most recent studies we have seen that is causing the choking.

I see that I have gone past my time, so I will enforce my rules and cut myself off and yield the floor to my good friend, Mr. Pickering, for 5 minutes.

Mr. PICKERING. Mr. Chairman, thank you. I am going to ask a few questions, but I am also going to try to make a case for the legislation and why it is the reasonable middle ground and why, from a Republican point of view, it is the best ground on which to stand. As Mr. Yoo talked about, the emerging marketplace and technologies, I happen to agree with him that regulation of the Internet and an open access or common carrier would be way too complex. And to get into that type of granular regulation would be litigious and would create mass uncertainty in the marketplace.

I do believe, however, a case-by-case approach, as Mr. Yoo outlined, is the right way to do this, and it is working today. And it is keeping us from having problems. When problems arise, they are knocked down pretty quickly. So the case-by-case where there is a dispute over whether the FCC has the authority on a case-by-case basis to enforce network neutrality principles adopted by Republican commissions.

And so to clarify that and to give us the authority on a case-by-case basis and to maintain the openness and the principles of network neutrality, this legislation is needed. And this legislation is not different from the COPE Act in any substantive form. In some ways but not of any significance.

It calls for a comment and hearings around the country so that we have the accountability, the transparency, and the democracy around the greatest freedom that we have known economically and

technologically of this century, the Internet, and the openness that we have had. And so this bill is the right way to do a case-by-case, clarify the authority, and maintain a discussion over what type of business models we are going to see in the future.

However, I disagree with Mr. Yoo that to allow different business models to be adopted would be a good thing, and this is why. And this is my question. Mr. Savitz, let us say one of the bell companies or one of the cable companies would strike an exclusive deal with the Bigfoot Shoe Company and they were to say, we will give preferential or exclusive access on our networks to the Bigfoot Shoe Company. What would that do to small businesses like you?

Mr. SAVITZ. It would be amazingly hurtful. I mean, right now we would be the Bigfoot that would be buying it, and I don't even want us to do it because it would just stifle the next guy and all the terrific entrepreneurial and innovation. When we started Shoebuy, that was during the crazy capital markets funding. People took a ridiculous amount of money.

We had a competitor out there, boot.com, I remember. They were spending money any way they could. It was a terrible consumer experience, but they went through $150 million in cash. They would have easily, no question, spent $3 million, $4 million, $5 million to buy preferential slotting treatment. Consumers would have had a terrible experience. They probably would have thought buying shoes online didn't work. So no question we think that that would be terrible for innovation and——

Mr. PICKERING. And if we replicated that across every sector of commerce on the Internet, how destructive would that be to what has been the most successful model of innovation, entrepreneurship, investment, expansion of business exponentially over the last 10 years if we went to a Wal-Mart model on the Internet—if that is a fair comparison—that you can only shop in one place. You get the——

Mr. SAVITZ. Gut-wrenching. I wouldn't be here today. I would move on, and I have already done my gig. But I think the Internet is just—I am very passionate about it because it has been an amazing open platform that we have seen a lot of incredible things. You know, you listen to Mr. Peterman. He finds ways to communicate with this incredible base of very passionate Hannah Montana fans through the use of the Internet.

Instead of looking at it as an obstacle, the people that are very innovative, that are very passionate about their consumer and the consumer experience and communication are finding ways to do terrific things.

Mr. PICKERING. The other thing that I wanted to bring out in the bill that why I believe it is a better bill from current policy for the network operators is that for the first time, the legislation addresses the issue of network management and clarifies that reasonable network management is allowable. Today we do not have that in law, and, Mr. McSlarrow, I know that as you look and, Mr. McCormick, as your companies look, at network management, it is a real issue. It is a legitimate issue.

And so this bill allows for the reasonable network management practices, and I see in the private sector, the industry-led groups, the voluntary groups of network management, standards and prac-

tices, best practices, that is exactly what this bill is intended to encourage so that there is not government regulation or intervention.

And, Mr. McSlarrow, would you say that the legislation does, for the first time, help on the issue of network management? And if not, do we need to do something more in the bill to give you greater comfort and certainty that network management practices and private sector initiatives that you are now doing are encouraged?

Mr. MCSLARROW. Well, I would be comforted if you struck everything before the study, but I am guessing that is not on the agenda. I mean, yes, I take the point we have an exception for reasonable network management, and yet the very fact that we just had this exchange and that we have had this debate about whether or not our ability to manage peer-to-peer traffic is being called into question tells me everything I need to know. With the best of intentions, it is a phrase. It is just going to be subject to litigation and people going to the FCC or here, and in the absence of a definable, real, and present problem, I don't know why we would go down that path.

Mr. PICKERING. Mr. Chairman, I will yield back. I don't know if we will have a second round. But, Mr. McSlarrow, if you do have any suggestions on network management, I do appreciate what you are doing on network management, clarifying the private sector practices.

Mr. MARKEY. Thank the gentleman. Chair now recognizes the gentleman from Texas, Mr. Gonzalez, for 8 minutes.

Mr. GONZALEZ. Thank you very much, Mr. Chairman. And I am glad Mr. Pickering used the example of an exclusive relationship that may well endanger an enterprise such as Mr. Savitz's because I actually see a greater threat elsewhere developing, and I want to get into that. And it is about management and such.

I don't think this piece of legislation is necessary. It is premature. If this committee does its work, if the FCC does its work, why would we need to do something by way of legislative mandate which takes it out of our hands and our oversight duties? And I don't think that is really necessary.

This whole argument has been couched in terms of access, openness, little guy, little consumer, Internet user, the blogger, the small businessman. I don't think that is what it is about at all. It really is about the big guys in this fight. And I am going to go and I will ask Mr. Savitz: is your concern access to the Internet, or should your concern really be where you are positioned when someone conducts a search and hits "shoes"? I think that should really be your predominant concern.

And what I will do now, because I am going to read from "The Search" by John Battelle, which is probably 3 years old. Many of you probably have already read it, but it is very instructive. And I will read from it now. Neil Moncrief couldn't afford to have a bad quarter. In fact, even a bad month made things a bit tense at home. Running your own business is like that. When things go south at the office, you take it home with you. As a small businessman, Moncrief lived on the edge of profit and loss. A bad month means avoiding his local banker, putting off home and car payments, and having less meat on his family's table. But Moncrief is proud of what he has achieved. He built a small e-commerce com-

pany. I think it was toobigshoes.com. Survived the nuclear winter of 2001, 2002 and emerged with enough cash flow to take care of his family. Moncrief has search engines to thank for that cash flow, Google in particular. Thanks to the traffic that Google drove to Moncrief's online storefront, Moncrief no longer worked for "The Man." Moncrief is one of tens of thousands of merchants who have taken to the Web since the Internet became a global phenomenon. For every household brand built during the bubble's infamous glory, EBay, Amazon, Expedia, thousands of Neil Moncriefs toiled in relative obscurity, building the Web's bike shops and insurance agencies and its button merchants and stroller stores. These digital cousins of strip mall America are the very beating heart of the United States economy. Small business writ large across cyberspace.

Do you think Amazon has got scale? Do you think EBay is huge? Mere drops in the bucket. Amazon's 2000 revenues were around $2.76 billion, but the Neil Moncriefs of the world taken together drove more than $25 billion across the net that same year according to U.S. government figures. That is the power of the Internet. It is a beast with a very, very long tail. The head, EBay, Amazon, Yahoo, may get all the attention, but the real story is in the tail. That is where Moncrief lives.

But while the Web may offer access to hundreds of millions of customers, you still have to let them know you exist. When folks went looking for something, they usually started at a search engine, and through some combination of luck, good karma, and what seemed like fair play, when folks punched "big feet" or similar key words into Google, Neil's site came up first.

The best part, Moncrief had never purchased an advertisement. All those search engine referrals were organic. We were the right answer for the search, so why buy an ad? In the third week of November 2003 to be precise, the phones stopped ringing. The orders stopped coming in. For 2 weeks, Neil Moncrief didn't know what hit him, but he began to wonder maybe Google was broken. The very thought seemed ludicrous. Google broken? But a quick search on Google confirmed his suspicion. Twobigfeet.com was no longer the first result for "big feet" on Google. In fact, it wasn't even in the first 100 results.

