

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

In the Matter of)
Protecting and Promoting the Open Internet) GN Docket No. 14-28
)

REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER

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By the Commission: Chairman Wheeler and Commissioners Clyburn and Rosenworcel issuing separate statements; Commissioners Pai and O’Rielly dissenting and issuing separate statements.

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I. INTRODUCTION

1. The open Internet drives the American economy and serves, every day, as a critical tool for America’s citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them. The benefits of an open Internet are undisputed. But it must remain open: open for commerce, innovation, and speech; open for consumers and for the innovation created by applications developers and content companies; and open for expansion and investment by America’s broadband providers. For over a decade, the Commission has been committed to protecting and promoting an open Internet.

2. Four years ago, the Commission adopted open Internet rules to protect and promote the “virtuous cycle” that drives innovation and investment on the Internet—both at the “edges” of the network, as well as in the network itself. In the years that those rules were in place, significant investment and groundbreaking innovation continued to define the broadband marketplace. For example, according to US Telecom, broadband providers invested \$212 billion in the three years following adoption of the rules—from 2011 to 2013—more than in any three year period since 2002.

3. Likewise, innovation at the edge moves forward unabated. For example, 2010 was the first year that the majority of Netflix customers received their video content via online streaming rather than via DVDs in red envelopes. Today, Netflix sends the most peak downstream traffic in North America of any company. Other innovative service providers have experienced extraordinary growth—Etsy reports that it has grown from \$314 million in merchandise sales in 2010 to \$1.35 billion in merchandise sales in 2013. And, just as importantly, new kinds of innovative businesses are busy being born. In the video space alone, in just the last sixth months, CBS and HBO have announced new plans for streaming their content free of cable subscriptions; DISH has launched a new package of channels that includes ESPN, and Sony is not far behind; and Discovery Communications founder John Hendricks has announced a new over-the-top service providing bandwidth-intensive programming. This year, Amazon took home two Golden Globes for its new series “Transparent.”

4. The lesson of this period, and the overwhelming consensus on the record, is that carefully-tailored rules to protect Internet openness will allow investment and innovation to continue to flourish. Consistent with that experience and the record built in this proceeding, today we adopt carefully-tailored rules that would prevent specific practices we know are harmful to Internet openness—blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness. We also enhance our transparency rule to ensure that consumers are fully informed as to whether the services they purchase are delivering what they expect.

5. Carefully-tailored rules need a strong legal foundation to survive and thrive. Today, we provide that foundation by grounding our open Internet rules in multiple sources of legal authority—including both section 706 of the Telecommunications Act and Title II of the Communications Act. Moreover, we concurrently exercise the Commission’s forbearance authority to forbear from application of 27 provisions of Title II of the Communications Act, and over 700 Commission rules and regulations. This is a Title II tailored for the 21st century, and consistent with the “light-touch” regulatory framework that has facilitated the tremendous investment and innovation on the Internet. We expressly eschew the future use of prescriptive, industry-wide rate regulation. Under this approach, consumers can continue to

enjoy unfettered access to the Internet over their fixed and mobile broadband connections, innovators can continue to enjoy the benefits of a platform that affords them unprecedented access to hundreds of millions of consumers across the country and around the world, and network operators can continue to reap the benefits of their investments.

6. Informed by the views of nearly 4 million commenters, our staff-led roundtables, numerous *ex parte* presentations, meetings with individual Commissioners and staff, and more, our decision today—once and for all—puts into place strong, sustainable rules, grounded in multiple sources of our legal authority, to ensure that Americans reap the economic, social, and civic benefits of an open Internet today and into the future.

II. EXECUTIVE SUMMARY

7. The benefits of rules and policies protecting an open Internet date back over a decade and must continue.¹ Just over a year ago, the D.C. Circuit in *Verizon v. FCC* struck down the Commission’s 2010 conduct rules against blocking and unreasonable discrimination.² But the *Verizon* court upheld the Commission’s finding that Internet openness drives a “virtuous cycle” in which innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.³ The *Verizon* court further affirmed the Commission’s conclusion that “broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.”⁴

8. Threats to Internet openness remain today. The record reflects that broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don’t like.⁵ The 2010 rules helped to deter such conduct while they were in effect. But, as *Verizon* frankly told the court at oral argument, but for the 2010 rules, it would be exploring agreements to charge certain content providers for priority service.⁶ Indeed, the wireless industry had a well-established record of

¹ See, e.g., National Arts and Cultural Organizations Comments at 3 (“[B]roadband Internet service has inspired tremendous innovation, which has in turn enabled individual artists and arts organizations to reach new audiences, cultivate patrons and supporters, collaborate with peers, stimulate local economies and enrich cultural and civic discourse.”); Common Cause Comments at 3-8 (arguing that the open Internet promotes free speech and civic engagement); Letter from Lauren M. Wilson, Policy Counsel, Free Press to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 13, 2015) (Free Press et al. Jan. 13, 2015 *Ex Parte* Letter) (describing the important role the open Internet plays in the work of public interest, social justice, and activist groups); Higher Education and Libraries Comments at ii (“Libraries and institutions of higher education depend upon an open Internet to carry out their missions and to serve their communities.”); Engine Advocacy Comments at 3-13 (arguing that an open Internet has been essential to promoting entrepreneurship, economic growth, and innovation). Unless otherwise noted, all citations to comments in this item refer to comments filed in GN Docket No. 14-28. “Remand PN Comments” is used to denote comments that were filed in response to the Feb. 19, 2014 Public Notice released by the Wireline Competition Bureau. *See New Docket Established to Address Open Internet Remand*, GN Docket No. 14-28, Public Notice, 29 FCC Rcd 1746 (Wireline Comp. Bur. 2014). “Comments” or “Reply” are used to denote comments filed in response to the Notice of Proposed Rulemaking released by the Commission on May 15, 2014. *See Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (2014 Open Internet NPRM).

² *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

³ *Id.* at 659.

⁴ *Id.* at 645.

⁵ See *infra* Section III.B.

⁶ *Verizon* Oral Arg. Tr. at 31 (“I’m authorized to state by my client [Verizon] today that, but for these rules, we would be exploring those commercial arrangements, but this order prohibits those, and in fact would shrink the types of services that will be available on the Internet.”). *But see* Letter from William H. Johnson, Vice President & Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1 (filed Feb. (continued....)

trying to keep applications within a carrier-controlled “walled garden” in the early days of mobile applications. That specific practice ended when Internet Protocol (IP) created the opportunity to leap the wall. But the Commission has continued to hear concerns about other broadband provider practices involving blocking or degrading third-party applications.

9. Emerging Internet trends since 2010 give us more, not less, cause for concern about such threats. First, mobile broadband networks have massively expanded since 2010. They are faster, more broadly deployed, more widely used, and more technologically advanced. At the end of 2010, there were about 70,000 devices in the U.S. that had LTE wireless connections. Today, there are more than 127 million.⁷ We welcome this tremendous investment and innovation in the mobile marketplace. With carefully-tailored rules in place, that investment can continue to flourish and consumers can continue to enjoy unfettered access to the Internet over their mobile broadband connections. Indeed, mobile broadband is becoming an increasingly important pathway to the Internet independent of any fixed broadband connections consumers may have, given that mobile broadband is not a full substitute for fixed broadband connections.⁸ And consumers must be protected, for example from mobile commercial practices masquerading as “reasonable network management.” Second, and critically, the growth of online streaming video services has spurred further evolution of the Internet.⁹ Currently, video is the

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11, 2015) (Verizon Feb. 11 *Ex Parte* Letter) (arguing that “[t]he ‘commercial arrangements’ referenced by counsel had nothing to do with ‘restrict[ing] access’ to content”). Also, during the oral argument before the D.C. Circuit, Verizon stated that “in paragraph 64 of the Order the Agency also sets forth the no charging of edge providers rule as a corollary to the no blocking rule, and that’s a large part of what is causing us our harm here.” In response, Judge Silberman stated, “if you were allowed to charge, which are you assuming you’re allowed to charge because of the anti-common carrier point of view, if somebody refused to pay then just like in the dispute between C[B]S and Warner, Time Warner . . . you could refuse to carry.” Verizon’s counsel responded: “[r]ight.” Verizon Oral Arg. Tr. at 28.

⁷ Fierce Wireless, *1H2014: LTE Share 33% of all Mobile Connections in the U.S. and Canada vs. 4% Worldwide*, (Sept. 2014), <http://www.fiercewireless.com/press-releases/1h2014-lte-share-33-all-mobile-connections-us-and-canada-vs-4-worldwide> (reporting remarkable growth with 16 million LTE connections at the end of June 2012; 63 million LTE connections as of June 2013; 127 million LTE connections as of June 2014).

⁸ See, e.g., *Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 13-135, Seventeenth Report, 29 FCC Rcd 15311 (Wireless Tel. Bur. 2014) (*17th Mobile Wireless Report*); Robert F. Roche and Liz Dale, *Annual Wireless Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry* (June 2014); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry, FCC 15-10, at para. 120 (rel. Feb. 4, 2015) (*2015 Broadband Progress Report*) (“We recognize that many households subscribe to both fixed and mobile services because they use fixed and mobile services in fundamentally different ways and, as such, view fixed and mobile services as distinct product offerings.”).

⁹ See *supra* para. 3; see also Netflix Inc., 2010 Annual Report (Form 10-K) (Feb. 18, 2011), <http://files.shareholder.com/downloads/NFLX/3969047782x0x460274/17454c5b-3088-48c7-957a-b5a83a14cf1b/132054ACL.PDF>; Letter from Reed Hastings, CEO and David Wells, CFO, Netflix to Shareholders of Netflix (Jan. 20, 2015), <http://ir.netflix.com/results.cfm> (follow “Q4 14 Letter to shareholders” hyperlink) (for 2014, Netflix reported 39.1 million domestic streaming subscribers compared to 5.8 million domestic DVD subscribers); Emily Steel, *Cord-Cutters Rejoice: CBS Joins Web Stream*, N.Y. Times (Oct. 16, 2014), <http://www.nytimes.com/2014/10/17/business/cbs-to-offer-web-subscription-service.html>; Brian Stelter, *ESPN on the web for \$20 a month is coming soon*, CNN Money (Jan. 5, 2015), <http://money.cnn.com/2015/01/05/media/dish-virtual-cable/>; Alex Ben Block, *Discovery Founder Launching SVOD Service Described as Netflix “For Curious People,”* Hollywood Reporter (Jan. 14, 2014), <http://www.hollywoodreporter.com/news/discovery-founder-launching-svod-service-763885>; Jenelle Riley, *Amazon, ‘Transparent’ Make History at Golden Globes*, Variety (Jan. 11, 2015), <http://variety.com/2015/tv/news/amazon-transparent-make-history-at-golden-globes-1201400485/>.

dominant form of traffic on the Internet. These video services directly confront the video businesses of the very companies that supply them broadband access to their customers.¹⁰

10. The Commission, in its May *Notice of Proposed Rulemaking*, asked a fundamental question: “What is the right public policy to ensure that the Internet remains open?”¹¹ It proposed to enhance the transparency rule, and follow the *Verizon* court’s blueprint by relying on section 706 to adopt a no-blocking rule and a requirement that broadband providers engage in “commercially reasonable” practices. The Commission also asked about whether it should adopt other bright-line rules or different standards using other sources of Commission authority, including Title II. And if Title II were to apply, the Commission asked about how it should exercise its authority to forbear from Title II obligations. It asked whether mobile services should also be classified under Title II.

11. Three overarching objectives have guided us in answering these questions, based on the vast record before the Commission: America needs more broadband, better broadband, and open broadband networks. These goals are mutually reinforcing, not mutually exclusive. Without an open Internet, there would be less broadband investment and deployment. And, as discussed further below, all three are furthered through the open Internet rules and balanced regulatory framework we adopt today.¹²

12. In enacting the Administrative Procedure Act (APA), Congress instructed expert agencies conducting rulemaking proceedings to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”¹³ It is public comment that cements an agency’s expertise. As was explained in the seminal report that led to the enactment of the APA:

The reason for [an administrative agency’s] existence is that it is expected to bring to its task greater familiarity with the subject than legislators, dealing with many subjects, can have. But its knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulations will affect.¹⁴

13. Congress could not have imagined when it enacted the APA almost seventy years ago that the day would come when nearly 4 million Americans would exercise their right to comment on a proposed rulemaking. But that is what has happened in this proceeding and it is a good thing. The Commission has listened and it has learned. Its expertise has been strengthened. Public input has “improve[d] the quality of agency rulemaking by ensuring that agency regulations will be ‘tested by exposure to diverse public comment.’”¹⁵ There is general consensus in the record on the need for the

¹⁰ See Public Knowledge, Benton Foundation, and Access Sonoma Broadband (Public Knowledge) Comments at 52-53 (discussing exemption of Xfinity online video application on Xbox from Comcast’s data cap without similar exemption for unaffiliated over-the-top video services).

¹¹ 2014 Open Internet NPRM, 29 FCC Rcd at 5562, para. 2.

¹² Consistent with the *Verizon* court’s analysis, this Order need not conclude that any specific market power exists in the hands of one or more broadband providers in order to create and enforce these rules. Thus, these rules do not address, and are not designed to deal with, the acquisition or maintenance of market power or its abuse, real or potential. Moreover, it is worth noting that the Commission acts in a manner that is both complementary to the work of the antitrust agencies and supported by their application of antitrust laws. *See generally* 47 U.S.C. § 152(b) (“[N]othing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”). Nothing in this Order in any way precludes the Antitrust Division of the Department of Justice or the Commission itself from fulfilling their respective responsibilities under Section 7 of the Clayton Act (15 U.S.C. §18), or the Commission’s public interest standard as it assesses prospective transactions.

¹³ 5 U.S.C. § 553(c).

¹⁴ Attorney General’s Committee, *Final Report of the Attorney General Committee* at 102 (1941), <http://www.law.fsu.edu/library/admin/pdfdownload/apa1941.pdf>.

¹⁵ *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979)).

Commission to provide certainty with clear, enforceable rules. There is also general consensus on the need to have such rules. Today the Commission, informed by all of those views, makes a decision grounded in the record. The Commission has considered the arguments, data, and input provided by the commenters, even if not in agreement with the particulars of this Order; that public input has created a robust record, enabling the Commission to adopt new rules that are clear and sustainable.

A. Strong Rules That Protect Consumers from Past and Future Tactics that Threaten the Open Internet

1. Clear, Bright-Line Rules

14. Because the record overwhelmingly supports adopting rules and demonstrates that three specific practices invariably harm the open Internet—Blocking, Throttling, and Paid Prioritization—this Order bans each of them, applying the same rules to both fixed and mobile broadband Internet access service.

15. *No Blocking.* Consumers who subscribe to a retail broadband Internet access service must get what they have paid for—access to all (lawful) destinations on the Internet. This essential and well-accepted principle has long been a tenet of Commission policy, stretching back to its landmark decision in *Carterfone*, which protected a customer’s right to connect a telephone to the monopoly telephone network.¹⁶ Thus, this Order adopts a straightforward ban:

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

16. *No Throttling.* The 2010 open Internet rule against blocking contained an ancillary prohibition against the degradation of lawful content, applications, services, and devices, on the ground that such degradation would be tantamount to blocking. This Order creates a separate rule to guard against degradation targeted at specific uses of a customer’s broadband connection:

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

17. The ban on throttling is necessary both to fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet, and to avoid gamesmanship designed to avoid the no-blocking rule by, for example, rendering an application effectively, but not technically, unusable. It prohibits the degrading of Internet traffic based on source, destination, or content.¹⁷ It also specifically prohibits conduct that singles out content competing with a broadband provider’s business model.

18. *No Paid Prioritization.* Paid prioritization occurs when a broadband provider accepts payment (monetary or otherwise) to manage its network in a way that benefits particular content, applications, services, or devices. To protect against “fast lanes,” this Order adopts a rule that establishes that:

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.

¹⁶ *Use of the Carterfone Device in Message Toll Telephone Service; Thomas F. Carter and Carter Electronics Corp., Dallas, Tex. (Complainants), v. American Telephone and Telegraph Co., Associated Bell System Companies, Southwestern Bell Telephone Co., and General Telephone Co. of the Southwest (Defendants)*, Docket Nos. 16942, 17073, Decision, 13 FCC 2d 420 (1968) (*Carterfone*), recon. denied, 14 FCC 2d 571 (1968).

¹⁷ To be clear, the protections of the no-blocking and no-throttling rules apply to particular classes of applications, content and services as well as particular applications, content, and services.

“Paid prioritization” refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.¹⁸

19. The record demonstrates the need for strong action. The *Verizon* court itself noted that broadband networks have “powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users.”¹⁹ Mozilla, among many such commenters, explained that “[p]rioritization . . . inherently creates fast and slow lanes.”²⁰ Although there are arguments that some forms of paid prioritization could be beneficial, the practical difficulty is this: the threat of harm is overwhelming,²¹ case-by-case enforcement can be cumbersome for individual consumers or edge providers, and there is no practical means to measure the extent to which edge innovation and investment would be chilled. And, given the dangers, there is no room for a blanket exception for instances where consumer permission is buried in a service plan—the threats of consumer deception and confusion are simply too great.²²

2. No Unreasonable Interference or Unreasonable Disadvantage to Consumers or Edge Providers

20. The key insight of the virtuous cycle is that broadband providers have both the incentive and the ability to act as gatekeepers standing between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own video services; and they can extract unfair tolls. Such conduct would, as the Commission concluded in 2010, “reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure.”²³ In other words, when a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply.

¹⁸ Unlike the no-blocking and no-throttling rules, there is no “reasonable network management” exception to the paid prioritization rule because paid prioritization is inherently a business practice rather than a network management practice.

¹⁹ *Verizon*, 740 F.3d at 645-46.

²⁰ Mozilla Comments at 20.

²¹ See, e.g., Free Press Comments at 50 (“In packet-switching, if there is no congestion, there is no meaning to priority.”).

²² AT&T Reply at 3 (proposing “a distinction between paid prioritization that is not directed by end users, and prioritization arrangements that are user-driven” and that “the Commission should not categorically foreclose such consumer-driven choices”). All Commission rules are subject to waiver requests and that principle applies to the open Internet rules. *See* 47 C.F.R. § 1.925; *Blanca Telephone Co. v. FCC*, 743 F.3d 860, 864 (D.C. Cir. 2014) (“When evaluating an agency’s interpretation and application of a general, discretionary waiver standard ‘[o]ur review . . . is extremely limited.’”) (quoting *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181 (D.C. Cir. 2003)). As Public Knowledge has recognized, “the Commission must not only permit such Petitions and waiver applications, but genuinely consider their merits [however,] the Commission has broad discretion with regard to what standard it will apply.” Letter from Gene Kimmelman, President, Public Knowledge to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2 (filed Nov. 7, 2014) (Public Knowledge Nov. 7, 2014 *Ex Parte* Letter). The Order requires any applicant to demonstrate that the proposed paid prioritization practice “*would provide some significant public interest benefit and would not harm the open nature of the Internet.*” It is very important to understand that a party seeking a waiver is banned from an inappropriate practice. Its only recourse is to seek a waiver, and that waiver request would not be decided until the Commission, after public comment and its own investigation, reaches a decision.

