



Center for Creative Voices in Media

JONATHAN RINTELS
Executive Director

July 16, 2007

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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Comments on NOI, WC Docket No. 07-52,
"In the Matter of Broadband Industry Practices"

Dear Ms. Dortch:

On behalf of the Center for Creative Voices in Media, please include this letter and attachments as our Comment in the FCC's NOI, WC Docket No. 07-52, "In the Matter of Broadband Industry Practices" proceeding.

The Center for Creative Voices in Media has been a leading voice for creative media artists in the Network Neutrality policy debate. Creative Voices is a nonpartisan nonprofit 501(c)(3) group dedicated to preserving free speech, free expression, and independent and diverse creative voices in our nation's media. Members of the Board of Advisors of Creative Voices include Warren Beatty, Peggy Charren, Blake Edwards, Sissy Spacek, Steven Bochco, and other Oscar, Emmy, Peabody, Tony, and other award-winning members of the creative community.

Writers, directors, producers, performers, musicians, and other talented professionals in the literary and entertainment arts give life to our nation's popular and literary arts -- educating the public, enriching the culture, and helping safeguard our democracy.

But our ability to create and produce our best work, and then distribute that work to the American public, has often been restricted by lack of access to the means of distribution. Film and television production and distribution are tremendously expensive, and usually tightly controlled by a handful of media conglomerates.

In conjunction with technological advances in video production, the broadband Internet promises to dramatically reduce the cost of production and distribution of video content. Creative media artists view these changes as a tremendously exciting opportunity to directly reach their audience – the American people – with the best content they can possibly create.

Yet that exciting opportunity may not come to pass if the cable and telephone companies that overwhelmingly dominate the market for broadband distribution can pick and choose who will get distribution over their "pipes" based on discriminatory fees for so-called "priority" service.

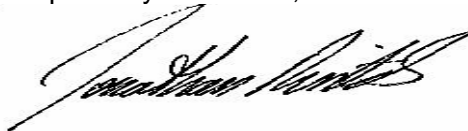
Such a system would essentially turn these broadband service providers into gatekeepers able to powerfully influence or manipulate artistic content, pick and choose which creative artists get broadband distribution, the quality of that distribution, and the audience the artists can reach – not unlike the oligopolistic broadcast and cable television distribution system. Such a closed, crabbed broadband Internet would not be in the interests of creative media artists or their audience – the American public. Artists must have the freedom to distribute their works over the broadband Internet, and the American public must have the freedom to choose from among those works, rather than have the cable and telephone broadband providers who overwhelmingly control the market for broadband deny those freedoms and make those choices for them.

I enclose an article I wrote titled, *The Future Internet: Open or Closed?* that appeared in *Produced By*, the monthly magazine of the Producers Guild of America. Other versions of this article have appeared in the *Journal of the Caucus of Television Producers, Writers & Directors*, and *The Independent*, the monthly magazine of the Association of Independent Video and Filmmakers. We also recently published a shorter piece on Network Neutrality in the current issue of *Written By*, the journal of the Writers Guild of America, west.

In addition, we attach letters from the prestigious Caucus for Television Producers, Writers & Directors to FCC Commissioner Michael J. Copps and to legislators on Capitol Hill that stress the importance of Net Neutrality not only to independent producers, writers, and directors of film, television, and video programming, but to the American public.

Thank you for holding this proceeding and allowing us to comment. If you would like to discuss this further or would like additional information, please don't hesitate to contact me.

Respectfully submitted,



Jonathan Rintels
Executive Director

Attachments



Center for Creative Voices in Media

The Future Internet: Open or Closed?

JONATHAN RINTELS
Executive Director

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Jonathan Rintels

"There are a handful of executives out there who are the gatekeepers of what gets made and seen -- or not. So we just decided to do it ourselves. You've already got the largest distribution network in the world on your desktop, and the end-user experience is getting better every day."

-- Daniel Myrick, director and co-creator of "The Blair Witch Project" and "The Strand," a dramatic series available only on the Internet

"This Internet may be dying."

-- FCC Commissioner Michael J. Copps

Many in America's creative community have assumed that the rapidly approaching Internet of tomorrow -- high-speed, low-cost, and utterly pervasive -- will empower media creators to directly reach their audience, eliminating the corporate middleman distributor. Or, as some might less diplomatically put it, "the worm has turned! With high speed Internet, there will be no more clueless, tasteless, penny-pinching suits mucking up my vision! No more exorbitant distribution costs, gatekeepers, and bottlenecks! No more warping my creative work to reach a narrow, finicky TV demo or sell popcorn in theaters that won't exist!" No doubt you've heard it, if you haven't said it once or twice yourself.