In short, Google had tweaked its search engine algorithms, something the company does quite frequently. But this time Google's modifications, which were intended to foil search engine spammers, had somehow sideswiped Moncrief's site as well. What Google giveth, Moncrief learned the hard way, Google can also take away.

It was then that Moncrief realized that while he may have stopped working for the man, he was now working for a far more capricious overlord who had no idea he even existed.

In short, Google had updated its indexes to penalize what the company viewed as spam, people gaming their sites so they ranked higher. And lots of folks, including Neil, were caught in the crossfire. Neil was an unfortunate casualty of a much larger war, an arms race of sorts fought over relevance, power, and money. And I am not complaining about Google doing that. It is just that I believe they had to manage their own service product and network. Google will have to determine though, if you think of their role,

what should come first when someone is looking for, for instance, hip-hop. Who gets first in such a system? Who gets the traffic, the business, the profits? How do you determine all the possibility, who wins and who loses?

But Google, more likely than not, will attempt to come up with a clever technological solution that attempts to determine the most objective answer for any given term, and I think that is admirable. Perhaps the ranking will be based on some sort of page rank, downloading statistics, and lord knows what else. But one thing for sure, Google will never tell you how they arrive at that.

Now, that is not such a bad thing. And I know it is going to take my whole 8 minutes, but I learned from Mr. Markey never ask a question that does not include the answer. The real problem comes in when Google then starts entering certain relationships with other individuals and that advertising is then tied to search engines. And that leads me, of course, to probably the latest article that I saw with Yahoo and Google, which is very interesting. It says "Yahoo Incorporated"—this is from May 2, Wall Street Journal. "Yahoo Incorporated could announce an agreement to carry search advertisements from Google Incorporated within the week. While a broad search ad pack would likely attract intense antitrust scrutiny, the oppositions Google and Yahoo are discussing include a non-exclusive arrangement. In other words, how do you get around the scrutiny of antitrust and such? I don't know what this would be. The basis of such an arrangement would be a real-time option system that would choose the most lucrative ads for any given consumer query."

Lucrative. I am not real sure what they mean by that, and I think they are going to expand, but wouldn't you be concerned, as a small businessman just starting out, where is your placement? It is not going to happen with organic search, is it? You are going to have to subscribe to some sort of ad service, most probably provided by Yahoo and Google, which comprise about 72 to 73 percent of all searches in the United States, which are directly tied in to whatever ad product. Do you feel that that should be a real concern?

And maybe while we are addressing the five principles of the Internet and the architecture, maybe we ought to also be addressing the openness, accessibility, and the freedom of how it operates when it comes to search engines and what is truly driving and financing the Internet, and that is advertisement revenues.

Mr. MARKEY. The gentleman's time has expired, but the witness can answer the question.

Mr. SAVITZ. I will tell you that for individuals like the one that you described that does not or cannot afford to do a lot of advertising, they are going to have to really rely on blogs and small individual entrepreneurial shopping sites and other things to get their word out. And my fear, what worries me and why I am here today, is that we have things like slotting fees and other things. Those very people that they would have to rely on as an individual to get the word out will be regulated to the slow lane.

Mr. MARKEY. All right, the gentleman's time has expired. The chair recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. Nice job downstairs. I always wonder when we agree who is messing up, who is wrong.

Mr. MARKEY. We are going to start the gentleman over again. Just so everyone understands what is going on, because it is hard for people to understand the way the committee is organized. Downstairs simultaneously this committee has jurisdiction over Energy and over Telecommunications, and it is broken into two separate subcommittees. So right below this hearing right now, there is another hearing going on on the impact that biofuels, corn-based biofuels, being put into gasoline tanks, is having on the price of food and any impact on the environment. So about half of the members of this subcommittee are also members of that subcommittee. So the members are running back and forth between the two subcommittees as the hearings are transpiring.

And while Mr. Shimkus do not agree on the issue before this hearing on net neutrality, we do agree upon the issue of biofuels and how that issue should be handled. And so that is what he is referring to so that everyone can understand because there has been about eight members who have made reference to the other hearing.

With that, the gentleman is recognized for 5 minutes for his questions.

Mr. SHIMKUS. Thank you, Mr. Chairman. I also want to kind of clear up—my colleague, Mr. Pickering, mentioned in his questioning that current law does not allow network management. But that is not the case. And I would like to quote a policy statement from the FCC where they state, "Accordingly, we are not adopting rules in this policy statement. The principles we adopt are subject to reasonable network management." So just to get that on the record.

Mr. PICKERING. Would the gentleman yield?

Mr. SHIMKUS. Sure.

Mr. PICKERING. Is that in policy, or is that in statute?

Mr. SHIMKUS. That is a policy statement by the FCC.

Mr. PICKERING. Does the policy have——

Mr. SHIMKUS. Dated——

Mr. PICKERING. Will the gentleman yield?

Mr. SHIMKUS [continuing]. September 23, 2005.

Mr. PICKERING. Does the policy have the same——

Mr. SHIMKUS. Are you going to give me some of your time?

Mr. PICKERING. Yes.

Mr. SHIMKUS. Are you filibustering me, Mr. Pickering? I am reclaiming my time. Mr. McCormick, why is it so important that broadband providers be able to manage their networks and prioritize Internet traffic in the absence of government regulation?

Mr. MCCORMICK. Mr. Shimkus, various applications have different requirements. Some applications are ordinarily sensitive to latency, for example, VoIP is sensitive. We had a situation where video screening on this—certain healthcare applications. This legislation says that it would adopt and enforce protections to guard against any unwritten discriminatory favoritism by network offers based on scores for tests. Massachusetts General Hospital has a telemedicine application that requires for its integrity that it receive a certain quality of service.

So it is important to be able to manage it.

Mr. SHIMKUS. And I appreciate that. That is part of my opening statement, the concern about a couple things, prioritization, buildout, more pipes, latency issue, especially for telemedicine, which is really applicable, and we would like to get it further developed in rural America.

Mr. McSlarrow, can you talk about the importance of network management for your members, as many cable companies are relatively new entrants into the broadband market? And how would this legislation affect small cable providers' decision to enter into this market?

Mr. MCSLARROW. Sure. The broadband deployment by the cable industry is really a decade old. And, as you point out, there are many rural areas where we are still trying to build out those broadband networks. What is seamless to the consumer when they sit down at a computer and you have an always-on broadband experience, on the other side of that computer is the wild, wild west.

And you have got a network manager who is dealing with spam. And just to give you a scale of it, one of my companies defeats a billion spam e-mails every 2 days. You have got botnet armies that have taken over millions of PCs that are engaged in all kinds of illegal transactions. You have got just the ordinary give and take, legal but nonetheless challenging problems of congestion. And someone is managing that for you. And so it is hard to break it down at any one time, but suffice it to say it is a fairly complex engineering challenge. And somebody is doing that all the time, and the good news is a consumer doesn't think twice about it, nor should they.

Mr. SHIMKUS. Yes, it is a great point because for me to have teenagers in this era and how they consume electronics and how they get information. The YouTube phenomenon is amazing, but, Mr. McCormick, you testified about the bandwidth consumed by YouTube versus—YouTube consumed as much bandwidth as the entire Internet consumed in 2000. What would happen in a regime, an FCC regime like is being proposed in this legislation?

Mr. MCCORMICK. Well, again the most important thing is to have further investment in broadband buildout, further enhancements to broadband infrastructure. And what we are seeing today is that it is the very growth of applications that is fueling Internet buildout and construction.

So what we don't want to have is a situation where the government chills that kind of innovation in an investment by creating uncertainty in the marketplace.