²³ *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17911, para. 14 (2010) (*2010 Open Internet Order*), aff’d in part, vacated and remanded in part sub nom. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

21. The bright-line bans on blocking, throttling, and paid prioritization will go a long way to preserve the virtuous cycle. But not all the way. Gatekeeper power can be exercised through a variety of technical and economic means, and without a catch-all standard, it would be that, as Benjamin Franklin said, “a little neglect may breed great mischief.”²⁴ Thus, the Order adopts the following standard:

Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

22. This “no unreasonable interference/disadvantage” standard protects free expression, thus fulfilling the congressional policy that “the Internet offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”²⁵ And the standard will permit considerations of asserted benefits of innovation as well as threatened harm to end users and edge providers.

3. Enhanced Transparency

23. The Commission’s 2010 transparency rule, upheld by the *Verizon* court, remains in full effect:

*A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.*²⁶

24. Today’s Order reaffirms the importance of ensuring transparency, so that consumers are fully informed about the Internet access they are purchasing and so that edge providers have the information they need to understand whether their services will work as advertised. To do that, the Order builds on the strong foundation established in 2010 and enhances the transparency rule for both end users and edge providers, including by adopting a requirement that broadband providers always must disclose promotional rates, all fees and/or surcharges, and all data caps or data allowances; adding packet loss as a measure of network performance that must be disclosed; and requiring specific notification to consumers that a “network practice” is likely to significantly affect their use of the service. Out of an abundance of caution and in response to a request by the American Cable Association, we also adopt a temporary exemption from these enhancements for small providers (defined for the purposes of the temporary exception as providers with 100,000 or fewer subscribers), and we direct our Consumer & Governmental Affairs Bureau to adopt an Order by December 15, 2015 concerning whether to make the exception permanent and, if so, the appropriate definition of “small.” Lastly, we create for all providers a “safe harbor” process for the format and nature of the required disclosure to consumers, which we believe will result in more effective presentation of consumer-focused information by broadband providers.

4. Scope of the Rules

25. The open Internet rules described above apply to both fixed and mobile broadband Internet access service. Consistent with the 2010 Order, today’s Order applies its rules to the consumer-

²⁴ Benjamin Franklin, *Poor Richard’s Almanac* (1757).

²⁵ 47 U.S.C. § 230(a)(3).

²⁶ 47 C.F.R. § 8.3.

facing service that broadband networks provide, which is known as “broadband Internet access service”²⁷ (BIAS) and is defined to be:

A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

26. As in 2010, BIAS does not include enterprise services, virtual private network services, hosting, or data storage services. Further, we decline to apply the open Internet rules to premises operators to the extent they may be offering broadband Internet access service as we define it today.

27. In defining this service we make clear that we are responding to the *Verizon* court’s conclusion that broadband providers “furnish a service to edge providers” (and that this service was being treated as common carriage *per se*). As discussed further below, we make clear that broadband Internet access service encompasses this service to edge providers. Broadband providers sell retail customers the ability to go anywhere (lawful) on the Internet. Their representation that they will transport and deliver traffic to and from all or substantially all Internet endpoints includes the promise to transmit traffic to and from those Internet endpoints back to the user.

28. *Interconnection.* BIAS involves the exchange of traffic between a broadband Internet access provider and connecting networks. The representation to retail customers that they will be able to reach “all or substantially all Internet endpoints” necessarily includes the promise to make the interconnection arrangements necessary to allow that access.

29. As discussed below, we find that broadband Internet access service is a “telecommunications service” and subject to sections 201, 202, and 208 (along with key enforcement provisions). As a result, commercial arrangements for the exchange of traffic with a broadband Internet access provider are within the scope of Title II, and the Commission will be available to hear disputes raised under sections 201 and 202 on a case-by-case basis: an appropriate vehicle for enforcement where disputes are primarily over commercial terms and that involve some very large corporations, including companies like transit providers and Content Delivery Networks (CDNs), that act on behalf of smaller edge providers.

30. But this Order does not apply the open Internet rules to interconnection. Three factors are critical in informing this approach to interconnection. First, the nature of Internet traffic, driven by massive consumption of video, has challenged traditional arrangements—placing more emphasis on the use of CDNs or even direct connections between content providers (like Netflix or Google) and last-mile broadband providers. Second, it is clear that consumers have been subject to degradation resulting from commercial disagreements,²⁸ perhaps most notably in a series of disputes between Netflix and large last-

²⁷ We note that our use of the term “broadband” in this Order includes but is not limited to services meeting the threshold for “advanced telecommunications capability,” as defined in Section 706 of the Telecommunications Act of 1996, as amended. 47 U.S.C. § 1302(b). Section 706 defines that term as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” 47 U.S.C. § 1302(d)(1). The *2015 Broadband Progress Report* specifically notes that “advanced telecommunications capability,” while sometimes referred to as “broadband,” differs from the Commission’s use of the term “broadband” in other contexts. *2015 Broadband Progress Report* at n.1 (rel. Feb. 4, 2015).

²⁸ See Letter from Sarah J. Morris, Senior Policy Counsel, Open Technology Institute, New America Foundation to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28 (filed Oct. 30, 2014), Attach. MLab, *ISP* (continued....)

mile broadband providers. But, third, the causes of past disruption and—just as importantly—the potential for future degradation through interconnection disputes—are reflected in very different narratives in the record.

31. While we have more than a decade’s worth of experience with last-mile practices, we lack a similar depth of background in the Internet traffic exchange context. Thus, we find that the best approach is to watch, learn, and act as required, but not intervene now, especially not with prescriptive rules. This Order—for the first time—provides authority to consider claims involving interconnection, a process that is sure to bring greater understanding to the Commission.

32. *Reasonable Network Management.* As with the 2010 rules, this Order contains an exception for reasonable network management, which applies to all but the paid prioritization rule (which, by definition, is not a means of managing a network):

A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

33. Recently, significant concern has arisen when mobile providers’ have attempted to justify certain practices as reasonable network management practices, such as applying speed reductions to customers using “unlimited data plans” in ways that effectively force them to switch to price plans with less generous data allowances. For example, in the summer of 2014, Verizon announced a change to its “unlimited” data plan for LTE customers, which would have limited the speeds of LTE customers using grandfathered “unlimited” plans once they reached a certain level of usage each month. Verizon briefly described this change as within the scope of “reasonable network management,” before changing course and withdrawing the change.

34. With mobile broadband service now subject to the same rules as fixed broadband service, the Order expressly recognizes that evaluation of network management practices will take into account the additional challenges involved in the management of mobile networks, including the dynamic conditions under which they operate. It also recognizes the specific network management needs of other technologies, such as unlicensed Wi-Fi networks.

35. *Non-Broadband Internet Access Service Data Services.* The 2010 rules included an exception for “specialized services.” This Order likewise recognizes that some data services—like facilities-based VoIP offerings, heart monitors, or energy consumption sensors—may be offered by a broadband provider but do not provide access to the Internet generally. The term “specialized services” can be confusing because the critical point is not whether the services are “specialized;” it is that they are not broadband Internet access service. IP-services that do not travel over broadband Internet access service, like the facilities-based VoIP services used by many cable customers, are not within the scope of the open Internet rules, which protect access or use of broadband Internet access service. Nonetheless, these other non-broadband Internet access service data services could be provided in a manner that undermines the purpose of the open Internet rules and that will not be permitted. The Commission expressly reserves the authority to take action if a service is, in fact, providing the functional equivalent of broadband Internet access service or is being used to evade the open Internet rules. The Commission will vigilantly watch for such abuse, and its actions will be aided by the existing transparency requirement that non-broadband Internet access service data services be disclosed.

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Interconnection and Its Impact on Consumer Internet Performance, A Measurement Lab Consortium Technical Report (Oct. 28, 2014) (MLab ISP Interconnection Report).

5. Enforcement

36. The Commission may enforce the open Internet rules through investigation and the processing of complaints (both formal and informal). In addition, the Commission may provide guidance through the use of enforcement advisories and advisory opinions, and it will appoint an ombudsperson. In order to provide the Commission with additional understanding, particularly of technical issues, the Order delegates to the Enforcement Bureau the authority to request a written opinion from an outside technical organization or otherwise to obtain objective advice from industry standard-setting bodies or similar organizations.

B. Promoting Investment with a Modern Title II

37. Today, our forbearance approach results in over 700 codified rules being inapplicable, a “light-touch” approach for the use of Title II. This includes no unbundling of last-mile facilities, no tariffing, no rate regulation, and no cost accounting rules, which results in a carefully tailored application of only those Title II provisions found to directly further the public interest in an open Internet and more, better, and open broadband. Nor will our actions result in the imposition of any new federal taxes or fees; the ability of states to impose fees on broadband is already limited by the congressional Internet tax moratorium.

38. This is Title II tailored for the 21st Century. Unlike the application of Title II to incumbent wireline companies in the 20th Century, a swath of utility-style provisions (including tariffing) will *not* be applied. Indeed, there will be fewer sections of Title II applied than have been applied to Commercial Mobile Radio Service (CMRS), where Congress expressly required the application of Sections 201, 202, and 208, and permitted the Commission to forbear from others. In fact, Title II has never been applied in such a focused way.

39. History demonstrates that this careful approach to the use of Title II will not impede investment. First, mobile voice services have been regulated under a similar light-touch Title II approach since 1994 — and investment and usage boomed.²⁹ For example, between 1993 and 2009 (while voice was the primary driver of mobile revenues), the mobile industry invested more than \$271 billion in building out networks, during a time in which industry revenues increased by 1300 percent and subscribership grew over 1600 percent.³⁰ Moreover, more recently, Verizon Wireless has invested tens of billions of dollars in deploying mobile wireless services since being subject to the 700 MHz C Block open access rules, which overlap in significant parts with the open Internet rules we adopt today.³¹ But that is not all. Today, key provisions of Title II apply to certain enterprise broadband services that AT&T has

²⁹ See *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) (CMRS Second Report & Order) (forbearing from various Title II requirements for CMRS).

³⁰ See CTIA Wireless Industry Indices: Annual Wireless Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry Year-End 2013 Results, 2014 at 25, 76, 97.

³¹ See Verizon Communications, Inc., Financial Reporting Quarterly Reports 2008-2014 (Form 10-K) <http://www.verizon.com/about/investors/quarterly-reports/> (last visited Feb. 23, 2015); see also *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review-Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule*, WT Docket Nos. 07-166, 06-169, 06-150, 03-264, 96-86, PS Docket No. 06-229, CC Docket No. 94-102, Second Report and Order, 22 FCC Rcd 15289, 15364, paras. 203-204 (2007) (700 MHz Second Report and Order); 47 C.F.R. § 27.16.

described as “the epicenter of the broadband investment” the Commission seeks to promote.³² Title II has been maintained by more than 1000 rural local exchange carriers that have chosen to offer their DSL and fiber broadband services as common carrier offerings. And, of course, wireline DSL was regulated as a common-carrier service until 2005—including a period in the late ‘90s and the first five years of this century that saw the highest levels of wireline broadband infrastructure investment to date.³³

40. In any event, recent events have demonstrated that our rules will not disrupt capital markets or investment. Following recent discussions of the potential application of Title II to consumer broadband, investment analysts have issued reports concluding that Title II with appropriate forbearance is unlikely to alter broadband provider conduct or have any negative effect on their value or future profitability.³⁴ Executives from large broadband providers have also repeatedly represented to investors that the prospect of regulatory action will not influence their investment strategies or long-term profitability; indeed, Sprint has gone so far to say that it “does not believe that a light touch application of Title II, including appropriate forbearance, would harm the continued investment in, and deployment of, mobile broadband services.”³⁵ Finally, the recent AWS auction, conducted under the prospect of Title II regulation, generated bids (net of bidding credits) of more than \$41 billion—further demonstrating that robust investment is not inconsistent with a light-touch Title II regime.³⁶

³² Comments of AT&T, Inc., WC Docket No. 05-25, at 2-3 (filed Apr. 16, 2013).

³³ See US Telecom Research Brief, *Latest Data Show Broadband Investment Surged in 2013* at 2, Chart 2 (Sept. 8, 2014) (wireline broadband capital expenditures peaked at \$79 billion in 2000), <http://www.ustelecom.org/sites/default/files/documents/090814%20Latest%20Data%20Show%20Broadband%20Investment%20Surged%20in%202013.pdf>.

³⁴ See, e.g., Philip Cusick et al., *Net Neutrality: Prepared for Title II but We Take Less Negative View*, J.P. Morgan, (Nov. 11, 2014) (“We wouldn’t change any of the fundamental assumptions on cable companies under our coverage under Title II, and shares are likely to rebound over time.”); Paul Gallant, *Title 2 Appears Likely Outcome at FCC, but Headline Risk May Exceed Real Risk*, Guggenheim Securities, LLC, (Dec. 8, 2014) (“We would not view a Title II decision by the FCC as changing the existing Washington framework for cable broadband service. The marketplace reality under Title II would be far less problematic for cable/telcos than most believe.”); Paul de Sa et al., Bernstein Research, (Nov. 17, 2014) (“We think net neutrality is largely irrelevant for fundamental value drivers. But headline noise in the coming months will likely result in fears about price regulation, increasing volatility and perhaps temporarily depressing cable & telco equity values.”).

³⁵ Letter from Stephen Bye, Chief Technology Officer, Sprint, to Chairman Wheeler, FCC, GN Docket No. 14-28, at 1 (filed Jan. 16, 2015) (Sprint Jan. 16, 2015 *Ex Parte* Letter); see also Transcript of Verizon Communications Presents at UBS 42nd Annual Global Media and Communications Conference Call, Seeking Alpha (Dec. 9, 2014), available at <http://seekingalpha.com/article/2743375-verizon-communications-vz-presents-at-ubs-42nd-annual-global-media-and-communications-conference-transcript?all=true&find=John%2BHodulik> (quoting Verizon CFO Fran Shammo as saying “I mean, to be real clear, I mean this does not influence the way we invest. I mean we’re going to continue to invest in our networks and our platforms, both in Wireless and Wireline FiOS and where we need to. So nothing will influence that. I mean if you think about it, look, I mean we were born out of a highly regulated company, so we know how this operates.”); Brian Fung, *Verizon: Actually Strong Net Neutrality Rules Won’t Affect our Network Investment*, Washington Post (Dec. 10, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/10/verizon-actually-strong-net-neutrality-rules-wont-affect-our-network-investment/>; Brian Fung, *Comcast, Charter and Time Warner Cable All Say Obama’s Net Neutrality Plan Shouldn’t Worry Investors*, Washington Post (Dec. 16, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/16/comcast-charter-and-time-warner-cable-all-tell-investors-strict-net-neutrality-wouldnt-change-much/>; Letter from Angie Kronenberg, COMPTEL to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Dec. 11, 2014) (COMPTEL Dec. 11, 2014 *Ex Parte* Letter).

³⁶ See John Eggerton, *AWS-3 Powers Past \$44 Billion*, Broadcasting & Cable (Dec. 16, 2014), <http://www.broadcastingcable.com/news/washington/aws-3-powers-past-44-billion/136438>.

C. Sustainable Open Internet Rules

41. We ground our open Internet rules in multiple sources of legal authority—including both section 706 and Title II of the Communications Act. The *Verizon* court upheld the Commission’s use of section 706 as a substantive source of legal authority to adopt open Internet protections. But it held that, “[g]iven the Commission’s still-binding decision to classify broadband providers . . . as providers of ‘information services,’” open Internet protections that regulated broadband providers as common carriers would violate the Act.³⁷ Rejecting the Commission’s argument that broadband providers only served retail consumers, the *Verizon* court went on to explain that “broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers’ ‘carriers,’” and held that the 2010 no blocking and no unreasonable discrimination rules impermissibly “obligated [broadband providers] to act as common carriers.”³⁸

42. The *Verizon* decision thus made clear that section 706 affords the Commission substantive authority, and that open Internet protections are within the scope of that authority. And this Order relies on section 706 for the open Internet rules. But, in light of *Verizon*, absent a classification of broadband providers as providing a “telecommunications service,” the Commission could only rely on section 706 to put in place open Internet protections that steered clear of regulating broadband providers as common carriers *per se*. Thus, in order to bring a decade of debate to a certain conclusion, we conclude that the best path is to rely on all available sources of legal authority—while applying them with a light touch consistent with further investment and broadband deployment. Taking the *Verizon* decision’s implicit invitation, we revisit the Commission’s classification of the retail broadband Internet access service as an information service and clarify that this service encompasses the so-called “edge service.”

43. Exercising our delegated authority to interpret ambiguous terms in the Communications Act, as confirmed by the Supreme Court in *Brand X*,³⁹ today’s Order concludes that the facts in the market today are very different from the facts that supported the Commission’s 2002 decision to treat cable broadband as an information service and its subsequent application to fixed and mobile broadband services. Those prior decisions were based largely on a factual record compiled over a decade ago, during an earlier time when, for example, many consumers would use homepages supplied by their broadband provider. In fact, the *Brand X* Court explicitly acknowledged that the Commission had previously classified the transmission service, which broadband providers offer, as a telecommunications service and that the Commission could return to that classification if it provided an adequate justification.⁴⁰ Moreover, a number of parties who, in this proceeding, now oppose our reclassification of broadband Internet access service, previously argued that cable broadband should be deemed a telecommunications service.⁴¹ As the record reflects, times and usage patterns have changed and it is clear that broadband providers are offering both consumers and edge providers straightforward transmission capabilities that the Communications Act defines as a “telecommunications service.”

44. The *Brand X* decision made famous the metaphor of pizza delivery. Justice Scalia, in dissent, concluded that the Commission had exceeded its legal authority by classifying cable-modem service as an “information service.”⁴² To make his point, Justice Scalia described a pizzeria offering

³⁷ *Verizon*, 740 F.3d at 650.

³⁸ *Id.* at 653.

³⁹ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) (*Brand X*).

⁴⁰ *Id.* at 986, 1001.

⁴¹ See *infra* para. 314 & n.810.

⁴² *Id.* at 1005 (Scalia, J., dissenting).

delivery services as well as selling pizzas and concluded that, similarly—broadband providers were offering “telecommunications services” even if that service was not offered on a “stand-alone basis.”⁴³

45. To take Justice Scalia’s metaphor a step further, suppose that in 2014, the pizzeria owners discovered that other nearby restaurants did not deliver their food and thus concluded that the pizza-delivery drivers could generate more revenue by delivering from any neighborhood restaurant (including their own pizza some of the time). Consumers would clearly understand that they are being offered a delivery service.

46. Today, broadband providers are offering stand-alone transmission capacity and that conclusion is not changed even if, as Justice Scalia recognized, other products may be offered at the same time. The trajectory of technology in the decade since the *Brand X* decision has been towards greater and greater modularity. For example, consumers have considerable power to combine their mobile broadband connections with the device, operating systems, applications, Internet services, and content of their choice. Today, broadband Internet access service is fundamentally understood by customers as a transmission platform through which consumers can access third-party content, applications, and services of their choosing.

47. Based on this updated record, this Order concludes that the retail broadband Internet access service available today is best viewed as separately identifiable offers of (1) a broadband Internet access service that is a telecommunications service (including assorted functions and capabilities used for the management and control of that telecommunication service) and (2) various “add-on” applications, content, and services that generally are information services. This finding more than reasonably interprets the ambiguous terms in the Communications Act, best reflects the factual record in this proceeding, and will most effectively permit the implementation of sound policy consistent with statutory objectives, including the adoption of effective open Internet protections.