That hoped-for panacea of seemingly unlimited creative power and freedom on the future Internet may never come to pass as a result of the Supreme Court's June 2005 decision in the *Brand X* case. Despite its underwhelming name, according to Andrew Jay Schwartzman of the Media Access Project, a public interest law firm specializing in media issues, *Brand X* "will, quite literally, determine the future of the Internet as we know it." It is nothing less than the opening shot in what promises to be an ongoing war between media goliaths and independent entrepreneurs, including creative media artists, over whether the future Internet will be "open" or "closed." What's at stake is whether a consumer will retain the freedom to access any website, as is the case today, or whether he/she will be restricted to visiting sites approved by -- or in business with -- the "gatekeeper" providing his/her high speed Internet access.

The outcome of this battle is especially important to the creative community. Television and films, along with music, are rapidly converging with and becoming "Internet," because the Net will soon be an infinitely cheaper method of distributing content. While it may now take hours to download a feature film, even over a broadband Net connection, researchers using the Internet2, a super-fast private "next Internet" that today links hundreds of colleges and is frequently used for illegal swapping of films, television, and music, recently demonstrated the ability to download a DVD-quality copy of "The Matrix" in 30 seconds. That is the future of content distribution, legal and illegal, and it will be here sooner than many think.

Daniel Myrick, co-director and co-writer of 1999's micro-budget horror hit "The Blair Witch Project," exemplifies the convergence of television and Internet with his latest project, "The Strand," an episodic ensemble drama set in Venice, California. Available exclusively online, each 50 minute "webisode" of "The Strand" is either presented in streaming video or downloaded for later viewing. For Episode 1, I chose the download option using my DSL broadband connection. Three hours later, I watched the 600 MB file on my large computer monitor, enjoying at least as good a viewing experience as watching a feature film on television. The writing, directing, acting, music, production values – the entire production was professional quality work digitally filmed on location in Venice. The budget was \$75,000, which vividly illustrates digital media's potential to shrink both production and distribution costs. Myrick plans to earn a profit by selling a license to view each webisode for 99 cents, doing advertising and other promotional deals on his site, and selling Strand-related paraphernalia.

Says Myrick, "For me as a creative, the webisodic format allows me to do so much exploration of characters and story without constraints on language or topic. Unlike a Fox show that needs 3 million viewers a week or it's canceled, I only need a fraction of that and I can be filming forever. At Sundance, we were the only ones out there not looking for distribution." With so much money at risk using more traditional methods of production and distribution, Myrick believes innovation and creativity suffer. Using the Internet lowers the financial risk, thereby increasing the filmmaker's creative freedom.

Is Myrick blazing a trail for future creative artists seeking to distribute their works directly to the consumer via the Internet? And is he illuminating a pathway that producers of existing programming can use to bypass costly distribution gatekeepers and deal directly with the consumer?

Not so fast. Enter the cable and telephone companies that provide the high speed broadband access to the Internet necessary for Myrick's venture to succeed. For example, Comcast, the nation's largest cable company, is also the nation's largest broadband service provider. It serves over 21.5 million homes, approximately 30 percent of the nation's homes that subscribe to cable service, and will soon grow to 23.5 million subscribers if regulators approve its joint purchase with Time Warner Cable of the assets of bankrupt cable operator Adelphia. In terms of cable television content, Comcast's high percentage of cable homes served gives it life or death gatekeeper power over which cable networks receive carriage not just on Comcast, but on any cable television system. Says cable tycoon John Malone, "There's no way on earth that you can be successful in the U.S. distributing a channel that Brian Roberts (CEO of Comcast) doesn't carry, particularly if he has one that competes with it." And the likelihood that Comcast will own a competitive channel is growing. Increasingly, Comcast seeks to own the content that it distributes, as illustrated by its partnership with

Sony in the takeover of MGM, as well as its unsuccessful takeover attempt of Disney in 2004.

Comcast's determination to own a piece of the content it distributes isn't limited to just cable television networks. It also extends to the Internet. And that's where the *Brand X* case comes in. When consumers use 56K "dial up" to access the Internet via modem over slow telephone lines, those telephone companies are defined as "common carriers." Under "common carrier" regulations, these companies must open their lines to competing Internet service providers (ISPs) such as Earthlink, AOL, and Brand X, a small ISP in the San Francisco area. They must also allow consumers to surf to any website they want, just as they must let consumers call any telephone number.