Mr. SHIMKUS. And, Mr. Bainwol, you wanted to chime in on one of the questions that I don't know who asked. But I had a question first. Talk about the recording industry and your response to this legislation, and then if you would have a chance to respond to——

Mr. BAINWOL. Sure, we are in a situation over the last few years that comes close to crisis. As I spoke to in the opening statement, our sales are down nearly 50 percent during this new digital age. But we don't view the digital age as one that is going to trap us forever. I mean there is enormous opportunity out there if we make the right judgments.

And I guess my plea to you and to this committee is that we approach these issues with a sense of balance. Openness is a vitally important concept. Innovation is a vitally important concept, but what is happening right now today on the Internet is a trampling of our property right. And the property right concept is so central to the American experience of capitalism and is so central to our economy that to set up a set of judgments that excludes and ignores what is happening in terms of the violation of our property right is the wrong way to proceed, which is why I applaud Chairman Markey and Congressman Pickering for clearly and directly articulating that unlawful activity can be dealt with by way of network management.

The trick though is what are the forms of network management that are going to be used? I am not a techonologist. And will those forms of network management, whether you trip over somebody's concept of net neutrality. And that is my concern. We have got to find a way to lock down, to provide balance and debate, to deal with the property right, but to do it in a fashion that is respectful to balance.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentlelady from California, Ms. Solis.

Ms. SOLIS. Thank you, Mr. Chairman, and I will be brief. I just wanted to ask Mr. Scott his opinion—we talked a lot about fairness, the bigger fish eating the smaller fish so to speak, as my father would say. Can you please explain to us what net neutrality regulations—how that would either encourage or prevent Internet innovation?

Mr. SCOTT. Sure, it is relatively straightforward. The Internet, as it has developed, has operated in a nondiscriminatory manner. That means that the market power of those who offer you Internet access, the DSL line into your house or your cable modem into your house, they can't use their market power to discriminate in the marketplace for content and services.

And as a result, we have had the greatest free market experiment in the history of capitalism on the Internet. It has been extraordinarily successful. There are no barriers to entry. Anybody in their dorm room can have a great idea and become a billionaire.

We have a problem when the market power from the wires begins to get transferred over into the market of content and services, and that market gets distorted. And in that context, deregulation is synonymous with cartelization. You are handing over the keys to that free market to those few market players who have control of the wires. And that is what kills innovation, and that is why an openness has been such a successful premise.

Ms. SOLIS. My last question is both for Mr. Peterman and Mr. Bainwol. Could you please describe how you envision network management assisting and protecting against privacy of copyrighted material? And do you believe regulations about lawful Internet traffic would have an effect on those efforts?

Mr. PETERMAN. Would you repeat the last part of that question?

Ms. SOLIS. Do you believe regulations about lawful Internet traffic would have an effect on those effects? And that is protecting against privacy of copyrighted material.

Mr. PETERMAN. Obviously I think—well, I will speak for my—we are both very much invested in protection of copyright. That is one of the reasons that the guild is in favor of the openness. There is an enormous amount of work being done on privacy and on control of copyright—piracy, sorry. And we just feel that once again we don't want to use the piracy issue. We don't want that to be an excuse for limiting our access to the Internet as a means of communicating with an enormous new audience.

Obviously everybody seems to recognize this is an enormous, money-making, profoundly important economic and informational generator for this next century. Everybody here is in agreement with that. What seems to be the question is all right, how do we balance the protection of peoples' interest in making money with the consumers' interest in having an open market?

We believe that fighting this bill in the name of preventing piracy is not an accurate way to help the industry. We think that there are constant innovations going on in piracy technology. Now there is ad-imbedded products that are involved in this. We feel that that is the way to do it, not to inhibit in any way the access that has made this the money generator that, as Ms. Eshoo said, is the reason why everybody is here today. We want to keep it the way it has been because it is working so extraordinarily well.

Mr. BAINWOL. And I am obviously focused on the unlawful piece of this equation, and the question here is how do we most urgently address this question. And my fear is that legislation will take time. It will take time to process, to pass, to do the study. And we have a problem that is right now, and the best way to address that problem is for us at the table—the ISPs and content—to get together in a private way with a sense of urgency and a sense of commitment to results to deal with this. And you deal with it by a way of graduated notice programs and by way of technology, whether it is filtering or watermarks.

That discussion has to take place, and it has to be results oriented. And if it is not results oriented, then I am going to be back here, and I am going to say members of this committee, we need your help because there is a sense of urgency that has to be responded to.

Ms. SOLIS. Thank you. Thank you, Mr. Chairman.

Mr. MARKEY. Would the gentlelady just yield briefly? She has 35 seconds left. Would the gentlelady yield? Yeah.

Ms. SOLIS. Yield, yes.

Mr. MARKEY. Yes, again I just want to make it very clear that on copyright protection, we all agree. There is no debate on this committee at all on vigorous 100 percent enforcement of copyright. Whether it is software developed in Silicon Valley or in my district for business use, whether it is some recording artist, some television show, a movie, we want it to be protected: copyright.

But when the means of conduit change, when you move from radio to television to cable now to the Internet, we have to be constantly making sure that it is not used in an anticompetitive way against content, against copyright-protected content. So distinguish between content protection, we all agree it is 100 percent. And then competition, new means of conduit, carrying it, that sometimes can lead to anticompetitive activity against content, that doesn't have

an affiliation with the large telephone or cable companies. That is the distinction, and I just want to clarify that once again for the record.

The chair recognizes the gentleman from Mississippi—I am sorry, the chair recognizes first—I did not realize the gentleman from Mississippi had already been recognized. The chair recognizes the gentlelady from California, Ms. Capps.

Ms. CAPPS. I thank you, Mr. Chairman, and I am overstaying my time, my own limit. So I am going to restrict myself just to one question. This is a very interesting panel, so I want to thank you all.

Mr. Yoo, as you know, innovation on the Internet evolves at such rapid pace, oftentimes leaving policymakers and even Internet service providers playing catch-up. Looking toward the future, do you ever see a time when the supply of broadband access will be able to keep up with demand? Or do you believe that to currently be the case?

Mr. YOO. The deployment rates suggest that we may see it keep up with demand in the backbone. They are adding tremendous services in the core. The big problem is in what we call the last mile, whoever provides the connection locally. We are seeing increasing diversity of providers in the wireless space, and the 700 megahertz auction is going to add some new providers in that space.

The big problem is no one can foresee the future perfectly, and everyone will configure even local—even if there is extra bandwidth, they will build it where they think the people are going to be. They are going to guess right sometimes. They are going to guess wrong sometimes.

And YouTube, we talked about, is now 20 percent of all Internet traffic, and no one saw that coming. And it is very difficult for them to be perfect in terms of adding capacity because no one is that good. So sometimes you end up using other techniques to deal with the fact that you have actually done your best, but you have misestimated the demand.

Mr. MARKEY. I thank the gentlelady, but if I may just reclaim the—just finishing out the balance of the gentlelady's time. Actually no one saw it coming, that is that YouTube would consume so much, except for Chad Hurley, except for the kid who invented it, except for the kid that said hey, look at that aperture, look at the Internet, look at this wonderful thing that I might be able to do. So except for this proverbial kid in the garage who comes up with the idea that revolutionizes this entire industry, you are right. No one for sure saw it at a big telephone company or a big cable company. That is 100 percent for sure.

And it is not to say that that is a bad thing because they have a role. They have a very important role to play. But the innovation historically comes from the proverbial kid in the garage, this young graduate student or even younger that is always thinking about how to create new ways of providing content over the means of conduit that is being created.

So I just, again, want to make it clear that we are trying to protect young Chad Hurley, young Mark Andresin. OK, and the whole point is that the innovation is driven by these millions of kids that

are all at home, that are manipulating, thinking about these technologies every day. And at the same time, we want to protect the copyright of any content which is produced. All right, but we don't want it to get managed out of existence.

The chairman of AT&T sat here in 1978 in a hearing—I have been here for 32 years on the committee. And we were then debating whether or not someone should be able to go to a store and buy a phone that wasn't a black, rotary dial phone and to plug the phone into the wall. And the chairman of AT&T said here, my goodness, if that ever happened up in Boston, it could bring down the whole phone system of Boston if someone could go to a phone store and buy a phone rather than rent it from us for $3 a month, which my mother, Mrs. Markey, rented that black, rotary dial phone for $3 a month for 40 years. Paid about $1,200 to rent the black, rotary dial phone.