48. This Order also revisits the Commission’s prior classification of mobile broadband Internet access service as a private mobile service, which cannot be subject to common carrier regulation, and finds that it is best viewed as a commercial mobile service or, in the alternative, the functional equivalent of commercial mobile service. Under the statutory definition, commercial mobile services must be “interconnected with the public switched network (as such terms are defined by regulation by the Commission).”⁴⁴ Consistent with that delegation of authority to define these terms, and with the Commission’s previous recognition that the public switched network will grow and change over time, this Order updates the definition of public switched network to reflect current technology, by including services that use public IP addresses. Under this revised definition, the Order concludes that mobile broadband Internet access service is interconnected with the public switched network. In the alternative, the Order concludes that mobile broadband Internet access service is the functional equivalent of commercial mobile service⁴⁵ because, like commercial mobile service, it is a widely available, for profit mobile service that offers mobile subscribers the capability to send and receive communications, including voice, on their mobile device.

49. By classifying broadband Internet access service under Title II of the Act, in our view the Commission addresses any limitations that past classification decisions placed on the ability to adopt strong open Internet rules, as interpreted by the D.C. Circuit in the *Verizon* case.

50. Having classified broadband Internet access service as a telecommunications service, we respond to the *Verizon* court’s holding, supporting our open Internet rules under the Commission’s Title

⁴³ *Id.* at 1007-09.

⁴⁴ 47 U.S.C. § 332(d)(2).

⁴⁵ Section 332 of the Act defines “private mobile service” as “any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.” 47 U.S.C. § 332(d)(3).

II authority and removing any common carriage limitation on the exercise of our section 706 authority. For mobile broadband services, we also ground the open Internet rules in our Title III authority to protect the public interest through the management of spectrum licensing.

D. Broad Forbearance

51. In finding that broadband Internet access service is subject to Title II, we simultaneously exercise the Commission's forbearance authority to forbear from 30 statutory provisions and render over 700 codified rules inapplicable, to establish a light-touch regulatory framework tailored to preserving those provisions that advance our goals of more, better, and open broadband. We thus forbear from the vast majority of rules adopted under Title II. We do not, however, forbear from sections 201, 202, and 208 (or from related enforcement provisions),⁴⁶ which are necessary to support adoption of our open Internet rules. We also grant extensive forbearance, minimizing the burdens on broadband providers while still adequately protecting the public.

52. In addition, we do not forbear from a limited number of sections necessary to ensure consumers are protected, promote competition, and advance universal access, all of which will foster network investment, thereby helping to promote broadband deployment.

53. *Section 222: Protecting Consumer Privacy.* Ensuring the privacy of customer information both directly protects consumers from harm and eliminates consumer concerns about using the Internet that could deter broadband deployment. Among other things, section 222 imposes a duty on every telecommunications carrier to take reasonable precautions to protect the confidentiality of its customers' proprietary information.⁴⁷ We take this mandate seriously. For example, the Commission recently took enforcement action under section 222 (and section 201(b)) against two telecommunications companies that stored customers' personal information, including social security numbers, on unprotected, unencrypted Internet servers publicly accessible using a basic Internet search.⁴⁸ This unacceptably exposed these consumers to the risk of identity theft and other harms.

54. As the Commission has recognized, "[c]onsumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services."⁴⁹ Thus, this Order finds that consumers concerned about the privacy of their personal information will be more reluctant to use the Internet, stifling Internet service competition and growth.⁵⁰ Application of section 222's protections will help spur consumer demand for those Internet access

⁴⁶ Specifically, we do not forbear from the enforcement authorities set forth in sections 206, 207, 208, 209, 216, and 217. To preserve existing CALEA obligations that already apply to broadband Internet access service, we also decline to forbear from section 229. 47 U.S.C. § 229. *See also* 47 C.F.R. §§ 1.20000 *et seq.*

⁴⁷ 47 U.S.C. § 222(a); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6959, para. 64 (2007) (2007 CPNI Order).

⁴⁸ *See TerraCom, Inc. and YourTel America, Inc. Apparent Liability for Forfeiture*, File No.: EB-TCD-13-00009175, Notice of Apparent Liability, 29 FCC Rcd 13325, 13335-40, paras. 31-41 (2014).

⁴⁹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14930, para. 148 (2005) (*Wireline Broadband Classification Order*); *see also id.* at 14931, para. 149 & n.447 (noting that "long before Congress enacted section 222 of the Act, the Commission had recognized the need for privacy requirements associated with the provision of enhanced services and had adopted CPNI-related requirements in conjunction with other *Computer Inquiry* obligations").

⁵⁰ *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, Report, 27 FCC Rcd 10342, 10410, para. 154 (2012) (2012 Eighth Broadband Progress Report).

services, in turn “driving demand for broadband connections, and consequently encouraging more broadband investment and deployment,” consistent with the goals of the 1996 Act.⁵¹

55. *Sections 225/255/251(a)(2): Ensuring Disabilities Access.* We do not forbear from those provisions of Title II that ensure access to broadband Internet access service by individuals with disabilities. All Americans, including those with disabilities, must be able to reap the benefits of an open Internet, and ensuring access for these individuals will further the virtuous cycle of consumer demand, innovation, and deployment. This Order thus concludes that application of sections 225, 255, and 251(a)(2) is necessary to protect consumers and furthers the public interest, as explained in greater detail below.⁵²

56. *Section 224: Ensuring Infrastructure Access.* For broadband Internet access service, we do not forbear from section 224 and the Commission’s associated procedural rules (to the extent they apply to telecommunications carriers and services and are, thus, within the Commission’s forbearance authority).⁵³ Section 224 of the Act governs the Commission’s regulation of pole attachments. In particular, section 224(f)(1) requires utilities to provide cable system operators and telecommunications carriers the right of “nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled” by a utility.⁵⁴ Access to poles and other infrastructure is crucial to the efficient deployment of communications networks including, and perhaps especially, new entrants.

57. *Section 254: Promoting Universal Broadband.* Section 254 promotes the deployment and availability of communications networks to all Americans, including rural and low-income Americans—furthering our goals of more and better broadband. With the exception of 254(d), (g), and (k) as discussed below, we therefore do not find the statutory test for forbearance from section 254 (and the related provision in section 214(e)) is met. We recognize that supporting broadband-capable networks is already a key component of Commission’s current universal service policies. The Order concludes, however, that directly applying section 254 provides both more legal certainty for the Commission’s prior decisions to offer universal service subsidies for deployment of broadband networks and adoption of broadband services and more flexibility going forward.

58. We partially forbear from section 254(d) and associated rules insofar as they would immediately require mandatory universal service contributions associated with broadband Internet access service.⁵⁵

⁵¹ 2007 CPNI Order, 22 FCC Rcd at 6957, para. 59; *see also* FCC, *Connecting America: The National Broadband Plan* at 55 (*National Broadband Plan*) (explaining that without privacy protections, new innovation and investment in broadband applications and content may be held back, and these applications and content, in turn, are likely the most effective means to advance many of Congress’s goals for broadband).

⁵² As explained in greater detail below, this Order does, however, forbear in part from the application of TRS contribution obligations that otherwise would apply to broadband Internet access service. Section 251(a)(2) precludes the installation of “network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.” *See infra* Section V.

⁵³ *See, e.g.*, Letter from Kathryn Zudem, Senior Vice President, Comcast, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 at 25 n.107 (filed Dec. 24, 2014) (Comcast Dec. 24, 2014 *Ex Parte* Letter); Letter from Matthew Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 21 (Dec. 23, 2014) (NCTA Dec. 23, 2014 *Ex Parte* Letter); *see also, e.g.*, Letter from Marvin Ammori and Julie Samuels, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1 (filed Nov. 12, 2014) (“Title II forbearance should be implemented in such a way so as to encourage continued deployment and investment in networks by for example preserving pole attachment rights.”).

⁵⁴ 47 U.S.C. § 224(f)(1).

⁵⁵ The first sentence of section 254(d) authorizes the Commission to impose universal service contributions requirements on telecommunications carriers—and, indeed, goes even further to require “[e]very telecommunications carrier that provides interstate telecommunications services” to contribute. 47 U.S.C. § 254(d).

59. Below, we first adopt three bright-line rules banning blocking, throttling, and paid prioritization, and make clear the no-unreasonable interference/disadvantage standard by which the Commission will evaluate other practices, according to their facts. These rules are grounded in multiple sources of statutory authority, including section 706 and Titles II and III of the Communications Act. Second, based on a current factual record, we reclassify broadband Internet access service as a telecommunications service under Title II. And, third, guided by our goals of more, better, and open broadband, we exercise our forbearance authority to put in place a “light touch” Title II regulatory framework that protects consumers and innovators, without deterring investment.

III. REPORT AND ORDER ON REMAND: PROTECTING AND PROMOTING THE OPEN INTERNET

A. History of Openness Regulation

60. These rules are the latest in a long line of actions by the Commission to ensure that American communications networks develop in ways that foster economic competition, technological innovation, and free expression. Ever since the landmark 1968 *Carterfone* decision,⁵⁶ the Commission has recognized that communications networks are most vibrant, and best able to serve the public interest, when consumers are empowered to make their own decisions about how networks are to be accessed and utilized. Openness regulation aimed at safeguarding consumer choice has therefore been a hallmark of Commission policy for over forty years.

61. In *Carterfone*, the Commission confronted AT&T’s practice of preventing consumers from attaching any equipment not supplied by AT&T to their home telephones, even if the attachment did not put the underlying network at risk.⁵⁷ Finding AT&T’s “foreign attachment” provisions unreasonable and unlawful, the Commission ruled that AT&T customers had the right to connect useful devices of their choosing to their home telephones, provided these devices did not adversely affect the telephone network.⁵⁸

62. *Carterfone* and subsequent regulatory actions by the Commission severed the market for customer premises equipment (CPE) from that for telephone service.⁵⁹ In doing so, the Commission allowed new participants and new ideas into the market, setting the stage for a wave of innovation that

⁵⁶ *Carterfone*, 13 FCC 2d 420.

⁵⁷ *Carterfone*, 13 FCC 2d at 421, 427. These “foreign attachment” provisions effectively allowed the company to extend its monopoly over phone service to the telephone equipment market as well. After AT&T prohibited use of the *Carterfone*, the product’s manufacturer brought an antitrust action against AT&T and certain other telephone companies. The district court, applying the doctrine of primary jurisdiction, asked the Commission to determine the reasonableness and validity of the tariff and telephone companies’ practices. The manufacturer also filed a formal complaint against certain of the telephone companies, and the Commission consolidated the two proceedings. *Id.* at 421-22.

⁵⁸ *Carterfone*, 13 FCC 2d at 423-424 (“[O]ur conclusion here is that a customer desiring to use an interconnecting device . . . should be able to do so, so long as the interconnection does not adversely affect the telephone company’s operations or the telephone system’s utility for others.”).

⁵⁹ As the Commission implicitly recognized, allowing AT&T to preclude adoption of even non-harmful third-party devices forestalled the development of a competitive telephone technology market, harming innovators and consumers alike. *See id.* at 424 (“No one entity need provide all interconnection equipment for our telephone system any more than a single source is needed to supply the parts for a space probe.”); *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 439 para. 141 (1980) (*Computer II*).

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For Immediate Release**FCC ACTS TO RESTORE INTERNET FREEDOM**

Reverses Title II Framework, Increases Transparency to Protect Consumers, Spur Investment, Innovation, and Competition

WASHINGTON, December 14, 2017—The Federal Communications Commission today voted to restore the longstanding, bipartisan light-touch regulatory framework that has fostered rapid Internet growth, openness, and freedom for nearly 20 years.

Following detailed legal and economic analysis, as well as extensive examination of comments from consumers and stakeholders, the Commission reversed the FCC's 2015 heavy-handed utility-style regulation of broadband Internet access service, which imposed substantial costs on the entire Internet ecosystem.

In place of that heavy-handed framework, the FCC is returning to the traditional light-touch framework that was in place until 2015. Moreover, the FCC today also adopted robust transparency requirements that will empower consumers as well as facilitate effective government oversight of broadband providers' conduct. In particular, the FCC's action today has restored the jurisdiction of the Federal Trade Commission to act when broadband providers engage in anticompetitive, unfair, or deceptive acts or practices.

The framework adopted by the Commission today will protect consumers at far less cost to investment than the prior rigid and wide-ranging utility rules. And restoring a favorable climate for network investment is key to closing the digital divide, spurring competition and innovation that benefits consumers. The Declaratory Ruling, Report and Order, and Order adopted by the Commission takes the following steps to achieve these goals:

Declaratory Ruling

- Restores the classification of broadband Internet access service as an “information service” under Title I of the Communications Act—the classification affirmed by the Supreme Court in the 2005 *Brand X* case.
- Reinstates the classification of mobile broadband Internet access service as a private mobile service.
- Finds that the regulatory uncertainty created by utility-style Title II regulation has reduced Internet service provider (ISP) investment in networks, as well as hampered innovation, particularly among small ISPs serving rural consumers.
- Finds that public policy, in addition to legal analysis, supports the information service classification, because it is more likely to encourage broadband investment and innovation, thereby furthering the goal of closing the digital divide and benefitting the entire Internet ecosystem.

- Restores broadband consumer protection authority to the Federal Trade Commission (FTC), enabling it to apply its extensive expertise to provide uniform online protections against unfair, deceptive, and anticompetitive practices.

Report and Order

- Requires that ISPs disclose information about their practices to consumers, entrepreneurs, and the Commission, including any blocking, throttling, paid prioritization, or affiliated prioritization.
- Finds that transparency, combined with market forces as well as antitrust and consumer protection laws, achieve benefits comparable to those of the 2015 “bright line” rules at lower cost.
- Eliminates the vague and expansive Internet Conduct Standard, under which the FCC could micromanage innovative business models.

Order

- Finds that the public interest is not served by adding to the already-voluminous record in this proceeding additional materials, including confidential materials submitted in other proceedings.

The item takes effect upon approval by the Office of Management and Budget of the new transparency rule that requires the collection of additional information from industry.

Action by the Commission December 14, 2017 by Declaratory Ruling, Report and Order, and Order (FCC 17-166). Chairman Pai, Commissioners O’Rielly and Carr approving. Commissioners Clyburn and Rosenworcel dissenting. Chairman Pai, Commissioners Clyburn, O’Rielly, Carr and Rosenworcel issuing separate statements.

WC Docket No. 17-108

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F.2d 385 (D.C. Cir. 1974).

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Restoring Internet Freedom*, WC Docket No. 17-108.

The Internet is the greatest free-market innovation in history. It has changed the way we live, play, work, learn, and speak. During my time at the FCC, I've met with entrepreneurs who have started businesses, doctors who have helped care for patients, teachers who have educated their students, and farmers who increased their crop yields, all because of the Internet. And the Internet has enriched my life immeasurably. In the past few days alone, I've downloaded interesting podcasts about blockchain technology, ordered a burrito, managed my playoff-bound fantasy football team, and—as you may have seen—tweeted.

What is responsible for the phenomenal development of the Internet? It certainly wasn't heavy-handed government regulation. Quite to the contrary: At the dawn of the commercial Internet, President Clinton and a Republican Congress agreed that it would be the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”

This bipartisan policy worked. Encouraged by light-touch regulation, the private sector invested over \$1.5 trillion to build out fixed and mobile networks throughout the United States. 28.8k modems gave way to gigabit fiber connections. Innovators and entrepreneurs grew startups into global giants. America's Internet economy became the envy of the world.

And this light-touch approach was good for consumers, too. In a free market full of permissionless innovation, online services blossomed. Within a generation, we've gone from email as the killer app to high-definition video streaming. Entrepreneurs and innovators guided the Internet far better than the clumsy hand of government ever could have.

But then, in early 2015, the FCC jettisoned this successful, bipartisan approach to the Internet. On express orders from the previous White House, the FCC scrapped the tried-and-true, light touch regulation of the Internet and replaced it with heavy-handed micromanagement. It decided to subject the Internet to utility-style regulation designed in the 1930s to govern Ma Bell.

This decision was a mistake. For one thing, there was no problem to solve. The Internet wasn't broken in 2015. We weren't living in a digital dystopia. To the contrary, the Internet is perhaps the one thing in American society we can all agree has been a stunning success.

Not only was there no problem, this “solution” hasn't worked. The main complaint consumers have about the Internet is not and has never been that their Internet service provider is blocking access to content. It's that they don't have access at all or enough competition. These regulations have taken us in the opposite direction from these consumer preferences. Under Title II, investment in high-speed networks has declined by billions of dollars. Notably, this is the first time that such investment has declined outside of a recession in the Internet era. When there's less investment, that means fewer next-generation networks are built. That means less competition. That means fewer jobs for Americans building those networks. And that means more Americans are left on the wrong side of the digital divide.

The impact has been particularly serious for smaller Internet service providers. They don't have the time, money, or lawyers to navigate a thicket of complex rules. I have personally visited some of them, from Spencer Municipal Utilities in Spencer, Iowa to Wave Wireless in Parsons, Kansas. I have personally spoken with many more, from Amplex Internet in Ohio to AirLink Services in Oklahoma. So it's no surprise that the Wireless Internet Service Providers Association, which represents small fixed wireless companies that typically operate in rural America, surveyed its members and found that over 80% “incurred additional expense in complying with the Title II rules, had delayed or reduced network expansion, had delayed or reduced services and had allocated budget to comply with the rules.” Other

small companies, too, have told the FCC that these regulations have forced them to cancel, delay, or curtail fiber network upgrades. And nearly two dozen small providers submitted a letter saying the FCC's heavy-handed rules "affect our ability to find financing." Remember, these are the kinds of companies that are critical to providing a more competitive marketplace.

These rules have also impeded innovation. One major company, for instance, reported that it put on hold a project to build out its out-of-home Wi-Fi network due to uncertainty about the FCC's regulatory stance. And a coalition of 19 municipal Internet service providers—that is, city-owned nonprofits—have told the FCC that they "often delay or hold off from rolling out a new feature or service because [they] cannot afford to deal with a potential complaint and enforcement action."

None of this is good for consumers. We need to empower all Americans with digital opportunity, not deny them the benefits of greater access and competition.

And consider too that these are just the effects these rules have had on the Internet of today. Think about how they'll affect the Internet we need ten, twenty years from now. The digital world bears no resemblance to a water pipe or electric line or sewer. Use of those pipes will be roughly constant over time, and very few would say that there's dramatic innovation in these areas. By contrast, online traffic is exploding, and we consume exponentially more data over time. With the dawn of the Internet of Things, with the development of high bit-rate applications like virtual reality, with new activities like high-volume bitcoin mining that we can't yet fully grasp, we are imposing ever more demands on the network. Over time, that means our networks themselves will need to scale, too.

But they don't have to. If our rules deter the massive infrastructure investment that we need, eventually we'll pay the price in terms of less innovation. Consider these words from Ben Thompson, a highly-respected technology analyst, from a post on his blog *Stratechery* supporting my proposal:

The question that must be grappled with . . . is whether or not the Internet is 'done.' By that I mean that today's bandwidth is all we [will] need, which means we can risk chilling investment through prophylactic regulation and the elimination of price signals that may spur infrastructure build-out. . . .

If we are "done", then the potential harm of a Title II reclassification is much lower; sure, ISPs will have to do more paperwork, but honestly, they're just a bunch of mean monopolists anyways, right? Best to get laws in place to preserve what we have.