But in a highly controversial ruling, the Federal Communications Commission (FCC) decided cable companies such as Comcast were exempt from "common carrier" regulation. Brand X successfully sued the FCC in the Ninth Circuit Court of Appeals. But in June 2005, the Supreme Court reversed the lower court and upheld the FCC's original determination. In early August, the Commission then extended the *Brand X* decision to give telephone companies' broadband service the same exemption from "common carrier" status.

The *Brand X* case is an excellent example of the way arcane and mind-numbingly technical distinctions debated in Washington, such as whether broadband is subject to "common carrier" regulation, can have tremendous potential implications for media artists, which they seemingly discover only after it's too late. As a result of these FCC decisions, a cable or telephone company broadband provider no longer must allow access to the entire Internet. Instead, it now has the power to control where its customers surf and on what terms. In other words, it is free to offer its broadband customers a "proprietary" Internet of websites that pay it for carriage. Or, if a customer types in a website, and the company operates a competing website, the company has the power to divert the customer to its own website and deny access to its competitor.

Now, imagine a company with that power to discriminate and its reaction to Daniel Myrick sending "The Strand" directly to its customers over broadband. Will a cable company stand by idly while content owners such as Myrick use its very own cable to do an end run around its cable television, pay-per-view, and video-on-demand distribution system? Will telephone companies such as SBC and Verizon, now launching their own television distribution systems over their broadband connections, be any more hospitable to Myrick's competing programming?

In a competitive marketplace, this wouldn't matter so much. Consumers who don't want the cable or telephone company's proprietary version of the Internet could easily get their broadband access elsewhere. But according to the FCC's July 2005 report on High Speed Internet Access, in December 2004 approximately 94 percent of Americans subscribing to high speed Internet access received it from either their local cable or a telephone company. Of those Americans, many have just two choices for high speed Internet access -- cable or telco. Others, including me, have only one realistic broadband option. Today's reality is that for many consumers who want broadband, the marketplace is not competitive.

As oligopoly gatekeepers, cable and telephone broadband providers will have the power to demand payment from content creators such as Myrick for access to their broadband customers. They will have the power to divert customers who try to download

"The Strand" to a different download site that they own and operate where they can try to sell them a different program. They can require "The Strand" to reach their customers not by the Internet, but by their cable television Video on Demand (VOD) service. Or they can simply block any and all access to "The Strand," period.

Indeed, these cable and telephone companies will have the power to become extremely powerful "gatekeepers" for all kinds of Internet content and services. For consumers unfortunate enough to have no choice for broadband access other than these oligopoly gatekeepers, their Internet may bear more resemblance to a "souped-up" cable television system than the wide open Internet we enjoy today. Some analysts believe this "closed" Internet model will resemble the early "walled garden" days of America Online, where its customers were limited to AOL content and could not access the Internet. For many consumers, their only broadband choice may be the walled garden of the cable company or the walled garden of the phone company.

The implications of *Brand X* and the ongoing battle over whether the Internet will be "open" or "closed" can hardly be overstated. FCC Commissioner Michael J. Copps observes, "*This Internet may be dying*. It may be dying because entrenched interests are positioning themselves to control the Internet's choke-points and they are lobbying the FCC to aid and abet them... We seem to be buying into a warped vision that open networks should be replaced by closed networks and that traditional user accessibility can be superseded by a new power to discriminate. Let this vision prevail and the winners will be entrenched interests with far greater power than they have today to design and control the Internet of the future."

Recently, the FCC issued a "Policy Statement" expressing a preference for open networks that give consumers the freedom to surf the entire Internet over broadband. But many criticize the statement as unenforceable and full of loopholes that would not prevent cable or phone companies from exercising gatekeeper power over the Internet. Many advocates, including the Center for Creative Voices in Media, are calling on the Commission and Congress to guarantee the right of Americans to access the entire Internet over broadband.

If the cable and telephone companies succeed in establishing themselves as toll collectors on the information superhighway, the result will be an Internet that dashes the high hopes of many creative artists and media producers, including Daniel Myrick. The worm will not have turned after all. Instead of the Internet eliminating the distributor "suit," as so many hoped and assumed, it may simply mean a new suit enters the picture – your friendly cable or telephone company.

JONATHAN RINTELS is the Executive Director of the Center for Creative Voices in Media, a nonprofit, nonpartisan 501(c)(3) organization dedicated to preserving in America's media the original, independent, and diverse creative voices that enrich our nation's culture and safeguard its democracy. He is also a screenwriter. Among his many credits, his film for CBS, Snowbound: The Jim and Jennifer Stolpa Story, the true story of a young couple trapped with their baby for over a week in a California blizzard, was one of the highest-rated television movies of the past decade and received numerous critical accolades. He has been a member of the Writers Guild of America, west since 1982. This article originally appeared Producers Guild of America Journal and on HearUsNow.com.