And AT&T, the old AT&T, the Bell Labs AT&T, even though they had already won like three or four Nobel prizes, in theory, when you said can someone buy a phone and plug it into the phone jack in the living room. No, it will bring down the whole system. Network management principles, they explained to us, are very important. We just can't have anyone making a phone and anyone plugging it into the wall because it would ruin our network management.

How long will it take you before you figure that out so people can buy other phones? And he said well, about 10 more years. And so I said, Mr. Chairman, we have got to break up AT&T. If it takes you 10 years to figure out how people can buy a different phone except that which is leased as a black, rotary dial phone in the living room.

So network management has always been used by the big companies, always, from the very beginning. It is a principle. That is one of the underlying principles of the big communications companies, that network management is used as the first argument against innovation, against the consumer having more choices. And so that was actually the hearing at which I began my efforts to break up AT&T, and it was just me and one other member of this committee, by the way, back then, long ago and far away. There are a couple people in the room who remember that.

Mr. PICKERING. Mr. Chairman, could you yield just a second?

Mr. MARKEY. Go ahead, sir.

Mr. PICKERING. Which president broke up AT&T?

Mr. MARKEY. Actually, this is scary, OK, to think that it was Ronald Reagan——

Mr. PICKERING. Thank you.

Mr. MARKEY [continuing]. That broke it up. And which shows again the bipartisan nature of this whole issue, OK. It is competition versus openness, innovation. Let me recognize now the gentlelady from California, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman. Thank you to all the witnesses. I think that it is healthy to be able to look at all of this with some sense of humor. You know it is professional humor, but it is some humor about our past and our resistance to things. And then when we look at it from—going fast forward a couple of dec-

ades later, we realize that where some of the louder voices stood, that it was really kind of ridiculous.

When Mr. Markey gives the description of the black phone that was really reliant. I mean that thing worked. Now our phones are like retractable pens. They don't work. We pitch them out. We get another one. But we are where we are, and I think that in some ways we are so much enjoying the success of what we built that we say because we built it and it is so successful that we don't need to protect that in some way.

And so I think, Mr. Chairman, that we that support this effort have a pretty tall challenge. I am going to be real frank. In the last Congress, we had 152 cosponsors, I believe. We are starting out in this one, and the argument is still that there isn't anything that is broken, everything is terrific, and nothing needs to be done.

And there are some of us that say, you know, the ingredients that made this so successful really need to be protected and that there are some things that are somewhat disturbing about what is going on. So I would like to just ask a couple of questions.

First, Mr. McCormick, do you believe that the broadband policy principles adopted by the FCC are enforceable? You do?

Mr. MCCORMICK. Congresswoman Eshoo, the Supreme Court has made it clear that the FCC has authority to take action against anyone who violates——

Ms. ESHOO. No, not whether it can be or not, but do you think that they are enforceable?

Mr. MCCORMICK. I believe——

Ms. ESHOO. You do?

Mr. MCCORMICK [continuing]. The FCC has authority to take action.

Ms. ESHOO. There was nondiscriminatory language in the Communications Act. Why is this legislation menacing to you when you see what the outcomes of that language are from the Telecom Act?

Mr. MCCORMICK. That particular language dealt with monopoly era on communications. It did not apply more broadly to others who are offering broadband service. It did not apply to the Internet backbone. It did not apply to cable service. It did not apply to broadband over power line. It did not apply to satellite-provided broadband. And so what we have is a very competitive atmosphere today. We have, like in your district, over two dozen broadband providers. And we think that that competitive marketplace is consistent with what has made the Internet great.

Ms. ESHOO. Except the people that are opposed to the legislation aren't very comfortable that there is enough competition and that the little guys not be able to break into it. That is where, I think, we have the debate, and I don't know whether this more targeted legislation has the ability to be non-menacing to people that have really already made up their minds and voted a certain way before. I think that is the issue that is before us really. I hope that we can be successful because I think everything isn't perfect in this paradise that is being described by some.

The well-respected professor and technology expert, Larry Lessig, was before the Senate recently, and I think he used a very interesting analogy. And that is that he described the Internet infrastructure a lot like the electrical grid and said Sony and Panasonic

are invited to develop new technologies that use the network and that they don't need permission from network owners. And the network doesn't ask whether the TV is made by Sony or RCA.

Now, by no means is the network free. Neither is the grid. We all pay an electric bill, and we pay for what we consume. Why is broadband access different than this description? Who would like to weigh in on that?

Mr. MCCORMICK. Well, I will try it. I don't know of any situation where there is an inability on the part of the consumer to access any lawful Web site. So——

Ms. ESHOO. Well, I think that we have some problems, and I think that Mr. McSlarrow maybe can say something about this and the BitTorrent situation. Is that not cause for concern? I am not trying to penalize anyone. I mean, around here what counts is big. So the bigger the outfits, the more influence they have with a big legislative body. Have you done many important things? I mean the investments that cable is invested is extraordinary.

But I want new outfits to be born. I want to see a lot of babies, not just parents. So is BitTorrent not a chip in the armor of this?

Mr. MCSLARROW. I don't think so. I think the interesting thing is that peer-to-peer networking is a relatively new phenomenon in a marketplace that itself is relative immature. I mean, we are talking a decade, and to the average consumer who wants to use peer-to-peer technologies, they do, and they don't even notice any network management taking place.

But what is happening right now is that ISPs, peer-to-peer applications companies, other technology services, are all talking about how you can do peer-to-peer in a way that consumes less bandwidth, that is more user friendly, and I think there is actually a cause for celebration that in the private sector, those conversations are taking place in the absence of regulation.

Ms. ESHOO. Well, I can see where we are. Everybody is sticking to their own story essentially, and so, we have to bring about some kind of meeting of the minds because I think if we don't, then there will be a degradation and a continuation of some manifestations of degradation.

Is it 100 percent or 80 percent? No, and I don't think anyone is pretending that that is what it is. But there are cases of degradation, and I think it always ends up being in the interest of growing and larger companies to be tempted to protect what they have and not let another foot in the door. I think it is just the nature of the animal. And so we need more cosponsors. We are going to work on that. I thank everybody for being here.

Mr. MARKEY. I thank the gentlelady, and, of course, the gentlelady has been a national leader on all of these issues throughout her entire career. And we thank her for being here. And now we turn and recognize the gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Chairman. Mr. McSlarrow, sorry I have been bouncing back and forth because I have been upstairs there. But do you believe the FCC has the authority to address the discrimination issues on the Internet?

Mr. MCSLARROW. I think it is ambiguous. I think the Supreme Court and the FCC have asserted Title I ancillary authority, and

it is clearly broad although not unlimited. But they haven't actually passed or enacted a rule doing something like that today.

Mr. STUPAK. OK, you stated that 5 percent of the customers use anywhere between 50 to 90 percent of the total capacity of a broadband network. Can you tell me how you came up with that?

Mr. MCSLARROW. Well, it is one estimate, and there are many. But they are all roughly in that range. Some actually are worst case scenarios where you are talking about 1 percent of consumers using the vast majority. I know in one example I went out to one of my operators, a mid-size operator serving about a million customers, and the number of people who consume over 50 percent of bandwidth and over 70 percent at peak congestion times is small enough that they are on a first-name basis with these people. So I mean it differs obviously network by network, but there is this disparity between the number of users, particularly at peak congestion, and the bandwidth consumers.

Mr. STUPAK. Mr. Savitz, how are the costs to host your business online determined? And how has that changed since 1999 when you first started?

Mr. SAVITZ. I am sorry. I didn't hear. Can you say that question again?

Mr. STUPAK. How is the cost determined for you to be on the Internet?