But what if we aren't done? What if virtual reality with dual 8k displays actually becomes something meaningful? What if those imagined remote medicine applications are actually developed? What if the Internet of Things moves beyond this messy experimentation phase and into real-time value generation, not just in the home but in all kinds of unimagined commercial applications? I certainly hope we will have the bandwidth to support all of that!¹

I do too. And as Thompson put it in another *Stratechery* post: "The fact of the matter is there is no evidence that harm exists in the sort of systematic way that justifies heavily regulating ISPs; the evidence that does exist suggests that current regulatory structures handle bad actors perfectly well. The only future to fear is the one we never discover because we gave up on the approach that has already brought us so far."²

¹ Ben Thompson, "Light Touch", Cable, and DSL: the Broadband Tradeoff; the Importance of Antitrust, *Stratechery*, <https://stratechery.com/2017/light-touch-cable-and-dsl-the-broadband-tradeoff-the-importance-of-antitrust/> (Nov. 29, 2017).

² Ben Thompson, Pro-Neutrality, Anti-Title II, *Stratechery*, <https://stratechery.com/2017/pro-neutrality-anti-title-ii/> (Nov. 28, 2017).

Remember: networks don't have to be built. Risks don't have to be taken. Capital doesn't have to be raised. The costs of Title II today may appear, at least to some, to be hidden. But the consumers and innovators of tomorrow will pay a severe price.

* * *

So what is the FCC doing today? Quite simply, we are restoring the light-touch framework that has governed the Internet for most of its existence. We're moving from Title II to Title I. Wonkier it cannot be.

It's difficult to match that mundane reality to the apocalyptic rhetoric that we've heard from Title II supporters. And as the debate has gone on, their claims have gotten more and more outlandish. So let's be clear. Returning to the legal framework that governed the Internet from President Clinton's pronouncement in 1996 until 2015 is not going to destroy the Internet. It is not going to end the Internet as we know it. It is not going to kill democracy. It is not going to stifle free expression online. If stating these propositions alone doesn't demonstrate their absurdity, our Internet experience before 2015, and our experience tomorrow, once this order passes, will prove them so.

Simply put, by returning to the light-touch Title I framework, we are helping consumers and promoting competition. Broadband providers will have stronger incentives to build networks, especially in unserved areas, and to upgrade networks to gigabit speeds and 5G. This means there will be more competition among broadband providers. It also means more ways that startups and tech giants alike can deliver applications and content to more users. In short, it's a freer and more open Internet.

We also promote much more robust transparency among ISPs than existed three years ago. We require ISPs to disclose a variety of business practices, and the failure to do so subjects them to enforcement action. This transparency rule will ensure that consumers know what they're buying and startups get information they need as they develop new products and services.

Moreover, we empower the Federal Trade Commission to ensure that consumers and competition are protected. Two years ago, the *Title II Order* stripped the FTC of its jurisdiction over broadband providers. But today, we are putting our nation's premier consumer protection cop back on the beat. The FTC will once again have the authority to take action against Internet service providers that engage in anticompetitive, unfair, or deceptive acts. As FTC Chairman Maureen Ohlhausen recently said, "The FTC's ability to protect consumers and promote competition in the broadband industry isn't something new and far-fetched. We have a long-established role in preserving the values that consumers care about online." Or as President Obama's first FTC Chairman put it just yesterday, "the plan to restore FTC jurisdiction is good for consumers. . . . [T]he sky isn't falling. Consumers will remain protected, and the [I]nternet will continue to thrive."

So let's be absolutely clear. Following today's vote, Americans will still be able to access the websites they want to visit. They will still be able to enjoy the services they want to enjoy. There will still be cops on the beat guarding a free and open Internet. This is the way things were prior to 2015, and this is the way they will be once again.

Our decision today will also return regulatory parity to the Internet economy. Some giant Silicon Valley platforms favor imposing heavy-handed regulations on other parts of the Internet ecosystem. But all too often, they don't practice what they preach. Edge providers regularly block content that they don't like. They regularly decide what news, search results, and products you see—and perhaps more importantly, what you don't. And many thrive on the business model of charging to place content in front of eyeballs. What else is "Accelerated Mobile Pages" or promoted tweets but prioritization?

What is worse, there is no transparency into how decisions that appear inconsistent with an open Internet are made. How does a company decide to restrict a Senate candidate's campaign announcement video because her views on a public policy issue are too "inflammatory"? How does a company decide to

demonetize videos from political advocates without notice? How does a company expressly block access to websites on rival devices or prevent dissidents' content from appearing on its platform? How does a company decide to block from its app store a cigar aficionado app, apparently because the company perceives that the app promotes tobacco use? You don't have any insight into any of these decisions, and neither do I. Yet these are very real, *actual* threats to an open Internet—coming from the very entities that claim to support it.

Look—perhaps certain companies support saddling broadband providers with heavy-handed regulations because those rules work to their economic advantage. I don't blame them for taking that position. And I'm not saying that these same rules should be slapped on them too. What I *am* saying is that the government shouldn't be in the business of picking winners and losers in the Internet economy. We should have a level playing field and let consumers decide who prevails.

* * *

Many words have been spoken during this debate but the time has come for action. It is time for the Internet once again to be driven by engineers and entrepreneurs and consumers, rather than lawyers and accountants and bureaucrats. It is time for us to act to bring faster, better, and cheaper Internet access to all Americans. It is time for us to return to the bipartisan regulatory framework under which the Internet flourished prior to 2015. It is time for us to restore Internet freedom.

I want to extend my deepest gratitude to the staff who have worked so many long hours on this item. From the Wireline Competition Bureau: Annick Banoun, Joseph Calascione, Megan Capasso, Paula Cech, Ben Childers, Nathan Eagan, Madeleine Findley, Doug Galbi, Dan Kahn, Melissa Kirkel, Gail Krutov, Susan Lee, Ken Lynch, Pam Megna, Kris Monteith, Ramesh Nagarajan, Eric Ralph, Deborah Salons, Shane Taylor. From the Office of General Counsel: Ashley Boizelle, Jim Carr, Kristine Fargotstein, Tom Johnson, Doug Klein, Marcus Maher, Scott Noveck, Linda Oliver, and Bill Richardson. From the Wireless Telecommunications Bureau: Stacy Ferraro, Nese Guendelsberger, Garnet Hanly, Betsy McIntyre, Jennifer Salhus, Paroma Sanyal, Jiaming "Jimmy" Shang, Don Stockdale, and Peter Trachtenberg. From the Office of Strategic Planning and Policy Analysis: Eric Burger, Mark Bykowsky, and Jerry Ellig. From the Consumer and Governmental Affairs Bureau: Jerusha Burnett. From the Public Safety and Homeland Security Bureau: Ken Carlberg. And from the Media Bureau: Tracy Waldon.

Zeran v. America Online, Inc.129 F.3d 327 (4th Cir. 1997)

WILKINSON, Chief Judge: Kenneth Zeran brought this action against America Online, Inc. (“AOL”), arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The district court granted judgment for AOL on the grounds that the Communications Decency Act of 1996 (“CDA”)—47 U.S.C. § 230—bars Zeran’s claims. Zeran appeals, arguing that § 230 leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services. He also contends that § 230 does not apply here because his claims arise from AOL’s alleged negligence prior to the CDA’s enactment. Section 230, however, plainly immunizes computer service providers like AOL from liability for information that originates with third parties. Furthermore, Congress clearly expressed its intent that § 230 apply to lawsuits, like Zeran’s, instituted after the CDA’s enactment. Accordingly, we affirm the judgment of the district court.

I.

“The Internet is an international network of interconnected computers,” currently used by approximately 40 million people worldwide. One of the many means by which individuals access the Internet is through an interactive computer service. These services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service’s individual proprietary network. *Id.* AOL is just such an interactive computer service. Much of the information transmitted over its network originates with the company’s millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber.

The instant case comes before us on a motion for judgment on the pleadings, see Fed.R.Civ.P. 12(c), so we accept the facts alleged in the complaint as true. On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising “Naughty Oklahoma T-Shirts.” The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call “Ken” at Zeran’s home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats. Zeran could not change his phone number because he relied on its availability to the public in running his business out of his home. Later that day, Zeran called AOL and informed a company representative of his predicament. The employee assured Zeran that the posting would be removed from AOL’s bulletin board but explained that as a matter of policy AOL would not post a retraction. The parties dispute the date that AOL removed this original posting from its bulletin board.

On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran’s phone number, to ask for “Ken,” and to “please call back if busy” due to high demand. The angry, threatening phone

calls intensified. Over the next four days, an unidentified party continued to post messages on AOL's bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans. During this time period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported his case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.

Meanwhile, an announcer for Oklahoma City radio station KRXO received a copy of the first AOL posting. On May 1, the announcer related the message's contents on the air, attributed them to "Ken" at Zeran's phone number, and urged the listening audience to call the number. After this radio broadcast, Zeran was inundated with death threats and other violent calls from Oklahoma City residents. Over the next few days, Zeran talked to both KRXO and AOL representatives. He also spoke to his local police, who subsequently surveilled his home to protect his safety. By May 14, after an Oklahoma City newspaper published a story exposing the shirt advertisements as a hoax and after KRXO made an on-air apology, the number of calls to Zeran's residence finally subsided to fifteen per day.

Zeran first filed suit on January 4, 1996, against radio station KRXO in the United States District Court for the Western District of Oklahoma. On April 23, 1996, he filed this separate suit against AOL in the same court. Zeran did not bring any action against the party who posted the offensive messages. After Zeran's suit against AOL was transferred to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a), AOL answered Zeran's complaint and interposed 47 U.S.C. § 230 as an affirmative defense. AOL then moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). The district court granted AOL's motion, and Zeran filed this appeal.

II.

A.

Because § 230 was successfully advanced by AOL in the district court as a defense to Zeran's claims, we shall briefly examine its operation here. Zeran seeks to hold AOL liable for defamatory speech initiated by a third party. He argued to the district court that once he notified AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material. Section 230 entered this litigation as an affirmative defense pled by AOL. The company claimed that Congress immunized interactive computer service providers from claims based on information posted by a third party.

The relevant portion of § 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).² By its plain language,

² Section 230 defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2). The term "information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(e)(3). The parties do not dispute that AOL falls within the CDA's "interactive computer service" definition and that the unidentified third party who posted the offensive messages here fits the definition

§ 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” *Id.* § 230(a)(3). It also found that the Internet and interactive computer services “have flourished, to the benefit of all Americans, *with a minimum of government regulation.*” *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is “the policy of the United States … 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.*” *Id.* § 230(b)(2) (emphasis added).

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” *Id.* § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.

Congress’ purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, [1995 WL 323710](#) (N.Y. Sup. Ct. May 24, 1995). There, the plaintiffs sued Prodigy—an interactive computer service like AOL—for defamatory comments made by

of an “information content provider.”

an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.

Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "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." 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

B.

Zeran argues, however, that the § 230 immunity eliminates only publisher liability, leaving distributor liability intact. Publishers can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 810 (5th ed. 1984). According to Zeran, interactive computer service providers like AOL are normally considered instead to be distributors, like traditional news vendors or book sellers. Distributors cannot be held liable for defamatory statements contained in the materials they distribute unless it is proven at a minimum that they have actual knowledge of the defamatory statements upon which liability is predicated. *Id.* at 811 (explaining that distributors are not liable "in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published"). Zeran contends that he provided AOL with sufficient notice of the defamatory statements appearing on the company's bulletin board. This notice is significant, says Zeran, because AOL could be held liable as a distributor only if it acquired knowledge of the defamatory statements' existence.

Because of the difference between these two forms of liability, Zeran contends that the term "distributor" carries a legally distinct meaning from the term "publisher." Accordingly, he asserts that Congress' use of only the term "publisher" in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore, his suit should be permitted to proceed against AOL. We disagree. Assuming *arguendo* that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.

The terms "publisher" and "distributor" derive their legal significance from the context of defamation law. Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only

one who publishes can be subject to this form of tort liability. Restatement (Second) of Torts § 558(b) (1977); Keeton et al., *supra*, § 113, at 802. Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party—each alleged by Zeran here under a negligence label—constitute publication. Restatement (Second) of Torts § 577. In fact, every repetition of a defamatory statement is considered a publication. Keeton et al., *supra*, § 113, at 799.

In this case, AOL is legally considered to be a publisher. “[E]very one who takes part in the publication ... is charged with publication.” *Id.* Even distributors are considered to be publishers for purposes of defamation law:

Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents—including the defamatory content—and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

Id. at 803. AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230’s immunity.

Zeran contends that decisions like *Stratton Oakmont and Cubby, Inc. v. CompuServe Inc.*, [776 F.Supp. 135](#) (S.D.N.Y. 1991), recognize a legal distinction between publishers and distributors. He misapprehends, however, the significance of that distinction for the legal issue we consider here. It is undoubtedly true that mere conduits, or distributors, are subject to a different standard of liability. As explained above, distributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability. But this distinction signifies only that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned. To the extent that decisions like *Stratton* and *Cubby* utilize the terms “publisher” and “distributor” separately, the decisions correctly describe two different standards of liability. *Stratton* and *Cubby* do not, however, suggest that distributors are not also a type of publisher for purposes of defamation law.

Zeran simply attaches too much importance to the presence of the distinct notice element in distributor liability. The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability—the publisher role.

Our view that Zeran’s complaint treats AOL as a publisher is reinforced because AOL is cast in the same position as the party who originally posted the offensive messages. According to Zeran’s logic, AOL is legally at fault because it communicated to third parties an allegedly defamatory statement. This is precisely the theory under which the original poster of the offensive messages would be found liable. If the original party is considered a publisher of the offensive messages, Zeran certainly cannot

attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the statements.

Zeran next contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined in Part II A. Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA. Like the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation.

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. *See Philadelphia Newspapers, Inc. v. Hepps*, [475 U.S. 767, 777](#) (1986) (recognizing that fears of unjustified liability produce a chilling effect antithetical to First Amendment's protection of speech). Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

Similarly, notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply "notify" the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact. ***
III.

The CDA was signed into law and became effective on February 8, 1996. Zeran did not file his complaint until April 23, 1996. Zeran contends that even if § 230 does bar the type of claim he brings here, it cannot be applied retroactively to bar an action arising from AOL's alleged misconduct prior to the CDA's enactment. We disagree. Section 230 applies by its plain terms to complaints brought after the CDA became

effective. As noted in Part IIB, the statute provides, in part: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(d)(3). *** Here, Congress decided that free speech on the Internet and self-regulation of offensive speech were so important that § 230 should be given immediate, comprehensive effect.

There finally is a significant contrast between statutes that impose new liabilities for already-completed conduct and statutes that govern litigants’ access to courts. For example, courts often apply intervening statutes that restrict a court’s jurisdiction. Section 230 neither imposes any new liability on Zeran nor takes away any rights acquired under prior law. No person has a vested right in a nonfinal tort judgment, much less an unfiled tort claim. Furthermore, Zeran cannot point to any action he took in reliance on the law prior to § 230’s enactment. Because § 230 has no untoward retroactive effect, even the presumption against statutory retroactivity absent an express directive from Congress is of no help to Zeran here.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

Homeaway.com v. City of Santa Monica

918 F.3d 676 (9th Cir. 2019)

NGUYEN, Circuit Judge: Located on the coast of Southern California, the city of Santa Monica consists of only about eight square miles but serves 90,000 residents and as many as 500,000 visitors on weekends and holidays. Similar to other popular tourist destinations, Santa Monica is struggling to manage the disruptions brought about by the rise of short-term rentals facilitated by innovative startups such as Appellants HomeAway.com, Inc. and Airbnb Inc. (the “Platforms”). Websites like those operated by the Platforms are essentially online marketplaces that allow “guests” seeking accommodations and “hosts” offering accommodations to connect and enter into rental agreements with one another.¹ As of February 2018, Airbnb had approximately 1,400 listings in Santa Monica, of which about 30 percent are in the “coastal zone” covered by the California Coastal Act, while HomeAway.com had approximately 300 live listings in Santa Monica, of which approximately 40 percent are in the coastal zone.

Santa Monica’s council reported that the proliferation of short-term rentals had negatively impacted the quality and character of its neighborhoods by “bringing commercial activity and removing residential housing stock from the market” at a time when California is already suffering from severe housing shortages. In response, the city passed an ordinance regulating the short-term vacation rental market by authorizing licensed “home-sharing” (rentals where residents remain on-site with guests) but prohibiting all other short-term home rentals of 30 consecutive days or less.

The Platforms filed suit, alleging that the city ordinance is preempted by the Communications Decency Act and impermissibly infringes upon their First Amendment rights. The

¹ The Platforms do not own, lease, or manage any of the properties listed on their websites, nor are they parties to the rental agreements. Instead, the content provided alongside the listings—such as description, price, and availability—are provided by the hosts. For their services, the Platforms collect a fee from each successful booking.

district court denied preliminary injunctive relief, and dismissed the Platforms' complaints for failure to state a claim under the Communications Decency Act and the First Amendment. We affirm.

BACKGROUND

In May 2015, Santa Monica passed its initial ordinance regulating the short-term vacation rental market by authorizing licensed "home-sharing" (rentals where residents remain on-site with guests) but prohibiting all other forms of short-term rentals for 30 consecutive days or less. Santa Monica Ordinance 2484 (May 12, 2015), *codified as amended*, Santa Monica Mun. Code §§ 6.20.010-6.20.100. The ordinance reflected the city's housing goals of "preserving its housing stock and preserving the quality and character of its existing single and multi-family residential neighborhoods." *Id.* As originally enacted, the ordinance prohibited hosting platforms from acting to "undertake, maintain, authorize, aid, facilitate or advertise any Home-Sharing activity" that was not authorized by the city. Hosting platforms also were required to collect and remit taxes, and to regularly disclose listings and booking information to the city.

The Platforms each filed a complaint in the Central District of California challenging the initial ordinance, and the district court consolidated the cases for discovery and pretrial matters. On September 21, 2016, the parties stipulated to stay the case while the city considered amendments to the local ordinance. During the stay period, the district court for the Northern District of California denied a preliminary injunction requested by the plaintiffs in a separate case challenging a similar ordinance in San Francisco. *See Airbnb Inc. v. City & County of San Francisco*, [217 F. Supp. 3d 1066](#) (N.D. Cal. 2016). That case ended in a settlement in which the Platforms agreed to comply with an amended version of San Francisco's ordinance that prohibited booking unlawful transactions but provided a safe harbor wherein any platform that complies with the responsibilities set out in the Ordinance will be presumed to be in compliance with the law.

In January 2017, Santa Monica likewise amended its own ordinance. The version challenged here, Ordinance 2535 (the "Ordinance"), retains its prohibitions on most types of short-term rentals, with the exception of licensed home-shares. In addition, the Ordinance imposes four obligations on hosting platforms directly: (1) collecting and remitting "Transient Occupancy Taxes," (2) disclosing certain listing and booking information regularly, (3) refraining from completing any booking transaction for properties not licensed and listed on the City's registry, and (4) refraining from collecting or receiving a fee for "facilitating or providing services ancillary to a vacation rental or unregistered home-share." If a housing platform operates in compliance with these obligations, the Ordinance provides a safe harbor by presuming the platform to be in compliance with the law. Otherwise, violations are punishable by a fine of up to \$500 and/or imprisonment for up to six months.