For Television Producers, Writers & Directors

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February 27, 2006

The Honorable Michael J. Copps
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Dear Commissioner Copps,

The Caucus for Television Producers, Writers & Directors respectfully asks that you join us in support of "Net Neutrality" - the principle that Internet users should be able to access any web content or use any applications they choose, without restrictions or limitations imposed by an Internet service provider, to preserve the free, open and nondiscriminatory Internet of today.

You may be wondering why a group of independent producers, writers and directors would take a position on this issue instead of spending our time just writing and producing stories. However, if you take a moment to read the story of what has happened in network television over the last decade, you will find the answer.

Once upon a time there was a vital, independent creative community thriving because our creative ideas and the guarantees of authorship were protected by government regulation from the total control of media companies. This was the case for years, and during this time span independents produced most of the best shows in the history of television. That was until, through tremendous pressure from network lobbyists, the FCC overturned two critical media rules in 1993 and the Telecommunications Act of 1996 was signed by President Clinton. Despite their initial claims to the contrary, networks immediately began merging with studios and cable companies allied with internet service providers, giving these new media conglomerates unprecedented power and control of access to the national audience. The American model of a free and open television industry changed drastically and, as a result, vital independent, entrepreneurial companies were wiped out in the process.

Absent regulatory oversight, self-dealing replaced unfettered competition and ultimately stifled creativity and crushed entrepreneurial innovation and spirit in the television industry. The Caucus believes that if the large telecom and cable giants are allowed to have their way, the free and open Internet of today will suffer the same fate,

and as we move closer to Internet delivery of TV programming, this would surely destroy the promise of a resurrection of independent creators via this new medium. Like the networks that monopolize the television industry, the telecom and cable giants also seek to control both the content and delivery of the content to the public. If this happens, the Internet will no longer be the "new frontier" and way for America's next generation of story tellers to access the audiences they hope to reach. Only stories created or owned by the corporations who control the Internet will make it through to the consumers who, although paying more, will no longer have the freedom and choice enjoyed on the Internet today.

Those representing telephone and cable companies promise that they would never - *ever* - interfere with the public's ability to access any lawful information on the Internet. This is déjà vu of the promises we heard made by the television network executives and studio heads before the laws were changed and the mergers began, not to mention the fact that, already, these companies are "interfering". Just one example is that Patrick Pfeffer, chief network architect for Detecon, was quoted as saying, "You see Comcast in Philadelphia locking out the competition by not allowing them to re-transmit the local sports programs." And this is only the tip of the ice-berg.

Without the principles of Net Neutrality firmly imbedded as law, the continued existence of a free and open Internet is in grave danger. That is because in 2002 the FCC upended the forty year commitment to open access and nondiscrimination that made it possible for "innovation without permission" and the development of the World Wide Web, Yahoo, Google and Amazon. Companies that built and maintained the Internet pipes have been regulated like telephone companies, and they are not permitted to discriminate among content providers or Internet applications. Now that these rules have been established, the door is open for telecom and cable giants to utilize most of the bandwidth for their own content, charge other content providers a premium for quality access to their consumers (or, in our case, audience) and leave little space for independents and startup companies. The only companies that could afford to buy premium access would be those who have already succeeded and the next generation of Yahoos and Googles would be barred from even entering the marketplace along with those independent creative voices already barred from network television.

As Vonage head Jeffrey Citron put it, "At the root, the network neutrality debate is about who will control innovation and competition on the Internet." Citron added, "Imagine if the electric company could dictate which television or toaster you could plug into the wall.... What would happen tomorrow if one of the network operators decided to block Google, Vonage, Yahoo or Amazon? What would be the legal recourse? There is nothing in the statute or regulation today that protects consumers or Internet application providers from potential network discrimination."

Letting the marketplace develop without government regulation and trusting that the telecom and cable companies won't block access to content over the public Internet would be a naïve and dangerous scenario.

Commissioner Michael J. Copps
February 27, 2006
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The genius of the Internet is its promise of freedom and unlimited accessibility. As independent content providers and entrepreneurs we urge you to keep the Internet free and open. But, also as consumers and, finally, as citizens of this great nation, we say keep the Internet free and open to protect our last truly diverse and democratic medium.

Sincerely yours,



Vin Di Bona,
Chair of The Caucus for Television Producers, Writers & Directors



Gary Grossman
Chair of the Governmental Affairs Committee

VDB/GG/psr