Mr. SAVITZ. How is the cost determined? Well, as you continue to grow scale, you have to increase infrastructure. When you have to—it becomes an expensive value proposition in terms of what we have to invest to be able to have Internet access, which is why when I talked about before during my testimony to say that the people on the other end aren't making tremendous investment. We are absolutely making an unbelievable amount of investment. It is an extremely costly proposition that you have to be able to succeed with the consumer to make it at all make sense.

Mr. STUPAK. Well, you said you started in '99. You had just a few employees, and you have greatly expanded. How have your costs done the same just to be accessed on broadband?

Mr. SAVITZ. Well, the beautiful thing about the—our costs have exponentially increased disproportionate to our revenue growth. So the costs have scaled, but because of the innovation and disability of this open platform, you are actually able to generate business in the sense that, at Shoebuy.com, we do over $1 million per employee.

Mr. STUPAK. What was it in '99 then per employee?

Mr. SAVITZ. Well, we actually formally launched the site in January 2000, so it was a terrible metric at that point.

Mr. STUPAK. Well, the point being you invested, but yet you saw return on it, right?

Mr. SAVITZ. Yes. Again, that is why I am here today. It is fairly incredible to think that by being very scrappy and innovative and entrepreneurial, we were actually able to get enough visibility and get out there and actually market the value proposition of Shoebuy to get enough visitation and enough transactional performance that we were able to scale now, at the present point of time we get over 4.5 million visitors a month.

Mr. STUPAK. OK. Now, Professor, do you think it is possible to establish some simple baseline expectations of nondiscrimination for the Internet that does not interfere with good networking management but preserves consumers' right to access content?

Mr. YOO. Past experience does not give the tremendous variety of technologies. Wireless, cable, telephone are so different. They are subject to congestion in very, very different ways, but it is very, very difficult for them to manage that. It also depends on how much traffic is being generated. It is not even technology based, just on the local conditions.

And the one thing that I wanted to say in this hearing is that one thread that came up in some of the filings is it is also very different for rural providers. Is that because they only have a very limited of bandwidth that if they can't discriminate a little bit between—basically it is video. If they can't dial back video a little bit, one person downloading video soaks up the entire bandwidth for everybody.

And so when we are talking about protecting the little people, little proprietors, in the attempt to create competition in the space, many of the rural providers will fall on the other side because they need those sorts of ability to discriminate because determining what is good discrimination and bad discrimination and what is cost justified and not cost justified, an antitrust law and an FCC law has been extremely difficult, and when the product is complex, almost unworkable.

Mr. STUPAK. I want to ask you a question I asked Mr. McSlarrow. As a law professor, what is your view of the FCC's ability to enforce policy and discrimination on the Internet?

Mr. YOO. As of now, the Supreme Court has indicated that they have the authority. The FCC by its own statement said we are not promulgating rules, and that can be reasonably interpreted as they have not as yet exercised that authority. They have an ongoing proceeding right now asking for all the examples, and they have indicated on five occasions that they are willing to enact rules if they get the record. But the record wasn't there yet in 2005, and the order and the merger clearances.

What is fascinating to me about the Bell South merger clearance is they did make one exception. They put in the network neutrality rules, but they said we will make an exception for IPTV. Why? Because we needed them to compete with cable, and without the ability to channelize that or without Comcast's ability to separate out its voice traffic, it can't cross-compete with the other types of providers.

Mr. STUPAK. Well, do you believe the FCC, through its ancillary authority, have the right to combat any perceived violations of its policy statement even though they really haven't exercised the authority?

Mr. YOO. On a proper record with proper notice and comment and an explanation of how it fits with the past decisions or whether they are breaking with them, I believe they have the authority. It is just a question of whether they properly exercise it in accordance with administrative law.

Mr. STUPAK. OK. All right, let me ask this question if I may then. You mention how the predominant use of the Internet has

gone between a peer-to-peer architecture and because of YouTube is returning to a client server architecture. You also say that this provides, and I am quoting now, "uncertainty for the business environment," but in order for either architecture to flourish, wouldn't open access be necessary?

Mr. YOO. It raises a whole bunch of problems. If you are in a peer-to-peer architecture, you allocate upload and download speeds more symmetrically than you do if you are just downloading. If you are downloading, all you are sending up are Web site addresses, these little short pieces of code, and you have taken down tremendous files.

Second, in the world before, where you have a Web site, you usually count the bits that the Web site puts out—in answer to your question to Mr. Savitz—on a 5-minute basis, and you charge them based on their highest volume over a 30-day period, using the 95th percentile volume. You don't get the absolute peak because there are little spikes. You just tail them off. And that is how we have counted it. So if a Web site downloaded 100 times, it created 100 times of downloads.

In a peer-to-peer world, you can download once, store it among end users, and yet serve 100 downloads on the user side with only generating one payment on this side. So if you move to a peer-to-peer world, you need to start metering the end user side because they are now generating congestion that we were previously capturing on the server side that we can't capture anymore, which is not just a question of regulation. It is a question of business models. It is usage sensitive pricing. Some of the models that Time Warner began to experiment with, but it has—profits on objections from Mr. Scott and some other people in the community about the concerns in the network neutrality space.

My point is it is a very complex problem. They are going to have to redesign the architecture of the network based on a bet whether peer-to-peer or filing sharing is going—downloads are going to win. They are going to have to redesign their business models, and they are going to have to remanage their networks in very different ways and put the meters in different places.

Mr. STUPAK. Thank you.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Nebraska, Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman. I enjoyed seeing your presence for a few minutes downstairs in the other hearing. I tried to reduce the issue into kind of one statement, one simple statement, and what I concluded is can we expect continued innovation and development of and within the Internet under an additional regulatory scheme, no matter how benevolent the scheme may sound. So, Mr. McSlarrow and Mr. McCormick, I have two kind of simple questions.

One is, is there becoming such a problem with reduced access or discrimination, bad practices within the Internet, that the sky is falling, we have to have a new regulatory scheme? And will a regulatory scheme enhance or retard development and uses within and of the Internet? Mr. McCormick, you have been silent since I have been here. Why don't you go first?

Mr. MCCORMICK. Well, thank you very much, Congressman. The Internet is full of innovation. As I said in my statement, for health care, for education, it is improving the environment, it is improving personal security. Each of these applications has different network requirements. We believe that there should be no preemptive prohibition against innovative business plans, partnerships, and use of the network.

And there is, at this point, no suggestion that any of the companies that I represent are in any way acting in a way that is not in conformance with the policy principles articulated by the FCC. So we think that this new language does create uncertainty, and we don't know when it says "guard against unreasonable discriminatory favoritism of content based upon source or destination," how does that impact a health care application? How does that impact a personal security application? Those are applications that we are working, through network management, that do have different requirements for both source and destination. So we think that this is regulatory, and it would show investment and innovation.

Mr. TERRY. Mr. McSlarrow, your thoughts?

Mr. MCSLARROW. I have to confess to a certain amount of frustration as much as I am glad to reprise my usual role as Mr. Markey's foil. The interesting thing about this is, and I am thinking about the '78 hearing with the chairman at AT&T. That is not the world we live in today, and those aren't the people we represent. And I admit full well both cable, telephone back in the monopoly era, totally different. But they think differently today.

And we said several years ago, we want our customers to access every Web site, to use every application, to use every service on the Internet. We told this committee and your counterpart in the Senate, we want them to be able to attach any device to the network so long as it doesn't harm the network. That is our policy because that is what we want our customers to have, and if we didn't do it, in the case of cable, they would go over to Walter's companies and vice versa.

So the innovation and the investment that Walter just talked about is clearly present. But really what this is about is our perspective is we are standing in the shoes of our customers. We want them to have a superior experience. And the hard cases where you are talking about a few affecting the experience of the many, people have to make judgments. And they could be right or wrong. But to your point about whether or not regulation makes it better, I just don't see how that could possibly be the case.

And that is really the concern here is not the goals, which we share, it is the reality of regulation in a space that has been up until now unregulated.

Mr. TERRY. All right, thank you. Mr. Yoo, are there a lot of bad practices, discriminatory practices that are occurring today that should give rise to a new regulatory scheme and that would be unreasonably discriminatory today?