After the district court lifted the stay, the Platforms amended their complaint to challenge the revised ordinance and moved for a preliminary injunction. Santa Monica moved to dismiss the amended complaint. The court denied the Platforms' motion for preliminary injunctive relief and subsequently granted Santa Monica's motion to dismiss on the ground that the Platforms failed to state a claim under federal law, including the Communications Decency Act of 1996 and the First Amendment. The district court also declined to exercise supplemental jurisdiction over their remaining state-law claims. The Platforms timely appealed these decisions, and we consolidated the appeals. ***

DISCUSSION

I. Communications Decency Act

The Communications Decency Act of 1996 (“CDA” or the “Act”), 47 U.S.C. § 230, provides internet companies with immunity from certain claims in furtherance of its stated policy “to promote the continued development of the Internet and other interactive computer services.” *Id.* § 230(b)(1). Construing this immunity broadly, the Platforms argue that the Ordinance requires them to monitor and remove third-party content, and therefore violates the CDA by interfering with federal policy protecting internet companies from liability for posting third-party content. Santa Monica, on the other hand, argues that the Ordinance does not implicate the CDA because it imposes no obligation on the Platforms to monitor or edit any listings provided by hosts. Santa Monica contends that the Ordinance is simply an exercise of its right to enact regulations to preserve housing by curtailing “incentives for landlords to evade rent control laws, evict tenants, and convert residential units into *de facto* hotels.”

We begin our analysis with the text of the CDA. Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” *Id.* § 230(c)(1). The CDA explicitly preempts inconsistent state laws: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).

We have construed these provisions to extend immunity to “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.” *Barnes v. Yahoo!, Inc.*, [570 F.3d 1096, 1100-01](#) (9th Cir. 2009). Only the second element is at issue here: whether the Ordinance treats the Platforms as a “publisher or speaker” in a manner that is barred by the CDA. Although the CDA does not define “publisher,” we have defined “publication” in this context to “involve[] reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.” *Id.* at 1102 (citing *Fair Hous. Council v. Roommates.com, LLC*, [521 F.3d 1157, 1170-71](#) (9th Cir. 2008) (en banc)).

The Platforms offer two different theories as to how the Ordinance in fact reaches “publication” activities. First, the Platforms claim that the Ordinance is expressly preempted by the CDA because, as they argue, it implicitly requires them “to monitor the content of a third-party listing and compare it against the City’s short-term rental registry before allowing any booking to proceed.” Relying on *Doe v. Internet Brands*, [824 F.3d 846, 851](#) (9th Cir. 2016), the Platforms take the view that CDA immunity follows whenever a legal duty “affects” how an internet company “monitors” a website.

However, the Platforms read *Internet Brands* too broadly. In that case, two individuals used the defendant’s website to message and lure the plaintiff to sham auditions where she was drugged and raped. We held that, where the website provider was alleged to have known independently of the ongoing scheme beforehand, the CDA did not bar an action under state law for failure to warn. We observed that a duty to warn would not “otherwise affect how [the defendant] publishes or monitors” user content. *Id.* at 851. Though the defendant did, in its business, act as a publisher of third-party content, the underlying legal duty at issue did not seek to hold the defendant liable as a “publisher or speaker” of third-party content. *See* 47 U.S.C. § 230(c)(1). We therefore declined to extend CDA immunity to the defendant for the plaintiff’s failure-to-warn claim. *Internet Brands*, [824 F.3d at 854](#).

We do not read *Internet Brands* to suggest that CDA immunity attaches any time a legal duty might lead a company to respond with monitoring or other publication activities. It is not enough that third-party content is involved; *Internet Brands* rejected use of a “but-for” test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content. We look instead to what the duty at issue actually requires: specifically, whether the duty would necessarily require an internet company to monitor third-party content.

Here, the Ordinance does not require the Platforms to monitor third-party content and thus falls outside of the CDA’s immunity. The Ordinance prohibits processing transactions for unregistered properties. It does not require the Platforms to review the content provided by the hosts of listings on their websites. Rather, the only monitoring that appears necessary in order to comply with the Ordinance relates to incoming requests to complete a booking transaction—content that, while *resulting from* the third-party listings, is distinct, internal, and nonpublic. As in *Internet Brands*, it is not enough that the third-party listings are a “but-for” cause of such internal monitoring. *See Barnes*, [824 F.3d at 853](#). The text of the CDA is “clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content.” [570 F.3d at 1100](#). To provide broad immunity “every time a website uses data initially obtained from third parties would eviscerate [the CDA].” *Barnes*, [570 F.3d at 1100](#) (quoting *Roommates.com*, [521 F.3d at 1171](#) (9th Cir. 2008) (en banc)). That is not the result that Congress intended.

Nor could a duty to cross-reference bookings against Santa Monica’s property registry give rise to CDA immunity. While keeping track of the city’s registry is “monitoring” third-party content in the most basic sense, such conduct cannot be fairly classified as “publication” of third-party content. The Platforms have *no* editorial control over the registry whatsoever. As with tax regulations or criminal statutes, the Ordinance can fairly charge parties with keeping abreast of the law without running afoul of the CDA.

Second, the Platforms argue that the Ordinance “in operation and effect . . . forces [them] to *remove* third-party content.” Although it is clear that the Ordinance does not expressly mandate that they do so, the Platforms claim that “common sense explains” that they cannot “leave in place a website chock-full of un-bookable listings.” For purposes of our review, we accept at face value the Platforms’ assertion that they will choose to *remove* noncompliant third-party listings on their website as a consequence of the Ordinance.³ Nonetheless, their choice to *remove* listings is insufficient to implicate the CDA.

On its face, the Ordinance does not proscribe, mandate, or even discuss the content of the listings that the Platforms display on their websites. *See Santa Monica Mun. Code §§ 6.20.010-6.20.100*. It requires only that transactions involve licensed properties. We acknowledge that, as the Platforms explain in Airbnb’s complaint and in the briefing on appeal, removal of these listings would be the best option “from a business standpoint.” But, as in *Internet Brands*, the underlying duty “could have been satisfied without changes to content posted by the website’s users.” *See 824 F.3d at 851*. Even assuming that removing certain listings may be the Platforms’ most practical compli-

³ The Platforms argued below that the district court must accept as true their allegation that they would “have to” monitor and screen listings. As a matter of law, the Ordinance does not require them to do so. Courts are “not bound to accept as true a legal conclusion couched as a factual allegation.” *Bell Atlantic Corp. v. Twombly*, [550 U.S. 544, 555](#) (2007) (quoting *Papasan v. Allain*, [478 U.S. 265, 286](#) (1986)).

ance option, allowing internet companies to claim CDA immunity under these circumstances would risk exempting them from most local regulations and would, as this court feared in *Roommates.com*, [521 F.3d at 1164](#), "create a lawless noman's-land on the Internet." We hold that the Ordinance is not "inconsistent" with the CDA, and is therefore not expressly preempted by its terms. *See* 47 U.S.C. § 230(e)(3).

Finally, the Platforms argue that, even if the Ordinance is not expressly preempted by the CDA, the Ordinance imposes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Crosby v. Nat'l Foreign Trade Council*, [530 U.S. 363, 372-73](#) (2000). Reading the CDA expansively, they argue that the Ordinance conflicts with the CDA's goal "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." *See* § 230(b)(2). We have consistently eschewed an expansive reading of the statute that would render unlawful conduct "magically . . . lawful when [conducted] online," and therefore "giv[ing] online businesses an unfair advantage over their real-world counterparts." *See Roommates.com*, [521 F.3d at 1164, 1164-65 n.15](#). For the same reasons, while we acknowledge the Platforms' concerns about the difficulties of complying with numerous state and local regulations, the CDA does not provide internet companies with a one-size-fits-all body of law. Like their brick-and-mortar counterparts, internet companies must also comply with any number of local regulations concerning, for example, employment, tax, or zoning. Because the Ordinance would not pose an obstacle to Congress's aim to encourage self-monitoring of third-party content, we hold that obstacle preemption does not preclude Santa Monica from enforcing the Ordinance.

Fundamentally, the parties dispute how broadly to construe the CDA so as to continue serving the purposes Congress envisioned while allowing state and local governments breathing room to address the pressing issues faced by their communities. We have previously acknowledged that the CDA's immunity reaches beyond the initial state court decision that sparked its enactment. *See Fair Hous. Council v. Roommates.com, LLC*, [521 F.3d 1157, 1163](#) (9th Cir. 2008) (en banc) (discussing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, which held an internet company liable for defamation when it removed some, but not all, harmful content from its public message boards, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished)). As the Platforms correctly note, the Act's policy statements broadly promote "the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." *See* 47 U.S.C. § 230(b)(2). "[A] law's scope often differs from its genesis," and we have repeatedly held the scope of immunity to reach beyond defamation cases. *Barnes*, [570 F.3d at 1101](#) (quoting *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, [519 F.3d 666, 671](#) (7th Cir. 2008), as amended (May 2, 2008)) (citing cases applying immunity for causes of action including discrimination, fraud, and negligence).

At the same time, our cases have hewn closely to the statutory language of the CDA and have limited the expansion of its immunity beyond the protection Congress envisioned. As we have observed, "the [relevant] section is titled 'Protection for "good Samaritan" blocking and screening of offensive material.'" *Roommates.com*, [521 F.3d at 1163-64](#) (quoting 47 U.S.C. § 230(c)); *see also Internet Brands*, [824 F.3d at 852](#). Congress intended to "spare interactive computer services [the] grim choice" between voluntarily filtering content and being subject to liability on the one hand, and "ignoring all problematic posts altogether [to] escape liability." *Roommates.com*, [521 F.3d at 1163-64](#).

In contrast, the Platforms face no liability for the content of the bookings; rather, any liability arises only from unlicensed bookings. We do not discount the Platforms' concerns about the administrative burdens of state and local regulations, but we nonetheless disagree that § 230(c)(1) of the CDA may be read as broadly as they advocate, or that we may ourselves expand its provisions beyond what Congress initially intended.

In sum, neither express preemption nor obstacle preemption apply to the Ordinance. We therefore affirm the district court's dismissal for failure to state a claim under the CDA.

II. First Amendment

The Platforms also contend that the district court erred in dismissing their First Amendment claims. They argue that, even if the plain language of the Ordinance only reaches "conduct," *i.e.*, booking unlicensed properties, the law effectively imposes a "content-based financial burden" on commercial speech and is thus subject to First Amendment scrutiny. The district court concluded that the Ordinance "regulates conduct, not speech, and that the conduct banned . . . does not have such a 'significant expressive element' as to draw First Amendment protection." We agree.

That the Ordinance regulates "conduct" is not alone dispositive. The Supreme Court has previously applied First Amendment scrutiny when "'speech' and 'nonspeech' elements are combined in the same course of conduct." *See United States v. O'Brien*, [391 U.S. 367, 376](#) (1968). But "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell v. IMS Health Inc.*, [564 U.S. 552, 567](#) (2011). While the former is entitled to protection, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.*

To determine whether the First Amendment applies, we must first ask the "threshold question [of] whether conduct with a 'significant expressive element' drew the legal remedy or the ordinance has the inevitable effect of 'singling out those engaged in expressive activity.'" *Int'l Franchise Ass'n v. City of Seattle*, [803 F.3d 389, 408](#) (9th Cir. 2015) (quoting *Arcara v. Cloud Books, Inc.*, [478 U.S. 697, 706-07](#) (1986)). A court may consider the "inevitable effect of a statute on its face," as well as a statute's "stated purpose." *Sorrell*, [564 U.S. at 565](#). However, absent narrow circumstances, a court may not conduct an inquiry into legislative purpose or motive beyond what is stated within the statute itself. *See O'Brien*, [391 U.S. at 383 n.30](#). Because the conduct at issue—completing booking transactions for unlawful rentals—consists only of nonspeech, nonexpressive conduct, we hold that the Ordinance does not implicate the First Amendment.

First, the prohibitions here did not target conduct with "a significant expressive element." *See Arcara*, [478 U.S. at 706](#). Our decision in *International Franchise Ass'n* is analogous. There, the plaintiff challenged a minimum wage ordinance that would have accelerated the raising of the minimum wage to \$15 per hour for franchise owners and other large employers. [803 F.3d at 389](#). In denying a preliminary injunction, the district court held that the plaintiffs were not likely to succeed on their First Amendment argument that the ordinance treated them differently based on their "speech and association" decisions to operate within a franchise relationship framework. *Id.* at 408-09. We agreed, concluding that the "business agreement or business dealings" were

not conduct with a “significant expressive element.” *Id.* at 408. Instead, “Seattle’s minimum wage ordinance [was] plainly an economic regulation that [did] not target speech or expressive conduct.” *Id.*

Similarly, here, the Ordinance is plainly a housing and rental regulation. The “inevitable effect of the [Ordinance] on its face” is to regulate nonexpressive conduct—namely, booking transactions—not speech. *See Sorrell, 564 U.S. at 565.* As in *International Franchise Ass’n*, the “business agreement or business dealings” associated with processing a booking is not conduct with a “significant expressive element.” *See 803 F.3d at 408* (citation and quotation marks omitted). Contrary to the Platforms’ claim, the Ordinance does not “require” that they monitor or screen advertisements. It instead leaves them to decide how best to comply with the prohibition on booking unlawful transactions.

Nor can the Platforms rely on the Ordinance’s “stated purpose” to argue that it intends to regulate speech. The Ordinance itself makes clear that the City’s “central and significant goal . . . is preservation of its housing stock and preserving the quality and nature of residential neighborhoods.” As such, with respect to the Platforms, the only inevitable effect, and the stated purpose, of the Ordinance is to prohibit them from completing booking transactions for unlawful rentals.

As for the second prong of our inquiry, whether the Ordinance has the effect of “singling out those engaged in expressive activity,” *Arcara, 478 U.S. at 706-07*, we conclude that it does not. As the Platforms point out, websites like Craigslist “advertise the very same properties,” but do not process transactions. Unlike the Platforms, those websites would not be subject to the Ordinance, underscoring that the Ordinance does not target websites that post listings, but rather companies that engage in unlawful booking transactions.

Moreover, the incidental impacts on speech cited by the Platforms raise minimal concerns. The Platforms argue that the Ordinance chills commercial speech, namely, advertisements for third-party rentals. But even accepting that the Platforms will need to engage in efforts to validate transactions before completing them, incidental burdens like these are not always sufficient to trigger First Amendment scrutiny. *See Int’l Franchise Ass’n, 803 F.3d at 408* (“[S]ubjecting every incidental impact on speech to First Amendment scrutiny ‘would lead to the absurd result that any government action that had some conceivable speech inhibiting consequences . . . would require analysis under the First Amendment.’” (quoting *Arcara, 478 U.S. at 708* (O’Connor, J., concurring))). Furthermore, to the extent that the speech chilled advertises unlawful rentals, “[a]ny First Amendment interest . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.” *See Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 389* (1973).

Finally, because the Ordinance does not implicate speech protected by the First Amendment, we similarly reject the Platforms’ argument that the Ordinance is unconstitutional without a scienter requirement. In most cases, there is no “closed definition” on when a criminal statute must contain a scienter requirement. *See Morissette v. United States, 342 U.S. 246, 260* (1952). However, the Supreme Court has drawn a bright line in certain contexts, such as holding that the First Amendment requires statutes imposing criminal liability for obscenity or child pornography to contain a scienter

requirement. *See New York v. Ferber*, [458 U.S. 747, 765](#) (1982). Such a requirement prevents “a severe limitation on the public’s access to constitutionally protected matter” as would result from inflexible laws criminalizing “bookshops and periodical stands.” *Smith v. California*, [361 U.S. 147, 153](#) (1959).

Here, even assuming that the Ordinance would lead the Platforms to voluntarily remove some advertisements for lawful rentals, there would not be a “severe limitation on the public’s access” to lawful advertisements, especially considering the existence of alternative channels like Craigslist. *Id.* Such an incidental burden is far from “a substantial restriction on the freedom of speech” that would necessitate a scienter requirement. *Id.* at 150. Otherwise, “[t]here is no specific constitutional inhibition against making the distributors of good[s] the strictest censors of their merchandise.” *Id.* at 152. ***

* * *

Because the district court properly dismissed the Platforms’ complaints for failure to state a claim, we dismiss as moot the appeals from the denial of preliminary injunctive relief.

AFFIRMED in part, DISMISSED in part.

117TH CONGRESS
1ST SESSION

H. R. 5596

To amend section 230 of the Communications Act of 1934 to limit the liability protection provided by such section when a provider of an interactive computer service knew or should have known such provider was making a personalized recommendation of third-party information or recklessly made a personalized recommendation of such information, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 15, 2021

Mr. PALLONE (for himself, Mr. MICHAEL F. DOYLE of Pennsylvania, Ms. SCHAKOWSKY, and Ms. ESHOO) introduced the following bill; which was referred to the Committee on Energy and Commerce

A BILL

To amend section 230 of the Communications Act of 1934 to limit the liability protection provided by such section when a provider of an interactive computer service knew or should have known such provider was making a personalized recommendation of third-party information or recklessly made a personalized recommendation of such information, 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,*

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Justice Against Mali-
3 cious Algorithms Act of 2021”.

4 SEC. 2. PERSONALIZED RECOMMENDATION OF THIRD-**5 PARTY INFORMATION.**

6 (a) IN GENERAL.—Section 230 of the Communica-
7 tions Act of 1934 (47 U.S.C. 230) is amended—

8 (1) by redesignating subsection (f) as sub-
9 section (g);

10 (2) by inserting after subsection (e) the fol-
11 lowing:

12 “(f) PERSONALIZED RECOMMENDATION OF INFOR-
13 MATION PROVIDED BY ANOTHER INFORMATION CONTENT
14 PROVIDER.—

15 “(1) IN GENERAL.—Subsection (c)(1) does not
16 apply to a provider of an interactive computer serv-
17 ice with respect to information provided through
18 such service by another information content provider
19 if—

20 “(A) such provider of such service—

21 “(i) knew or should have known such
22 provider of such service was making a per-
23 sonalized recommendation of such informa-
24 tion; or

25 “(ii) recklessly made a personalized
26 recommendation of such information; and

1 “(B) such recommendation materially con-
2 tributed to a physical or severe emotional injury
3 to any person.

4 “(2) EXEMPTIONS.—

5 “(A) SMALL BUSINESSES.—Paragraph (1)
6 of this subsection does not apply to an inter-
7 active computer service that (in combination
8 with each subsidiary and affiliate of the service)
9 has 5,000,000 or fewer unique monthly visitors
10 or users for not fewer than 3 of the preceding
11 12 months.

12 “(B) USER-SPECIFIED SEARCH.—Para-
13 graph (1) of this subsection does not apply to
14 a provider of an interactive computer service to
15 the extent that the recommendation was made
16 directly in response to a user-specified search.

17 “(C) INTERNET INFRASTRUCTURE.—Para-
18 graph (1) of this subsection does not apply to
19 a provider of an interactive computer service to
20 the extent that the service, system, or access
21 software of such provider is used by another
22 interactive computer service for the manage-
23 ment, control, or operation of such other inter-
24 active computer service, including for—

25 “(i) web hosting;

1 “(ii) domain registration;
2 “(iii) content delivery networks;
3 “(iv) caching;
4 “(v) data storage; and
5 “(vi) cybersecurity.”; and
6 (3) in subsection (g) (as so redesignated), by
7 adding at the end the following:

8 “(5) PERSONALIZED RECOMMENDATION.—The
9 term ‘personalized recommendation’ means, with re-
10 spect to information, the material enhancement,
11 using a personalized algorithm, of the prominence of
12 such information with respect to other information.

13 “(6) PERSONALIZED ALGORITHM.—The term
14 ‘personalized algorithm’ means an algorithm that re-
15 lies on information specific to an individual.