Mr. YOO. They opened notice of inquiry, and the FCC has invited parties to file. And so this was the moment where the record is supposed to be made. And as Mr. McSlarrow has indicated, there are basically four examples in the record, two of which really don't involve Internet content. The one example, the Pearl Jam example,

AT&T was hosting something on its Web site, decided it no longer wanted to be associated with that speech. I don't personally agree with the decision, but what most people would say what you actually host on your own Web site is protected. You have discretion over that. And I guess my bottom line of that is there are very few examples and usually not the kind of volume of examples you would need for regulatory limit.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Mississippi, Mr. Pickering.

Mr. PICKERING. I just wanted a quick follow up question and then close, summarize real quickly. Mr. McCormick, do you think that the FCC has the current authority on a case-by-case basis to enforce their network neutrality principles?

Mr. MCCORMICK. I think that based upon the Supreme Court's decision in Brand X that the FCC has authority, ancillary authority, to take action against what it would consider to be activities that would not be in conformance with its principles.

Mr. PICKERING. Mr. Yoo, you had summarized in your statement that a case-by-case approach could be the best way to proceed. If the FCC has the authority, whether that is in dispute or not, but if it is clarified and then the outcome of this effort was to strengthen and give certainty that the FCC does have that authority on a case-by-case basis, would that be a good outcome?

Mr. YOO. I think that would be a good outcome. The only question I have about the current legislation is it actually makes a commitment to a set of baseline principles, which could actually interfere with case-by-case decisionmaking to the extent to which we had one baseline for one technological reality or be shaped by one technology. We have a different technology or a new technology come along, and then all of a sudden the baseline is no longer really well designed for that context.

But the idea of a case-by-case method I support. It is the notion of baseline principles that give me pause and trouble.

Mr. PICKERING. And Mr. McSlarrow, Mr. McCormick, let me just ask one question of whether this is a legitimate concern or not. Because I think in the marketplace today, we are not seeing many problems, to be honest. We do have concentration occurring in cable and telecom and wireless. And the question is as you begin, for example, in wireless to have an exclusive Apple with iPhone, do you see a business model where you would want to do an exclusive with Yahoo! or Microsoft or content providers? Or if not an exclusive, a preferential agreement that may be with the big record producers but not with the independent record producers, or with some in Hollywood but not others in Hollywood? Do you all see that type of business model being considered, and would it make sense?

Mr. MCCORMICK. I am not aware of any instance where any of our companies are looking at a business model that would, for example disadvantage access to the shoe Web site.

Mr. PICKERING. But in the future, do you want the option—codifying the principles, does it take away that option from you, and does that concern you?

Mr. MCCORMICK. I believe that if you have a competitive environment, as we do today, where the barriers to investment, in offering broadband services are extraordinarily low, that as people are in-

vesting in broadband, one of the ways they may capitalize their investment is through innovative partnerships. We are seeing that with university networks. We are seeing that with a variety of unlicensed, wireless-based networks, and therefore I think that it would be a mistake to preemptively prohibit innovative partnerships that may lead to our goal of increased broadband deployment and competition.

Mr. PICKERING. Thank you, Mr. McCormick. I see that my time, and I am about to defer to the chairman. I want to thank you for working with me on this legislation. I do think it is the reasonable common ground, that it clarifies current policy and principles. I do not believe it will lead, and I hope it actually prevents us from having a new regulatory scheme adopted.

I hope it gives clarity and certainty that this will be the business model going forward. And from a principle, philosophical point of view, it is the way to maximize freedom, whether it is economic, political, or personal, that we have in the Internet.

And if we can have support from the Christian Coalition to the Planned Parenthood, from independent record producers to major labels to the writers in the creative community to the small business community, I think that it is a wise and well-reasoned and principled, from a freedom point of view, way to go. And it is not—if you look at the counterpart on the Senate, Snowe-Dorgan, very regulatory, very prescriptive. This is very balanced, and it is consistent with the committee's work under Republican majority and consistent with the Republican commission's principles adopted.

And I do think that it clarifies network management or strengthens it, and it clarifies lawful to unlawful uses. And this is a good ground upon which to start in this committee of getting the consensus to promote American values and ideals and a good way. And I hope that we are successful, Mr. Chairman, in our efforts to do. And I look forward to working with you on it.

Mr. MARKEY. The gentleman's time has expired, and the chair will recognize himself. And just to close the hearing and to say that I value my partnership with the gentleman from Mississippi. This issue really should not be Democrat, Republican. It should just be an evaluation of what is needed in order to ensure that we see the innovation out in the marketplace without giving protection to the pornography, the piracy, the other practices that legitimately should be looked at as areas that are still subject to the traditional laws. And I don't think there is going to be any compromise on that.

But let me just say that Comcast, AT&T, Verizon, and Time Warner have 66 percent of the market. And most Americans, 94 percent of all Americans, only have a choice between their telephone company and their cable company for broadband service. So, you know, Mark Twain used to say that history doesn't repeat itself, but it does tend to rhyme. So it is not exactly like 1978, but it is something that rhymes with 1978. It is very close to 1978. It is a digital duopoly that we have now rather than just one telephone company. But it still is restrictive and unnecessarily so in terms of the incentive that we need to create for entrepreneurs, for new ides to enter into the marketplace.

Back then in 1978, as part of network management, AT&T used to argue that the cable company should not be able to put their wire on top of a telephone pole, that they should have to build their own poles across America. Now these poles, because of the financial state of the cable industry, would probably have been three feet tall right next to the telephone pole back in 1978. So network management, OK, but we want this revolution, the cable revolution. So we mandated that for a reasonable charge that the telephone company would have to give the cable company access to it.

When a company called MCI came along and said we have this new phone service, AT&T said that is fine, but you will have to dial 23 digits before you actually reach the phone number that everyone has memorized. Network management. Too hard for us to figure it out, and we had to, through regulation and laws, make it possible for MCI and Sprint and these other companies that we now know to be able to compete. Otherwise, network management would be used as their block.

Same thing is true for telephones. Same thing is true et cetera et cetera. So here in no way do we want to impose burdens upon AT&T, upon Comcast, upon Time Warner, upon Verizon that are excessively burdensome. We don't. But we want to make sure at the same time that principles are established that allow the companies that don't own these wires to be able to innovate and to be able to reach millions of consumers across the country while compensating the phone company and the cable company reasonably for the use of their wires. That should be the principle.

And in fact, while the DSL technology sat for years in the laboratories of the phone companies, beginning with the '96 Act, there was a massive deployment because of the kind of Darwinian paranoia inducing principles that were built into the 1996 Act. But everyone abided by those long-standing principles against unreasonable discrimination from '96 on until the Federal Communications Commission reclassified that service in 2005.

And so that is really what we are talking about. A whole history here that kind of changes in 2005, and we have to find a way of reconciling this so that we have the smaller voices. We have the smaller entrepreneurs who are able to act.

And by the way, I just want to add, Mr. Yoo, that it wasn't the founders of Google actually who discovered how YouTube would work. It was the proverbial kid in the garage. So I want to say that as well. Not only AT&T and the cable companies, but also even this large company Google didn't invent it. It was a smaller, entrepreneurial, younger person. And so all of this is central to the long-term well being of our country.

You know what I have decided to do? Let me just finish here. Without objection, a statement of support for the bill from the National Association of Realtors as well as from the Independent Film and Television Alliance are entered into the record. I am going to give each one of you 30 seconds very quickly to tell us what you want us to remember. It can only be 30 seconds because of action on the House floor. Let me begin with you, Mr. McCormick, if you would tell us what you want the committee to remember.

[The information appears at the the conclusion of the hearing.]

Mr. MCCORMICK. Mr. Chairman, as you proceed forward, please do so in a way that does no harm to innovation and investment.

Ms. COMBS. We just want to keep the Internet fair and neutral and this discriminatory material that—we don't want any more discrimination on the Internet.

Mr. MARKEY. Mr. Bainwol.

Mr. BAINWOL. We are going to roll up our sleeves, get to work with our colleagues in the ISP community to try to solve the piracy problem, and we will report back to you, sir.

Mr. MARKEY. Thank you, Mr. Bainwol. Mr. Peterman.

Mr. PETERMAN. The Internet has been an extraordinary opportunity artistically, economically, informationally, educationally. We urge you to err on the side of openness, keeping it open, and letting opportunity for all flourish rather than concentrating power into smaller groups.

Mr. MARKEY. OK, Mr. McSlarrow.

Mr. MCSLARROW. We want our customers to do anything and go anywhere on the Internet. We think we can do that without government regulation, and we do think that a full examination, as you suggested, will show that that is the case.

Mr. MARKEY. Mr. Savitz.

Mr. SAVITZ. An open network that is fair and equal for all so other entrepreneurs can do what we were able to do at Shoebuy.

Mr. MARKEY. Mr. Yoo.

Mr. YOO. There is growing empirical evidence that the kinds of openness actually deters investment in networks. And what we are seeing is an incredible increase in the variety of uses in the network and technologies. One-size-fits-all threatens all the variety and the chances of letting the network evolve.

Mr. MARKEY. And Mr. Scott.

Mr. SCOTT. I would say continue your efforts to build consensus around these important consumer protection principles. They belong in the law. And as you talk with your colleagues about this important issue going forward, ensure them it is a question of when and not if we will have rules protecting consumers and the free market. And it is not just about how we are going to explain to industry why we need consumer protections in the law. It is how we are going to explain to the public if we don't have them in the law. That is where I would leave it.

Mr. MARKEY. I thank you, Mr. Scott. I subscribe to that view. My mother always said try to start out where you are going to be forced to wind up anyway. So we eventually will have rules, so let us try to figure out what they should be. Let us make them reasonable. We already passed legislation 2 years ago on a bipartisan basis with the Republican leadership of the committee supporting it. The bill that the gentleman from Mississippi, Mr. Pickering, and I are cosponsoring with other members of the committee are based upon that bill that already passed.

So it is not something that is radical, and it is not something that, in our opinion, would have any undue influence, any improper influence on the large carriers. But I think the strength of our position, if I can say this to the gentleman from Mississippi, is that the arguments that are being used against us are arguments about an-

other bill that we do not support. And that is where they have to go if they are going to attack our bill.

We need to have the principles understood, this debate aired out, and for us to pass the legislation. That is our intention, without harming the cable industry or the telephone industry. We think we can strike that proper balance. We thank this distinguished panel for your excellent testimony today. This hearing is adjourned.

[Whereupon, at 12:40 p.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

STATEMENT OF HON. JOHN D. DINGELL

Thank you Mr. Chairman.

One thing is for certain, Mr. Chairman—network neutrality is an issue that is here to stay. The last time this Subcommittee considered the issue of network (net) neutrality, it was in the last Congress in connection with the Communications Opportunity, Promotion, and Enhancement Act, or the COPE Act. I would note that, in the early stages of negotiations on the COPE Act, the Subcommittee was well on its way to reaching bipartisan agreement on most key issues, including that of net neutrality. But, as I said then, a funny thing happened on the way to the forum. The majority elected to go it alone, abandoned the bipartisan approach, and pushed through a bill that did not fully address very legitimate net neutrality concerns. That bill failed to become law, in part because it did not adequately address net neutrality.

This is the first time we will have a full hearing focused solely on legislation relating to net neutrality, and it is an issue about which I have great interest and harbor significant concerns. Over the last several years, the Federal Communications Commission (FCC) has deregulated residential broadband services. As a result, consumers no longer have explicit protections in the Communications Act from discriminatory or unreasonable behavior by broadband network operators. Many maintain that the FCC can use its ancillary authority to ensure that broadband networks remain open and fair. The Commission has also adopted a broadband policy statement, but its ability to enforce the principles set forth there has been called into question.

I am pleased that recently, when there have been missteps by network operators with respect to ensuring a fair and open Internet, those missteps have been quickly corrected. I suspect this is due in no small part to the strong and watchful eye of the Congress and others. And while I am encouraged by the course corrections some network operators have made, it also suggests that this is an area where we must continue to be vigilant.

Recently, the focus of discussions about net neutrality appears to have shifted. While debate at the time of the COPE Act focused on the ability of consumers to have unfettered access to the content, applications, and services of their choice, today we discuss when and whether network operators can impede that access for some consumers to benefit the majority of their subscribers. While I am pleased that network operators seem to have accepted that they should not be permitted to interfere with their customers' access to the world-wide Web, I am concerned about how "network management" activities can be carried out in a reasonable way that does not work to the detriment of consumers and independent content providers. These are my concerns, and they are the concerns of the University of Michigan and others in my district.

I hope that the panel addresses a few of the following questions. First, what are the reasonable limits of network management? How can we be sure that network management is used for worthy pursuits without impeding competition and ultimately harming consumers? Second, what would happen if network operators start to not only charge consumers for Internet access, but also to charge the content, application, and service providers that consumers want to reach? What are the costs and benefits of such an approach for network operators, consumers, innovation, free speech, and new entry by the smallest, newest Internet companies? Finally, what is the status of the Commission's ability to protect consumers? Is its broadband policy statement enforceable? If not, what authority does the Commission have to ensure that network operators do not act to the detriment of consumers? Should that authority be made explicit? I remain troubled by arguments made by some that suggest the Commission is powerless to act today should trouble arise.

Thank you, Mr. Chairman, and I look forward to today's testimony.

The Wall Street Journal

April 12, 2008

REVIEW & OUTLOOK

An Alternative to 'Net Neutrality'
April 12, 2008; Page A8

DOW JONES REPRINTS
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Google, MoveOn.org and other comrades in regulation have been calling for more government control of Internet service for several years now. The good news is they've just suffered a setback. An agreement worked out recently between cable giant Comcast and BitTorrent, the creator of a popular file-sharing program, offers a private-sector alternative to "net neutrality" industrial policy.

Comcast gained villain status last year when the company tried to ease congestion on its network by slowing the transmission of high-bandwidth files that use the BitTorrent protocol. BitTorrent users trade large files that consume huge amounts of capacity and slow down Internet service for everybody else. Around 5% of the people on Comcast's network use 70% of the capacity.

BitTorrent was none-too-pleased, and Comcast's political detractors pounced, arguing that it was proof of a network owner discriminating among different types of content. Representative Ed Markey of Massachusetts, who chairs a House subcommittee on telecommunications and the Internet, chided Comcast executives for trying to turning "BitTorrent into BitTrickle" and called for a "national broadband policy." Mr. Markey is a Google fave.

[Kevin Martin] Kevin Martin, who heads the Federal Communications Commission, accused Comcast of not being "open and transparent" about its network management practices. Mr. Martin apparently isn't finished piling on. He's holding yet another hearing to discuss "broadband network management practices" next week at Stanford University.

Comcast was engaging in a kind of content discrimination. But federal regulations and its "terms of service" agreement give Comcast the authority to use reasonable network management techniques. There's also no evidence Comcast acted to favor a Comcast service, or to shut down a political view, or for any other nefarious reason that net-neutrality advocates cite when demanding more government regulation. The company's justifiable goal was making sure that the vast majority of its users weren't receiving poor Internet service on account of a few bandwidth hogs.

The good news is that while politicians and MoveOn were busy exploiting the episode to push a pro-regulatory agenda, Comcast and BitTorrent were fleshing out a new network management plan. It will allow file-sharers to use Comcast's network without slowing service for everyone else. And it shows that the private sector is perfectly capable of handling these issues on its own.

Government's role here, properly understood, is not to tell Comcast how to manage its network. Rather, it is to make sure consumers have alternatives to Comcast if they are unhappy with their Internet service. Today, almost everyone in the country has the choice of receiving Internet service from a cable provider or from a phone company. And the percentage of people who don't have that choice is shrinking rapidly.