16 “(7) ALGORITHM.—The term ‘algorithm’ means
17 any computational process, model, or other auto-
18 mated means of processing to rank, order, promote,
19 recommend, amplify, or similarly alter the delivery
20 or display of information (including any text, image,
21 audio, or video post and any page, group, account,
22 channel, or affiliation).”.

23 (b) CONFORMING AMENDMENT.—Section 223(h)(2)
24 of the Communications Act of 1934 (47 U.S.C. 223(h)(2))

1 is amended by striking “section 230(f)(2)” and inserting
2 “section 230(g)(2)”.

3 (c) APPLICABILITY.—The amendments made by this
4 section shall apply with respect to recommendations made
5 after the date that is 180 days after the date of the enact-
6 ment of this Act.

○

117TH CONGRESS
1ST SESSION

S. 3029

To amend section 230(c) of the Communications Act of 1934 to remove immunity for providers of interactive computer services for certain claims, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 20, 2021

Mr. LUJÁN introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To amend section 230(c) of the Communications Act of 1934 to remove immunity for providers of interactive computer services for certain claims, 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 “Protecting Americans

5 from Dangerous Algorithms Act”.

1 **SEC. 2. AMENDMENT TO THE COMMUNICATIONS DECENCY**2 **ACT.**

3 Section 230(c) of the Communications Act of 1934
4 (47 U.S.C. 230(c)) is amended by adding at the end the
5 following:

6 **“(3) ALGORITHMIC AMPLIFICATION.—**

7 **“(A) IN GENERAL.—**For purposes of para-
8 graph (1), a provider of an interactive computer
9 service shall be considered to be an information
10 content provider and the protection under that
11 paragraph shall not apply for any claim de-
12 scribed in subparagraph (B) of this paragraph.

13 **“(B) CONDITIONS FOR CLAIM.—**

14 **“(i) IN GENERAL.—**A claim described
15 in this subparagraph is a claim—

16 **“(I) in a civil action brought**
17 **under—**

18 **“(aa) section 1980 or 1981**
19 **of the Revised Statutes (42**
20 **U.S.C. 1985, 1986); or**

21 **“(bb) section 2333 of title**
22 **18, United States Code; and**

23 **“(II) that, except as provided in**
24 **clause (ii), involves a case in which**
25 **the interactive computer service used**
26 **an algorithm, model, or other com-**

1 putational process to rank, order, pro-
2 mote, recommend, amplify, or simi-
3 larly alter the delivery or display of
4 information (including any text,
5 image, audio, or video post, page,
6 group, account, channel, or affiliation)
7 provided to a user of the service if the
8 information is directly relevant to the
9 claim.

1 “(bb) by average user rating
2 or number of user reviews;
3 “(cc) alphabetically;
4 “(dd) randomly; and
5 “(ee) by views, downloads,
6 or a similar usage metric; or
7 “(II) the algorithm, model, or
8 other computational process is used
9 for information for which a user spe-
10 cifically searches.

5

- 1 “(I) web hosting;
- 2 “(II) domain registration;
- 3 “(III) content delivery networks;
- 4 “(IV) caching;
- 5 “(V) data storage; and
- 6 “(VI) cybersecurity.”.

○

117TH CONGRESS
2D SESSION

S. 3608

To require the Federal Trade Commission to identify content-agnostic platform interventions to reduce the harm of algorithmic amplification and social media addiction on covered platforms, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 9, 2022

Ms. KLOBUCHAR (for herself and Ms. LUMMIS) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To require the Federal Trade Commission to identify content-agnostic platform interventions to reduce the harm of algorithmic amplification and social media addiction on covered platforms, 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 “Nudging Users to
5 Drive Good Experiences on Social Media Act” or the “So-
6 cial Media NUDGE Act”.

7 **SEC. 2. FINDINGS.**

8 Congress finds the following:

1 (1) Social media platforms can have significant
2 impacts on their users, both positive and negative.
3 However, social media usage can be associated with
4 detrimental outcomes, including on a user's mental
5 and physical health. Design decisions made by social
6 media platforms, such as decisions affecting the con-
7 tent a user might see on a social media platform,
8 may drive or exacerbate these negative or detri-
9 mental outcomes.

10 (2) Viral harmful content often spreads on so-
11 cial media platforms. Social media platforms do not
12 consistently enforce their terms of service and con-
13 tent policies, leading to supposedly prohibited con-
14 tent often being shown to users and amplified by
15 such platforms.

16 (3) Social media platforms often rely heavily on
17 automated measures for content detection and mod-
18 eration. These social media platforms may rely on
19 such automated measures due to the large quantity
20 of user-generated content on their platforms. How-
21 ever, evidence suggests that even state-of-the-art
22 automated content moderation systems currently do
23 not fully address the harmful content on social
24 media platforms.

1 (4) Significant research has found that content-
2 agnostic interventions, if made by social media plat-
3 forms, may help significantly mitigate these issues.
4 These interventions could be readily implemented by
5 social media platforms to provide safer user experi-
6 ences. Such interventions include the following:

7 (A) Nudges to users and increased platform viewing options, such as screen time alerts
8 and grayscale phone settings, which may reduce
9 addictive platform usage patterns and improve
10 user experiences online.
11

12 (B) Labels and alerts that require a user
13 to read or review user-generated content before
14 sharing such content.

15 (C) Prompts to users, which may help
16 users identify manipulative and microtargeted
17 advertisements.

18 (D) Other research-supported content-ag-
19 nostic interventions.

20 (5) Evidence suggests that increased adoption
21 of content-agnostic interventions would lead to im-
22 proved outcomes of social media usage. However, so-
23 cial media platforms may be hesitant to independ-
24 ently implement content-agnostic interventions that

1 will reduce negative outcomes associated with social
2 media use.

3 **SEC. 3. STUDY ON CONTENT-AGNOSTIC INTERVENTIONS.**

4 (a) STUDY TO IDENTIFY CONTENT-AGNOSTIC
5 INTERVENTIONS.—The Director of the National Science
6 Foundation (in this section referred to as the “Director”)
7 shall enter into an agreement with the National Academies
8 of Sciences, Engineering, and Medicine (in this section re-
9 ferred to as the “Academies”) to conduct ongoing studies
10 to identify content-agnostic interventions that covered
11 platforms could implement to reduce the harms of algo-
12 rithmic amplification and social media addiction on cov-
13 ered platforms. The initial study shall—

14 (1) identify ways to define and measure the
15 negative mental or physical health impacts related to
16 social media, including harms related to algorithmic
17 amplification and social media addiction, through a
18 review of—

19 (A) a wide variety of studies, literature, re-
20 ports, and other relevant materials created by
21 academic institutions, civil society groups, and
22 other appropriate sources; and

23 (B) relevant internal research conducted
24 by a covered platform or third-party research in
25 the possession of a covered platform that is vol-

1 untarily submitted to the Academies by the cov-
2 ered platform (through a process, established by
3 the Academies, with appropriate privacy safe-
4 guards);

5 (2) identify research-based content-agnostic
6 interventions, such as reasonable limits on account
7 creation and content sharing, to combat problematic
8 smartphone use and other negative mental or phys-
9 ical health impacts related to social media, including
10 through a review of the materials described in sub-
11 paragraphs (A) and (B) of paragraph (1);

12 (3) provide recommendations on how covered
13 platforms may be separated into groups of similar
14 platforms for the purpose of implementing content-
15 agnostic interventions, taking into consideration fac-
16 tors including any similarity among the covered plat-
17 forms with respect to—

18 (A) the number of monthly active users of
19 the covered platform and the growth rate of
20 such number;

21 (B) how user-generated content is created,
22 shared, amplified, and interacted with on the
23 covered platform;

24 (C) how the covered platform generates
25 revenue; and

1 (D) other relevant factors for providing
2 recommendations on how covered platforms
3 may be separated into groups of similar plat-
4 forms;

5 (4) for each group of covered platforms rec-
6 ommended under paragraph (3), provide rec-
7 ommendations on which of the content-agnostic
8 interventions identified in paragraph (2) are gen-
9 erally applicable to the covered platforms in such
10 group;

11 (5) for each group of covered platforms rec-
12 ommended under paragraph (3), provide rec-
13 ommendations on how the covered platforms in such
14 group could generally implement each of the con-
15 tent-agnostic interventions identified for such group
16 under paragraph (4) in a way that does not alter the
17 core functionality of the covered platforms, consid-
18 ering—

19 (A) whether the content-agnostic interven-
20 tion should be offered as an optional setting or
21 feature that users of a covered platform could
22 manually turn on or off with appropriate de-
23 fault settings to reduce the harms of algo-
24 rithmic amplification and social media addiction

1 on the covered platform without altering the
2 core functionality of the covered platform; and

3 (B) other means by which the content-ag-
4 nistic intervention may be implemented and
5 any associated impact on the experiences of
6 users of the covered platform and the core
7 functionality of the covered platform;

20 (b) REQUIREMENT TO SUBMIT ADDITIONAL RE-
21 SEARCH.—If a covered platform voluntarily submits inter-
22 nal research to the Academies under subsection (a)(1)(B),
23 the covered platform shall, upon the request of the Acad-
24 emies and not later than 60 days after receiving such a
25 request, submit to the Academies any other research in

1 the platform's possession that is closely related to such
2 voluntarily submitted research.

3 (c) REPORTS.—

4 (1) INITIAL STUDY REPORT.—Not later than 1
5 year after the date of enactment of this Act, the
6 Academies shall submit to the Director, Congress,
7 and the Commission a report containing the results
8 of the initial study conducted under subsection (a),
9 including recommendations for how the Commission
10 should establish rules for covered platforms related
11 to content-agnostic interventions as described in
12 paragraphs (1) through (5) of subsection (a).

13 (2) UPDATES.—Not later than 2 years after the
14 effective date of the regulations promulgated under
15 section 4, and every 2 years thereafter during the
16 10-year period beginning on such date, the Acad-
17 emies shall submit to the Director, Congress, and
18 the Commission a report containing the results of
19 the ongoing studies conducted under subsection (a).

20 Each such report shall—

21 (A) include analysis and updates to earlier
22 studies conducted, and recommendations made,
23 under such subsection;

24 (B) be based on—

1 (i) new academic research, reports,
2 and other relevant materials related to the
3 subject of previous studies, including addi-
4 tional research identifying new content-ag-
5 nostic interventions; and

6 (ii) new academic research, reports,
7 and other relevant materials about harms
8 occurring on covered platforms that are
9 not being addressed by the content-agnos-
10 tic interventions being implemented by cov-
11 ered platforms as a result of the regula-
12 tions promulgated under section 4;

13 (C) include information about the imple-
14 mentation of the content-agnostic interventions
15 by covered platforms and the impact of the im-
16 plementation of the content-agnostic interven-
17 tions; and

18 (D) include an analysis of any entities that
19 have newly met the criteria to be considered a
20 covered platform under this Act since the last
21 report submitted under this subsection.

22 SEC. 4. IMPLEMENTATION OF CONTENT-AGNOSTIC INTER- 23 VENTIONS.

24 (a) DETERMINATION OF APPLICABLE CONTENT-AG-
25 NOSTIC INTERVENTIONS—

7 (A) to determine how covered platforms
8 should be grouped together;

9 (B) to determine which content-agnostic
10 interventions identified in such report shall be
11 applicable to each group of covered platforms
12 identified in the report; and

13 (C) to require each covered platform to im-
14 plement and measure the impact of such con-
15 tent-agnostic interventions in accordance with
16 subsection (b).

17 (2) CONSIDERATIONS.—In the rulemaking pro-
18 ceeding described in paragraph (1), the Commis-
19 sion—

20 (A) shall consider the report under section
21 3(c)(1) and its recommendations; and

22 (B) shall not promulgate regulations re-
23 quiring any covered platform to implement a
24 content-agnostic intervention that is not dis-
25 cussed in such report.

1 (3) NOTIFICATION TO COVERED PLATFORMS.—

2 The Commission shall, not later than 30 days after
3 the promulgation of the regulations under this sub-
4 section, provide notice to each covered platform of
5 the content-agnostic interventions that are applicable
6 to the platform pursuant to the regulations promul-
7 gated under this subsection.

8 (b) IMPLEMENTATION OF CONTENT-AGNOSTIC 9 INTERVENTIONS.—

10 (1) IN GENERAL.—

11 (A) IMPLEMENTATION PLAN.—

12 (i) IN GENERAL.—Not later than 60
13 days after the date on which a covered
14 platform receives the notice from the Com-
15 mission required under subsection (a)(3),
16 the covered platform shall submit to the
17 Commission a plan to implement each con-
18 tent-agnostic intervention applicable to the
19 covered platform (as determined by the
20 Commission) in an appropriately prompt
21 manner. If the covered platform reasonably
22 believes that any aspect of an applicable
23 intervention is not technically feasible for
24 the covered platform to implement, would
25 substantially change the core functionality,

12

1 of the covered platform, or would pose a
2 material privacy or security risk to con-
3 sumer data stored, held, used, processed,
4 or otherwise possessed by such covered
5 platform, the covered platform shall in-
6 clude in its plan evidence supporting these
7 beliefs in accordance with paragraph (2).

8 (ii) COMMISSION DETERMINATION.—
9 Not later than 30 days after receiving a
10 covered platform's plan under clause (i),
11 the Commission shall determine whether
12 such plan includes details related to the
13 appropriately prompt implementation of
14 each content-agnostic intervention applica-
15 ble to the covered platform, except for any
16 aspect of an intervention for which the
17 Commission determines the covered plat-
18 form is exempt under paragraph (2).

19 (iii) APPEAL OR REVISED PLAN.—

20 (I) IN GENERAL.—Subject to
21 subclause (II), if the Commission de-
22 termines under clause (ii) that a cov-
23 ered platform's plan does not satisfy
24 the requirements of this subsection,
25 not later than 90 days after the

1 issuance of such determination, the
2 covered platform shall—

3 (aa) appeal the determina-
4 tion by the Commission to the
5 United States Court of Appeals
6 for the Federal Circuit; or

7 (bb) submit to the Commis-
8 sion a revised plan for a Commis-
9 sion determination pursuant to
10 clause (ii).

11 (II) LIMITATION.—If a covered
12 platform submits 3 revised plans to
13 the Commission for a determination
14 pursuant to clause (ii) and the Com-
15 mission determines that none of the
16 revised plans satisfy the requirements
17 of this subsection, the Commission
18 may find that the platform is not act-
19 ing in good faith in developing an im-
20 plementation plan and may require
21 the platform to implement, pursuant
22 to a plan developed for the platform
23 by the Commission, each content-ag-
24 nostic intervention applicable to the
25 platform (as determined by the Com-

1 mission) in an appropriately prompt
2 manner.

3 (B) STATEMENT OF COMPLIANCE.—Not
4 less frequently than annually, each covered plat-
5 form shall make publicly available on their
6 website and submit to the Commission, in a
7 machine-readable format and in a privacy-pre-
8 serving manner, the details of—

9 (i) the covered platform's compliance
10 with the required implementation of con-
11 tent-agnostic interventions; and

12 (ii) the impact (using the metrics de-
13 fined by the Director of the National
14 Science Foundation and the National
15 Academies of Sciences, Engineering, and
16 Medicine pursuant to section 3(a)(6)) of
17 such content-agnostic interventions on re-
18 ducing the harms of algorithmic amplifi-
19 cation and social media addiction on cov-
20 ered platforms.

21 (2) FEASIBILITY, FUNCTIONALITY, PRIVACY,
22 AND SECURITY EXEMPTIONS.—

23 (A) STATEMENT OF INAPPLICABILITY.—
24 Not later than 60 days after the date on which
25 a covered platform receives the notice from the

1 Commission required under subsection (a)(3), a
2 covered platform seeking an exemption from
3 any aspect of such rule may submit to the Com-
4 mission—

5 (i) a statement identifying any specific
6 aspect of a content-agnostic intervention
7 applicable to such covered platform (as de-
8 termined by the Commission under sub-
9 section (a)) that the covered platform rea-
10 sonably believes—

11 (I) is not technically feasible for
12 the covered platform to implement;

13 (II) will substantially change the
14 core functionality of the covered plat-
15 form; or

16 (III) will create a material and
17 imminent privacy or security risk to
18 the consumer data stored, held, used,
19 processed, or otherwise possessed by
20 such covered platform; and

21 (ii) specific evidence supporting such
22 belief, including any relevant information
23 regarding the core functionality of the cov-
24 ered platform.

1 (B) DETERMINATION BY THE COMMIS-
2 SION.—Not later than 30 days after receiving a
3 covered platform’s statement under subpara-
4 graph (A), the Commission shall determine
5 whether the covered platform shall be exempt
6 from any aspect of a content-agnostic interven-
7 tion discussed in the covered platform’s state-
8 ment.

9 (C) APPEAL OR REVISED PLAN.—Not later
10 than 90 days after a determination issued
11 under subparagraph (B), a covered platform
12 may—

13 (i) appeal the determination by the
14 Commission to the United States Court of
15 Appeals for the Federal Circuit; or

16 (ii) submit to the Commission a re-
17 vised plan, including details related to the
18 prompt implementation of any content-ag-
19 nostic intervention for which the covered
20 platform requested an exemption that the
21 Commission subsequently denied, for a
22 Commission determination pursuant to
23 paragraph (1)(A)(ii).

1 SEC. 5. TRANSPARENCY REPORT.

2 Not later than 180 days after the date of enactment
3 of this Act, and semiannually thereafter, each covered
4 platform shall publish a publicly available, machine-read-
5 able report about the content moderation efforts of the
6 covered platform with respect to each language spoken by
7 not less than 100,000 monthly active users of the covered
8 platform in the United States. Such report shall include
9 the following:

10 (1) CONTENT MODERATORS.—The total number
11 of individuals employed or contracted by the covered
12 platform during the reporting period to engage in
13 content moderation for each language, broken down
14 by the number of individuals retained as full-time
15 employees, part-time employees, and contractors of
16 the covered platform and reported in a privacy-pre-
17 serving manner.

18 (2) RANDOM SAMPLE OF VIEWED CONTENT.—
19 Information related to a random sample of publicly
20 visible content accounting for 1,000 views each
21 month. Each month, covered platforms shall cal-
22 culate the total number of views for each piece of
23 publicly visible content posted during the month and
24 sample randomly from the content in a manner such
25 that the probability of a piece of content being sam-
26 pled is proportionate to the total number of views of

1 that piece of content during the month. Covered
2 platforms shall report the following information
3 about each piece of sampled content (with appro-
4 priate redactions to exclude the disclosure of illegal
5 content):

6 (A) The text, images, audio, video, or other
7 creative data associated with each such piece of
8 content.

9 (B) The details of the account or accounts
10 that originally posted the content.

11 (C) The total number of views of each such
12 piece of content during the month.

13 (3) HIGH REACH CONTENT.—Content modera-
14 tion metrics broken down by language to assess the
15 prevalence of harmful content on the covered plat-
16 form, including, for each language, the 1,000 most
17 viewed pieces of publicly visible content each month,
18 including the following (with appropriate redactions
19 to exclude the disclosure of illegal content):

20 (A) The text, images, audio, video, or other
21 creative data associated with each such piece of
22 content.

23 (B) The details of—
24 (i) the account that originally posted
25 the content; and

1 (ii) any account whose sharing or re-
2 posting of the content accounted for more
3 than 5 percent of the views of the content.