BitTorrent doesn't want resistance from the Internet service providers that its users depend on, and Comcast doesn't want to lose customers to telcos because of bad service, so both companies had every incentive to work out their differences. And whaddaya know? They did. Maybe someone should tell the FCC's Mr. Martin that markets work.

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May 6, 2008

Dear Congressman,

As the House Energy and Commerce Telecom Subcommittee prepares to hold its hearing on H.R. 5353 – the Internet Freedom Preservation Act, we, the undersigned organizations, on behalf of our millions of members and supporters, encourage you to support the free market principles that have enabled the Internet to become one of the most successful innovations in history.

Unfortunately, proponents of regulating the Internet through so-called Net Neutrality are pushing the type of government intervention that is counter-intuitive to successful ventures. Simply put, the idea of Net Neutrality, which has been called "the web's worst new idea" by the *Wall Street Journal*, goes against the basic rules of the free market.

Expanded commerce and unprecedented citizen participation in the democratic process are outcomes of the Internet's unfettered growth. Few would argue that such growth is a direct result of the government's refusal to over-regulate the Internet. A shift toward stifling regulation and unnecessary government intervention threatens the Internet's continued success.

The premise of Net Neutrality flies in the face of free-market principles, specifically:

There should be no preemptive regulation of an industry or service in response to a hypothetical problem;

There should not be increased intrusion of the government into the free market and private sector;
and

The government should not be used to solve perceived market shortfalls.

And yet, perhaps the most basic principle, "If it isn't broke, don't fix it," is the one most important maxim, and probably is the most obviously violated here. Net neutrality is a solution in search of a problem. Indeed, Net Neutrality will lead to fewer consumer choices, higher prices and would stifle new investment in much-needed broadband network infrastructure.

We are asking you to stand up for pro-growth principles and to not allow any anti-free-market Internet regulation to gain traction in the House.

Respectfully Submitted,

Jeffrey Mazzella
President
Center for Individual Freedom

Thomas Schatz
President
Council for Citizens Against
Government Waste

Larry Hart
Director of Government Relations
American Conservative Union

Matt Kibbe
President
FreedomWorks

Duane Parde
President
National Taxpayers Union

Derek Hunter
Executive Director,
Media Freedom Project

Grover Norquist
President
Americans for Tax Reform

Ryan Ellis
Executive Director,
American Shareholders Association

Kelsey Zahourek
Executive Director
Property Rights Alliance

March 10, 2008

Dear Member of Congress,

We write to you to warn of the dangers of "net neutrality." Legislation has been introduced in both houses of Congress that will stifle future innovation and may limit our ability to protect families and children from harmful content found on the web. Recent efforts to impose burdensome regulations on the Internet have failed, and we ask that you continue to resist any such proposals.

Experience has shown that competitive markets work to the benefit of all Internet users. It is competition, not regulation, which has led to significant investment in improving and upgrading broadband networks by our nation's Internet service providers. Thanks to these investments, more Americans have access to high-speed Internet than ever before which has been vital to our ability to spread our message. Network neutrality mandates would directly harm future innovation and broadband deployment, and as a result, would hinder our efforts.

The Internet has unquestionably changed the way we communicate for the better. However, as you know, the Internet has also made obscenity, child pornography, and other objectionable content readily accessible. Thankfully, research, innovation, and competition have given Internet users tools to block unwanted content from entering their homes. It is critically important for parents and broadband service providers to continue to have these tools available to them because despite what network neutrality proponents may say, all content on the web is not equal and should not be treated equally. Network management is not some insidious method of stifling voices on the Internet; network management is critical to stop pornographers and pedophiles from having unfettered access to consumers' Internet connections.

We appreciate your willingness up to this point to allow the market to function properly, and ask that you continue to do so by resisting the call for network neutrality. Please inform Chairman Martin that although the Commission may be "ready, willing, and able to step in if necessary," absent market failure now is certainly not an appropriate time for the FCC to act.

Sincerely,

Leslee J. Unruh
Founder & President
Abstinence Clearinghouse

Dr. Carl Herbster
President
AdvanceUSA

David A. Keene
Chairman
American Conservative Union

Grover Norquist
President
Americans for Tax Reform

Gary L. Bauer
President
American Values

Austin Ruse
President
Catholic Family & Human Rights Institute

Larry Cirignano
Founder
CatholicVote.org

Hance Haney
Director
Technology & Democracy Project, Discovery Institute

Brian Burch
President
Fidelis

Steve Elliot
President
Grassfire.org Alliance

Joseph K. Grieboski
Founder & President
Institute on Religion & Public Policy

Derek Hunter
Executive Director
Media Freedom Project

C. Preston Noell III
President
Tradition, Family, Property, Inc.

Statement of the
NATIONAL ASSOCIATION OF REALTORS®
To the House Energy and Commerce
Subcommittee on Telecommunications and the Internet
Hearing on the Internet Freedom Preservation Act of 2008
May 6, 2008

On behalf of the 1.2 million members of the NATIONAL ASSOCIATION OF REALTORS®, we are pleased to submit this written statement in support of H.R. 5353, the Internet Freedom Preservation Act of 2008. The NATIONAL ASSOCIATION OF REALTORS® represents a wide variety of real estate industry professionals. Realtors® are industry innovators who understand that more and more consumers today are seeking real estate information and services online. For this reason, the overwhelming majority of NAR members rely on competitive broadband services in order to efficiently operate their businesses.

The NATIONAL ASSOCIATION OF REALTORS® supports five principles with respect to network neutrality. These include: 1) consumers are entitled to access the lawful Internet content of their choice; 2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; 3) consumers are entitled to connect to their choice of legal devices that do not harm the network; 4) consumers are entitled to competition among network providers, application and service providers, and content providers; and 5) network providers should not discriminate among internet data transmissions on the basis of the source of the transmission as they regulate the flow of network content.

NAR believes that H.R. 5353 will maintain the freedom to use for lawful purposes broadband networks without unreasonable interference from or discrimination by network operators. This measure will preserve and promote the open nature of broadband networks enabling consumers, including real estate professionals, to access lawful content, applications, devices and services of their choice.

We thank the subcommittee for this opportunity to share our views regarding network neutrality. The NATIONAL ASSOCIATION OF REALTORS® supports H.R. 5353 and urges the subcommittee to pass this important legislation.

Independent Film & Television Alliance®

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JEAN M. PREWITT
President and CEO

May 6, 2008

Chairman Edward J. Markey
Subcommittee on Telecommunications and the Internet
House Energy & Commerce Committee
Washington, DC

Ranking Member Fred Upton
Subcommittee on Telecommunications and the Internet
House Energy & Commerce Committee
Washington, DC

RE: May 6, 2008 House Energy & Commerce Telecommunications and the Internet Subcommittee Hearing on Net Neutrality

Dear Representatives Markey and Upton:

On behalf of the Independent Film and Television Alliance (IFTA), which represents independent film and television producers and has more than 180 members, I would like to submit this letter for the record. These companies, which produce and distribute entertainment programming that is financed outside of the seven major U.S. studios, are responsible for more than 400 films each year and countless hours of television programming. Collectively, they generate more than $4 billion in distribution revenues annually. IFTA members have been responsible for many Academy Award® winning films, including "The Departed", "Crash", "Lord of the Rings", and "Million Dollar Baby", among many others. Other recent independent productions include "The Great Debaters", "Mr. Magorium's Wonder Emporium", "The Golden Compass", and the cable television series "The Tudors".

IFTA commends the subcommittee for holding this hearing to review H.R. 5353, the "Internet Freedom Preservation Act of 2008". IFTA supports the bill's goal of ensuring nondiscrimination so that diverse content and innovative services are not blocked or discouraged under the ambiguous rubric of "network management". This bill also wisely recognizes that a wide choice of content and a robust infrastructure are mutually reinforcing and cannot be separated.

IFTA has previously voiced concerns to this subcommittee regarding the vertical integration by studios, networks and cable channels that has essentially eliminated source diversity in these traditional media. For independents, the Internet offers a new route to reach consumers and a new creative medium that will change the very form that story-telling will take. A policy to

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