4 (4) REMOVED AND MODERATED CONTENT.—

5 (A) IN GENERAL.—Aggregate metrics for
6 user-generated content that is affected by any
7 automated or manual moderation system or de-
8 cision, including, as calculated on a monthly
9 basis and reported in a privacy-preserving man-
10 ner, the number of pieces of user-generated
11 content and the number of views of such con-
12 tent that were—

13 (i) reported to the covered platform by
14 a user of the covered platform;

15 (ii) flagged by the covered platform by
16 an automated content detection system;

17 (iii) removed from the covered plat-
18 form and not restored;

19 (iv) removed from the covered plat-
20 form and later restored; or

21 (v) labeled, edited, or otherwise mod-
22 erated by the covered platform following a
23 user report or flagging by an automated
24 content detection system.

4 (i) the language of the user-generated
5 content;

6 (ii) the topic of the user-generated
7 content, such as bullying, hate speech,
8 drugs and firearms, violence and incite-
9 ment, or any other category determined by
10 the covered platform to categorize such
11 content; and

12 (iii) if the covered platform has a
13 process for publicly verifying that an ac-
14 count on the platform belongs to a promi-
15 nent user or public figure, whether the cre-
16 ator of the content is a politician or jour-
17 nalist with a verified account.

18 SEC. 6. ENFORCEMENT.

19 (a) UNFAIR OR DECEPTIVE ACTS OR PRACTICES.—
20 A violation of section 3(b), 4, or 5 or a regulation promul-
21 gated under section 4 shall be treated as a violation of
22 a rule defining an unfair or deceptive act or practice pre-
23 scribed under section 18(a)(1)(B) of the Federal Trade
24 Commission Act (15 U.S.C. 57a(a)(1)(B)).

25 (b) POWERS OF THE COMMISSION.—

23 (4) AUTHORITY PRESERVED.—Nothing in this
24 Act shall be construed to limit the authority of the
25 Commission under any other provision of law.

1 SEC. 7. DEFINITIONS.

2 In this Act:

3 (1) ALGORITHMIC AMPLIFICATION.—The term
4 “algorithmic amplification” means the promotion,
5 demotion, recommendation, prioritization, or de-
6 prioritization of user-generated content on a covered
7 platform to other users of the covered platform
8 through a means other than presentation of content
9 in a reverse-chronological or chronological order.10 (2) COMMISSION.—The term “Commission”
11 means the Federal Trade Commission.12 (3) CONTENT MODERATION.—The term “con-
13 tent moderation” means the intentional removal, la-
14 beling, or altering of user-generated content on a
15 covered platform by the covered platform or an auto-
16 mated or human system controlled by the covered
17 platform, including decreasing the algorithmic rank-
18 ing of user-generated content, removing user-gen-
19 erated content from algorithmic recommendations,
20 or any other action taken in accordance with the
21 covered platform’s terms of service, community
22 guidelines, or similar materials governing the con-
23 tent allowed on the covered platform.24 (4) CONTENT-AGNOSTIC INTERVENTION.—The
25 term “content-agnostic intervention” means an ac-
26 tion that can be taken by a covered platform to alter

1 a user's experience on the covered platform or the
2 user interface of the covered platform that does
3 not—

4 (A) rely on the substance of user-generated
5 content on the covered platform; or
6 (B) alter the core functionality of the cov-
7 ered platform.

11 (A) is operated for commercial purposes;
12 (B) provides a forum for user-generated
13 content;

14 (C) is constructed such that the core
15 functionality of the website or application is to
16 facilitate interaction between users and user-
17 generated content; and

18 (D) has more than 20,000,000 monthly ac-
19 tive users in the United States for a majority
20 of the months in the previous 12-month period.

1 being used, either on its own or in combination with
2 other readily accessible information, to uniquely
3 identify an individual.

4 (7) USER.—The term “user” means a person
5 that uses a covered platform, regardless of whether
6 that person has an account or is otherwise registered
7 with the platform.

8 (8) USER-GENERATED CONTENT.—The term
9 “user-generated content” means any content, includ-
10 ing text, images, audio, video, or other creative data
11 that is substantially created, developed, or published
12 on a covered platform by any user of such covered
13 platform.

○

Advanced Television Systems and their Impact upon the Existing Television Broadcast Service: Fourth Report and Order

FCC 96-493 (Dec. 27, 1996)

I. Introduction

1. In this, the Fourth Report and Order in our digital television (“DTV”) proceeding, we adopt a standard for the transmission of digital television. This standard is a modification of the ATSC DTV Standard proposed in the Fifth Further Notice of Proposed Rule Making and is consistent with a consensus agreement voluntarily developed by a broad cross-section of parties, including the broadcasting, consumer equipment manufacturing and computer industries. As explained below, the Standard we adopt does not include requirements with respect to scanning formats, aspect ratios, and lines of resolution. For clarity, we will refer to this modified standard as the “DTV Standard.” ***

II. Background

4. This proceeding began in 1987, when we issued our first inquiry into the potential for advanced television (“ATV”) services. *** In the fall of 1987, a few months after initiating this rulemaking proceeding, we established the Advisory Committee on Advanced Television Service (“Advisory Committee” or “ACATS”) to provide recommendations concerning technical, economic and public policy issues associated with the introduction of ATV service. Early in the process we decided that no additional spectrum would be allocated for television broadcasting, but that existing broadcasters should be permitted to upgrade their transmission technology so long as the public remains served throughout any transition period. We later decided “that an ATV system that transmits the increased information of an ATV signal in a separate 6 MHz channel independent from an existing NTSC channel will allow for ATV introduction in the most non-disruptive and efficient manner.” As the proceeding progressed, all-digital advanced television systems were developed and we began to refer to advanced television as digital television (“DTV”) in recognition that, with the development of the technology, it was decided any ATV system was certain to be digital. In February of 1993, the Advisory Committee reported that a digital HDTV system was achievable, but that all four competing digital systems then under consideration would benefit significantly from further development and none would be recommended over the others at that time. In May of 1993, seven companies and institutions that had been proponents of the four tested digital ATV systems, joined together in a “Grand Alliance” to develop a final digital ATV system for the standard. Over the next two-and-a-half years, that system was developed, extensively tested, and is documented in the ATSC DTV Standard. On November 28, 1995, the Advisory Committee voted to recommend the Commission’s adoption of the ATSC DTV Standard.

5. The system described by the ATSC DTV Standard is generally recognized to represent a significant technological breakthrough. It includes discrete subsystem descriptions, or “layers,” for video source coding and compression, audio source coding and compression, service multiplex and transport, and RF/transmission. In addition to being able to broadcast one, and under some circumstances two, high definition television (“HDTV”) programs, the Standard allows for multiple streams, or “multicasting,” of Standard Definition Television (“SDTV”) programming at a visual quality better than the current analog signal. Utilizing this Standard, broadcasters can transmit

three, four, five, or more such program streams simultaneously. The Standard allows for the broadcast of literally dozens of CD-quality audio signals. It permits the rapid delivery of large amounts of data; an entire edition of the local daily newspaper could be sent, for example, in less than two seconds. Other material, whether it be telephone directories, sports information, stock market updates, information requested concerning certain products featured in commercials, computer software distribution, interactive education materials, or virtually any other type of information access can also be provided. It allows broadcasters to send, video, voice and data simultaneously and to provide a range of services dynamically, switching easily and quickly from one type of service to another. For example, a broadcaster could transmit a news program consisting of four separate, simultaneous SDTV program streams for local news, national news, weather and sports; then transmit an HDTV commercial with embedded data about the product; then transmit a motion picture in an HDTV format simultaneously with unrelated data. As stated by the HDTV Grand Alliance:

The ATSC DTV Standard based on the Grand Alliance system represents by far the world's best digital broadcast television system, with unmatched flexibility and unprecedented ability to incorporate future improvements. Implementing this technology will dramatically increase the technical quality of broadcast television, helping to preserve for consumers and for our democratic society the benefits of a vibrant and healthy free over-the-air television service in the future. In addition, deploying this technology will give consumers access to a host of potential information services that can help meet pressing needs in health care, education and other areas....

*** 7. *** On November 25, 1996, representatives of a broad cross section of the broadcast, computer and receiver manufacturing industries reached an agreement ("the Agreement") and, the following day, submitted it to the Commission. The Agreement stated that the FCC should adopt the voluntary ATSC DTV Standard ***. On November 27, 1996, the Commission released a Public Notice soliciting comment on the Agreement. Comments were filed December 6, 1996.

III. Comments

8. Technical Standards for DTV. *** There is widespread agreement among commenters that selection of a DTV standard should be analyzed in terms of network effects, that is the indirect benefits that accrue to other DTV users when any particular user adopts DTV. Broadcasters, computer interests and cable interests agree that broadcasting is a network product; that issues surrounding selection of a DTV standard are influenced by network effects; and that in order to evaluate the various alternatives, it is important to understand how network effects will operate. While commenters agreed on a common analytical framework, they disagreed on the relative severity of the startup, coordination and potential splintering problems facing digital broadcast television. Startup refers to the situation where everyone would be better off adopting DTV technology but no one has the incentive to move first. Coordination is the collaborative effort by broadcasters, consumer equipment manufacturers, and program producers that is necessary to introduce DTV. Splintering refers to the breakdown of the consensus or agreement to use the DTV Standard.

9. Commenters also disagreed on the availability and effectiveness of market-based mechanisms to solve these problems and to facilitate the goals and objectives established in this proceeding. Broadcasters, equipment manufacturers and some consumer

groups contend that DTV has startup, coordination and splintering problems that are more severe than those of other network industries and that a DTV standard adopted by the Commission is needed to overcome these problems. In contrast, cable and computer interests contend that all sectors of the broadcast industry have significant incentives to reach a consensus on transmission and reception standards without a government mandate.

10. Broadcasters warn that a market-driven selection of a standard would result in barriers to the introduction of DTV if different incompatible systems develop. Under a market-based approach, for example, broadcasters in the same community could select different and incompatible transmission systems so that consumers would only be able to obtain service from those television stations using the system that is compatible with the receiver they have purchased and be denied access to those using another transmission system. Broadcasters maintain that a government-mandated standard is essential to ensure a universally available, advertiser-supported over-the-air digital broadcast service in the future. In contrast, cable interests do not agree that there are unique characteristics or public policy goals attendant to broadcast DTV, or that there would be a market failure unless a mandatory transmission standard is adopted.

IV. The Digital Television Standard ***

31. In the Fifth Further Notice, we proposed to adopt the ATSC DTV Standard. In addition to requesting comment on our proposal, we requested comment on alternative approaches to requiring a standard and specifically mentioned two options previously identified by the Commission: 1) authorizing use of a standard and prohibiting interference to it, but not requiring the use of that standard; and 2) adopting a standard for allocation and assignment purposes only. We also sought comment on requiring use of some layers of the ATSC DTV Standard but making others optional. In this Report and Order, we decide to adopt this last alternative and to require the use of all layers of the ATSC DTV Standard, except the video format layer, which will remain optional.

32. Our decision today to adopt the ATSC DTV Standard, as modified, is based on a careful weighing and balancing of the various goals and objectives outlined in this proceeding. We conclude that adopting the DTV Standard will fulfill the four objectives set out in the Fifth Further Notice.

33. First, we conclude that the DTV Standard will serve our goal of ensuring that all affected parties have sufficient confidence and certainty in order to promote the smooth introduction of a free and universally available digital broadcast television service. As we have recognized before, broadcast television is unique. It is free, available to nearly every American, and many Americans rely on broadcast television programming as a primary source of information and entertainment. Because of these characteristics, we stated that the goals of certainty and reliability take on special significance and strengthen the case for our adoption of a DTV standard. The DTV Standard we adopt today will help ensure that broadcast television remains available to all Americans in the digital era.

34. Many commenters argued that startup, coordination and potential splintering problems are so severe in digital broadcast television that they cannot be adequately solved without the Commission adopting a single DTV standard. We recognize that these problems may be more troublesome for digital broadcast television than cable,

DBS, MMDS and other subscription video services which have a greater degree of control over the equipment used by their customers. While we are not convinced that these problems are so severe that they would absolutely preclude us from allowing the market to operate without a set standard, we are concerned that market solutions may result in more than one sustainable transmission standard. Such an outcome might result in compatibility problems and increase the risk that consumer DTV equipment purchased in one city would not work well in another city; that a receiver would not display all the broadcast channels in a city; or that a digital television set purchased one year might not work several years later. Such results would hurt consumers and make it more difficult to preserve a universally available broadcast television service.

35. More than one transmission standard could also cause some consumers and licensees to postpone purchasing DTV equipment, because they do not wish to take the risk of investing in what may soon become obsolete technology, or because they believe better technologies will soon become available. This could slow investment during the early stages of the transition to DTV and, thereby, slow the transition to DTV.

36. In addition, more than one transmission standard would make it more difficult to facilitate an efficient allotment of broadcast channels and protect against interference. Determining interference performance becomes more complicated as the number of transmission systems increases, because each system's interference characteristics must be tested against every other system. This could complicate moving some licensees to new channels following the conversion to DTV and decrease the amount of spectrum recovered.

37. For all of these reasons, we believe that adopting the DTV Standard provides additional certainty that the public policy goals unique to broadcast DTV are realized. Simply protecting a standard, or using a standard for allocation purposes would not address our concerns with "wait-and-see" behavior and preserving a universally available broadcast television service. We also reject the argument that the Agreement is too restrictive and still includes too many mandatory aspects of the DTV Standard. As more fully explained below, we believe that the entire DTV Standard is needed to achieve our goals.

38. Second, we conclude that adopting the DTV Standard will increase the availability of new products and services for consumers. The DTV Standard is flexible and extensible and permits data broadcasting as well as new services. With respect to data broadcasting, the DTV Standard provides for multiple 19 Mega (Million) bits per second ("Mbps") digital pipelines directly into the home of every American. While we would anticipate that licensees would, at the very least, continue to provide tomorrow what consumers have come to expect today—that is, at least one free program per 6 MHz channel—we also expect to authorize its use to transmit, for example, newspapers, stock market or sports data and, perhaps of greatest significance, software applications directly to computing devices.

39. Third, we conclude that incorporating the DTV Standard into our Rules will encourage technological innovation and competition. In particular, we conclude that our decision not to specify video formats will result in greater choice and diversity of equipment, allow computer equipment and software firms more opportunity to compete by promoting interoperability, and result in greater consumer benefits by allowing an increase in the availability of new products and services. By not adopting video

formats, we are allowing consumers to choose which formats are most important to them. Thus, we avoid the possibility that we could inhibit development of services which might, in fact, draw consumers more readily to embrace digital broadcasting and thus, hasten its adoption. By not specifying video formats in this respect we foster competition among those aspects of the technology where we are least able to predict the outcome, choosing instead to rely upon the market and consumer demand.

40. Moreover, the DTV Standard itself is highly extensible. The DTV Standard remains fully digital and incorporates packet identifiers (“PIDs”) which provide a large amount of “headroom” for further development without requiring changes to the DTV Standard. We note that ATSC is already at work on technical standards to facilitate data broadcasting with DTV systems. It has formed a new ATSC Specialist Group on Data Broadcasting to develop data broadcasting standards that “will provide the mechanism for distribution of computer files including programs (executable code) and data.”

41. Furthermore, there is little risk in such extensibility making obsolete consumer investment in digital receivers or decoders. While not all receivers would be capable of interpreting new PIDs, we are satisfied that, “[b]ackward compatibility is assured when new bit streams are introduced into the transport system as existing decoders will automatically ignore new PIDs” and continue to decode and display the intended material. The resultant conditions would be reminiscent of the introduction of color or stereo sound to the NTSC system. Earlier equipment continued to work unimpaired even as newer equipment provided additional or improved features.

42. Finally, we conclude that adopting this Standard provides for the minimum of regulation needed to provide for a smooth transition. At the same time, we provide the certainty needed for the transition. The DTV Standard eliminates an unnecessary government requirement by not specifying video formats. A key point of contention throughout this proceeding has been the migration to progressive scan transmission formats. While almost all parties agree that, ultimately, progressive scanning is superior to interlaced across a variety of dimensions, the record has been marked by dissent and contradiction about the desirability of allowing both interlaced and progressive scanning, given the over-the-air bandwidth limitation of 6 MHz. Adoption of the DTV Standard, which will allow video formats to be tested and decided by the market, avoids the risk of a mistaken government intervention in the market and is consistent with the deregulatory direction of the Telecommunications Act of 1996. ***

44. We recognize that although there was substantial praise among members of the broadcasting, equipment manufacturing and computer industries, support for the Agreement was not unanimous. The Coalition of Film Makers was party to the negotiations that resulted in the Agreement, but did not join in its support and opposes the Agreement because it does not require the display of films in the films’ original aspect ratios. We note, however, that consistent with the Agreement, we are not adopting Table 3 of the ATSC DTV Standard as part of the DTV Standard, and thus not adopting any particular aspect ratio. This goes far in meeting the Film Makers’ initially expressed concerns that by adopting Table 3 we might prevent films from being displayed in their original aspect ratio. We are sensitive to the concerns of film makers but note that the standard we adopt will allow pass-through of films in whatever format they are provided to broadcasters by distributors. The DTV Standard we are adopting not only does not impose any impediment to the display of films in their

original aspect ratios, but to the extent that resolution of displays is improved and a wide aspect ratio is adopted by consumers, the display of films in their original aspect ratios might be promoted.

46. We are not persuaded by those who contend that not specifying video formats in the DTV Standard will inject uncertainty into the transition process and delay implementation of digital television. As explained above, we believe that by adopting a transmission standard, we are providing the appropriate level of certainty that the digital television market will need to move forward. Our belief in this regard is supported by the fact that the major industries affected by this decision have reached an agreement that video formats need not be part of the DTV Standard. The confidence expressed by these parties gives us reasonable assurance it is not necessary to require video formats. We recognize that some parties contend that the Commission should not rely on the Agreement in considering an appropriate digital standard. As the analysis above shows, we are not relying solely on the fact that these parties reached agreement. Nevertheless, we believe the consensus flows from a sufficiently broad segment of the affected industries to warrant our recognition of the end result and factor it into our analysis. ***

VI. Licensing Technology

54. In earlier phases of this proceeding we indicated that, in order for DTV to be successfully implemented, the patents on the technology would have to be licensed to other manufacturing companies on reasonable and nondiscriminatory terms. We noted that the system proponents that participated in the Advisory Committee's competitive testing process were required to submit a statement that they would comply with the ANSI patent policies. The proponents agreed to make any relevant patents that they owned available either free of charge or on a reasonable, nondiscriminatory basis and we stated that we intended to condition selection of a DTV system on such commitments. In the Fifth Further Notice, we sought additional comment on whether more detailed information on the specific terms of such patent licensing, how pending patents will be licensed, or any other intellectual property issues should be considered.

55. It appears that licensing of the patents for DTV technology will not be an impediment to the development and deployment of DTV products for broadcasters and consumers. We reiterate that adoption of this standard is premised on reasonable and nondiscriminatory licensing of relevant patents, but believe that greater regulatory involvement is not necessary at this time. We remain committed to this principle and if a future problem is brought to our attention, we will consider it and take appropriate action.

IX. Conclusion

61. This Report and Order is one of the crucial milestones in our effort to ensure that the benefits of digital technology are available to terrestrial television broadcasting and to the American public. We believe that the course we are taking will provide the certainty that many broadcasters, equipment manufacturers and consumers need to invest with confidence in new technology while at the same time preserving the flexibility to accommodate innovation and experimentation. In doing so, we believe our decision will provide many benefits to American consumers. We believe that the inter-industry agreement has provided us with a valuable roadmap to resolve seemingly conflicting goals. After thorough review of the record and reflection on these issues, we believe our decision strikes a proper balance in achieving all of our goals. Accordingly,

we will incorporate into our Rules, by reference, the ATSC Digital Television Standard ***.

Advanced Television Systems and their Impact upon the Existing Television Broadcast Service: Fifth Report and Order

FCC 97-116 (April 21, 1997)

I. INTRODUCTION

1. Television has played a critical role in the United States in the second half of the twentieth century. A technological breakthrough—digital television—now offers the opportunity for broadcast television service to meet the competitive and other challenges of the twenty-first century.

2. The Telecommunications Act of 1996 (“1996 Act”) provided that initial eligibility for any advanced television licenses issued by the Commission should be limited to existing broadcasters, conditioned on the eventual return of either the current 6 MHz channel or the new digital channel. Today we adopt rules to implement the statute. ***

II. ISSUE ANALYSIS

A. Goals

*** 4. *** These goals can be distilled into the two essential objectives that underlie the decisions we make today.

5. First, we wish to promote and preserve free, universally available, local broadcast television in a digital world. Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast television’s unique benefit: free, widely accessible programming that serves the public interest. DTV will also help ensure robust competition in the video market that will bring more choices at less cost to American consumers. Particularly given the intense competition in video programming, and the move by other video programming providers to adopt digital technology, it is desirable to encourage broadcasters to offer digital television as soon as possible. We make decisions today designed to promote the viability of digital television services. Digital broadcasters must be permitted the freedom to succeed in a competitive market, and by doing so, attract consumers to digital. In addition, broadcasters’ ability to adapt their services to meet consumer demand will be critical to a successful initiation of DTV.

6. Second, we wish to promote spectrum efficiency and rapid recovery of spectrum. Decisions that promote the success of digital television—our first goal—promote this goal as well. The more quickly that broadcasters and consumers move to digital, the more rapidly spectrum can be recovered and then be reallocated or reassigned, or both. The faster broadcasters roll out digital television, the earlier we can recover spectrum.

7. Our decisions today further these goals. They ensure that broadcasters have more flexibility in their business. Broadcasters will be able to experiment with innovative offerings and different service packages as they continue to provide at least one free program service and meet their public-interest obligations. We choose to impose few restrictions on broadcasters and to allow them to make decisions that will further their ability to respond to the marketplace. We leave to broadcasters’ business judgment such decisions as whether to provide high definition television or whether, initially, to

simulcast the NTSC stream on DTV, and what and how many ancillary and supplementary services to provide. To aid the launch of digital services, we provide for a rapid construction of digital facilities by network-affiliated stations in the top markets, in order to expose a significant number of households, as early as possible, to the benefits of DTV. We require those most able to bear the risks of introducing digital television to proceed most quickly. Our decisions here will foster the swift development of DTV, which should enable us to meet our target of ending NTSC service by 2006. To permit careful monitoring of the development of digital television and an opportunity to reassess the decisions we make today, we intend to conduct a review of DTV every two years until the cessation of NTSC service.

B. Channel Bandwidth

8. Background. In the *Fourth Further Notice/Third Inquiry*, we noted that we had previously decided that DTV would be introduced by assigning existing broadcasters a temporary channel on which to operate a DTV station during the transition period. We also noted that the DTV transmission system was designed for a 6 MHz channel and added that “we continue to believe that providing 6 MHz channels for ATV purposes represents the optimum balance of broadcast needs and spectrum efficiency.” ***

9. Comments. All broadcasters filing comments support affording a second 6 MHz channel per broadcaster for DTV. ***

10. However, Media Access Project, et al. (“MAP”) argues that the Commission should provide broadcasters only enough spectrum to provide one “free” digital program service, either by allocating less than 6 MHz channels to broadcasters, by allocating the spectrum to others and only affording broadcasters “must carry” rights; or by allocating the spectrum to broadcasters but requiring them to lease out excess capacity to unaffiliated programmers. ***

11. Decision. We invited comment in the *Fourth Further Notice/Third Inquiry* on any means of achieving greater spectrum efficiency. Based on the comments, we continue to believe that providing 6 MHz channels for DTV purposes “represents the optimum balance of broadcast needs and spectrum efficiency.” See *Fourth Further Notice/Third Inquiry*, *supra*, at 10543. We do not believe that greater spectrum efficiency can be achieved by adopting a different channel size. Indeed, use of 6 MHz channels would facilitate spectrum efficiency because making the DTV channel the same width as the analog channel will afford greater flexibility at the end of the transition in terms of the choice of channel the broadcaster retains for DTV purposes.

12. Moreover, contrary to those comments that disagreed with allotting 6 MHz channels for DTV, we believe that the use of 6 MHz channels is necessary to provide viewers and consumers the full benefits of digital television made possible by the DTV Standard, including high definition television (“HDTV”), standard definition television, and other digital services. The DTV Standard was premised on the use of 6 MHz channels. To specify a different channel size at this late date would not promote our goals in adopting the DTV Standard and would prolong the conversion to DTV. Specifically, we believe that failing to specify a 6 MHz channel would undermine our goals, expressed in the *Fourth Report and Order*, of fostering an expeditious and orderly transition to digital technology and managing the spectrum to permit the recovery of contiguous blocks of spectrum and promote spectrum efficiency. The conversion to DTV

would undoubtedly be significantly delayed if we set aside the longstanding expectations of the parties, on which they have based the technology and established their plans, and specified a different channel bandwidth. Accordingly, we reaffirm our earlier judgment and will allot 6 MHz channels for DTV.

C. Eligibility

13. Background. We proposed to limit initial eligibility for DTV channels to existing broadcasters. Our proposed criteria for existing broadcasters included full-service television broadcast station licensees, permittees authorized as of October 24, 1991, and parties with applications for a construction permit on file as of October 24, 1991, who are ultimately awarded a full-service broadcast license. After release of the *Fourth Further Notice/Third Inquiry*, Congress statutorily addressed eligibility in the 1996 Act. Congress instructed the Commission to limit the initial eligibility for advanced television licenses to persons that, as of the date of the issuance of the licenses, are licensed to operate a television broadcast station or hold a permit to construct such a station. The 1996 Act did not change the fact that the Commission lacks statutory authority to auction broadcast spectrum. ***

17. Decision. In the 1996 Act, Congress specifically addressed the eligibility issue. Congress provided that the Commission “should limit the initial eligibility for [DTV] licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct a station (or both) . . .” 47 U.S.C. 336(a)(1). *** Following Congress’ direction, we determine that initial eligibility should be limited to those broadcasters who, as of the date of issuance of the initial licenses, hold a license to operate a television broadcast station or a permit to construct such a station, or both. ***

D. Definition of Service

1. SPECTRUM USE

19. Background. The *Fourth Further Notice/Third Inquiry* reaffirmed our intention to preserve and promote universal, free, over-the-air television. We recognized that broadcast television has become an important part of American life and thus stated “we envision that the 6 MHz channel earmarked for [DTV] will be used for free, over-the-air broadcasting.” We also recognized the increased flexibility that DTV offered broadcasters and noted that “allowing at least some level of flexibility would increase the ability of broadcasters to compete in an increasingly competitive marketplace, and would allow them to serve the public with new and innovative services.”

20. The DTV Standard, adopted by the Commission in the *Fourth Report and Order*, See 47 C.F.R. 73.682(d), permits broadcasters to offer a variety of services. It allows broadcasters to offer free television of higher resolution than analog technology. It allows the broadcast of at least one, and under some circumstances two, high definition television programs; and it allows “multicasting,” the simultaneous transmission of three, four, five, or more digital programs. The Standard also allows for the broadcast of CD-quality audio signals. And it permits the rapid delivery of large amounts of data: an entire edition of the local newspaper in less than two seconds, sports information, computer software, telephone directories, stock market updates, interactive educational materials and, indeed, any information that can be translated into digital bits. In addition to allowing broadcasters to transmit video, voice, and data simultaneously, the DTV Standard allows broadcasters to do so dynamically, meaning that they

can switch back and forth quickly and easily. For example, a broadcaster could transmit a news program consisting of four separate SDTV programs for local news, national news, weather and sports; while interrupting that programming with a single high definition television commercial with embedded data about the product; or transmit a motion picture in a high definition format, while simultaneously using the excess capacity for transmission of data unrelated to the movie. ***

27. Decision. As we have noted before, an overarching goal of this proceeding is to promote the success of a *free*, local television service using digital technology. ***

28. We expect that the fundamental use of the 6 MHz DTV license will be for the provision of free over-the-air television service. In order to ease the transition from our current analog broadcasting system to a digital system, we will require broadcasters to provide on their digital channel the free over-the-air television service on which the public has come to rely. Specifically, broadcasters must provide a free digital video programming service the resolution of which is comparable to or better than that of today's service and aired during the same time periods that their analog channel is broadcasting.

29. We wish to preserve for viewers the public good of free television that is widely available today. At the same time, we recognize the benefit of permitting broadcasters the opportunity to develop additional revenue streams from innovative digital services. This will help broadcast television to remain a strong presence in the video programming market that will, in turn, help support a free programming service. Thus, we will allow broadcasters flexibility to respond to the demands of their audience by providing ancillary and supplementary services that do not derogate the mandated free, over-the-air program service. Ancillary and supplementary services could include, but are not limited to, subscription television programming, computer software distribution, data transmissions, teletext, interactive services, audio signals, and any other services that do not interfere with the required free service. ***

33. Moreover, we believe that the approach we take here will serve the public interest by fostering the growth of innovative services to the public and by permitting the full possibilities of the DTV system to be realized. One of our goals is to promote spectrum efficiency. Encouraging an expeditious transition from analog to digital television and a quick recovery of spectrum will promote that goal. By permitting broadcasters to assemble packages of services that consumers desire, we will promote the swift acceptance of DTV and the penetration of DTV receivers and converters. That, in turn, will help promote the success of the free television service. As discussed above, digital television promises a wealth of possibilities in terms of the kinds and numbers of enhanced services that could be provided to the public. Indeed, we believe that giving broadcasters flexibility to offer whatever ancillary and supplementary services they choose may help them attract consumers to the service, which will, in turn, hasten the transition. In addition, the flexibility we authorize should encourage entrepreneurship and innovation. For example, it may encourage the development of compression technologies that could allow even more digital capacity on a 6 MHz channel, paving the way for multiple high definition programs and more free programming than would otherwise be offered. ***

2. HIGH DEFINITION

37. Background. In the *Fourth Further Notice/Third Inquiry*, the Commission *** requested comment as to whether it should require broadcasters to provide a minimum

amount of high definition television and, if so, what minimum amount should be required.

38. Comments. Many commenters are opposed to a minimum HDTV requirement. Commenters urging the Commission not to apply a minimum HDTV requirement but rather to leave that determination to the marketplace and thus to broadcasters and viewers include the National Association of Broadcasters (“NAB”), ALTV, the Benton Foundation, Microsoft Corporation, Telemundo Group, Inc. (“Telemundo”), and AAPTS/PBS. NAB notes that mandating a certain amount of HDTV could impair broadcasters’ ability rapidly to fuel development of the DTV market with complementary program offerings and could prolong the transition to digital television. NAB states: “By providing maximum latitude, the Commission will encourage development of diverse new programming services that will facilitate the most rapid acceptance of AT&T and lead to the most rapid return of NTSC spectrum.” *** The Benton Foundation argues that mandating an HDTV minimum serves no public interest because it does not increase the number of voices in the marketplace or contribute to the civic discourse of democracy.

39. Support for a minimum HDTV requirement is expressed by three networks, HBO, NYNEX Corporation, receiver manufacturers, Viacom, Golden Orange Broadcasting Co., Inc. (“Golden Orange”), and the National Consumers League. Supporters of a minimum requirement generally argue that a requirement will help promote the early availability of HDTV programming, create demand for HDTV receivers, stimulate the market, and speed the transition. Golden Orange, for example, notes that without HDTV, the public will not be motivated to buy receivers. HBO argues that the legal and policy principles that justify awarding incumbent broadcasters a second channel for DTV do not permit broadcasters to use this second channel for anything other than HDTV programming, and, if the FCC allows other than HDTV programming, it should require that a substantial portion of the broadcast day, especially during dayparts and prime time, be devoted exclusively to HDTV. These commenters vary on the amount of HDTV programming that should be required and on how the minimum should be implemented.

41. Decision. Our decisions today, and our previous adoption of the DTV Standard, give broadcasters the opportunity to provide high definition television programming, but we decline to impose a requirement that broadcasters provide a minimum amount of such programming and, instead, leave this decision to the discretion of licensees. ***

42. Our decisions to adopt the DTV Standard and to use 6 MHz channels permit broadcasters to provide high definition television in response to viewer demand. If we do not mandate a minimum amount of high resolution television, we anticipate that stations may take a variety of paths: some may transmit all or mostly high resolution television programming, others a smaller amount of high resolution television, and yet others may present no HDTV, only SDTV, or SDTV and other services. We do not know what consumers may demand and support. Since broadcasters have incentives to discover the preferences of consumers and adapt their service offerings accordingly, we believe it is prudent to leave the choice up to broadcasters so that they may respond to the demands of the marketplace. A requirement now could stifle innovation as it would rest on *a priori* assumptions as to what services viewers would prefer. Broadcasters can best stimulate consumers’ interest in digital services if able to offer the

most attractive programs, whatever form those may take, and it is by attracting consumers to digital, away from analog, that the spectrum can be freed for additional uses. Further, allowing broadcasters flexibility as to the services they provide will allow them to offer a mix of services that can promote increased consumer acceptance of digital television, which, in turn, will increase broadcasters' profits, which, in turn, will increase incentives to proceed faster with the transition.

44. We note that some commenters argued that a high definition television mandate is necessary to give program producers and equipment manufacturers the necessary incentives to support high resolution television, and to provide viewers and consumers enough high resolution television programming to foster demand for such programming and to drive DTV receiver purchases. To the contrary, however, we believe that a minimum high definition television requirement is unnecessary to achieve these goals. We note in this regard that broadcasters and networks have emphasized their commitment to high definition television. We find nothing in the record that identifies a market failure or other reason to impose a governmental requirement for high definition television. High definition television will afford broadcasters an important tool in the increasingly competitive video programming market. There is no reason to believe that a government mandate is necessary to ensure that high definition television gets a fair chance in the marketplace.

E. Public Interest Obligations

45. Background. As we stated in the *Fourth Further Notice*, the rules imposing public interest obligations on broadcast licensees originate in the statutory mandate that broadcasters serve the "public interest, convenience, and necessity," as well as other provisions of the Communications Act. ***

48. Decision. In this proceeding we seek to promote the successful transition of analog broadcast television into a digital broadcast television service that serves the public interest. Broadcasters have long been subject to the obligation to serve the "public interest, convenience and necessity." 47 U.S.C. 307(a), 309(a). In the 1996 Act, Congress provided that broadcasters' public interest obligations extend into the digital environment:

"(d) Public Interest Requirement. --Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. In the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest."

47 U.S.C. 336(d). In enacting this provision, Congress clearly provided that broadcasters have public interest obligations on the program services they offer, regardless of whether they are offered using analog or digital technology. ***

50. Some argue that broadcasters' public interest obligations in the digital world should be clearly defined and commensurate with the new opportunities provided by the digital channel broadcasters are receiving. Others contend that our current public interest rules need not change simply because broadcasters will be using digital technology to provide the same broadcast service to the public. We are not resolving this debate today. Instead, at an appropriate time, we will issue a Notice to collect and

consider all views. *** Thus as to the public interest, our action today forecloses nothing from our consideration. ***

K. All-Channel Receiver Issues

107. Background. Traditionally, we have not regulated broadcast receivers except insofar as they incidentally radiate energy. However, the All Channel Receiver Act authorizes us to require that television receivers "be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting." While we require that all TV broadcast receivers be capable of adequately receiving all channels allocated by the Commission to the television broadcast service, we previously determined in this proceeding that the All Channel Receiver Act does not mandate the manufacture of dual-mode (DTV and NTSC) receivers. ***

109. Comments. Most broadcasters support a requirement that all DTV receivers and set-top converters be able to receive and display NTSC signals, and receive all DTV signals included in the DTV transmission standard and display them in the highest quality format which the particular set is designed to accommodate.

110. While most broadcasters and Motorola favor regulations governing how DTV signals are displayed on DTV receivers, most equipment manufacturers and other commenters favor a market-driven approach. ***

111. Decision. The digital broadcast transmission standard which we adopted in the *Fourth Report and Order* differed from the standard we proposed in the *Fifth Further Notice*. Many of the comments we received in response to the *Fifth Further Notice* assumed that the Commission would adopt a DTV transmission standard that included specific video formats. However, the standard we adopted in the *Fourth Report and Order* did not specify video formats. We chose instead to allow video formats to be determined by the market and consumer demand. Because of this important modification, we believe that some of the arguments made by the commenters on specific all-channel receiver issues are no longer applicable.

112. We have decided that, at this time, equipment manufacturers should have maximum latitude to determine which video formats DTV equipment will receive. We believe that it is likely that market forces will provide incentives for broadcasters and equipment manufacturers to work closely together to produce the receiver and converter designs most valued by consumers.

113. We do not believe that our goals would be advanced by mandating that all digital receivers receive and display NTSC signals and DTV signals, regardless of format, aspect ratio, or progressive or interlaced scanning, as broadcasters argue. We expect that equipment manufacturers will make available to consumers digital receivers that receive both NTSC and DTV signals. However, we will not preclude equipment manufacturers from designing digital receivers that do not receive NTSC signals. In addition, we believe that equipment manufacturers should be allowed to offer lower-cost, digital receivers that receive only progressive scan or SDTV formats. Our two-year reviews will give us an opportunity to monitor DTV receiver designs and address any problems that may arise.

114. We have decided to postpone any decision concerning a labeling requirement. We are providing broadcasters flexibility in their choice of video formats and equipment manufacturers flexibility in their choice of receiver designs and we are hopeful that this will result in products and services that draw consumers to DTV. At this early

stage of the transition process, we will rely on consumer electronics manufacturers and retailers to provide the information necessary for consumers to make informed choices. Should problems arise, and consumers become confused, as the transition moves forward, we will have opportunity to revisit labeling requirement issues through our review process. Finally, we recognize that there is an enormous embedded base of video cassette recorders, cable decoder boxes, laser disc players, and other video equipment that use NTSC receivers for non-broadcast purposes. This suggests that there may be a continuing market for the sale of NTSC display devices, even after the conversion to DTV. Therefore, we decline to limit the sale of NTSC-only display devices.

DVD Joint Licensing of Patents Request Letter

July 29, 1998

Honorable Joel I. Klein, Esq.,
Assistant Attorney General,
Antitrust Division,
United States Department of Justice,
10th Street and Constitution Avenue, N.W.,
Washington, D.C. 20530.

Re: Request for Business Review Letter Regarding the Licensing of Patents Essential to DVD-Video and DVD-ROM

Dear Mr. Klein:

On behalf of Koninklijke Philips Electronics, N.V. (“Philips”), Sony Corporation of Japan (“Sony”), and Pioneer Electronic Corporation of Japan (“Pioneer”) (and their affiliates which are involved in the patent licensing program described below) we submit this request for a Business Review pursuant to 28 C.F.R. § 50.6 regarding the proposed arrangement under which certain patents essential to the manufacture and use of DVD-Video and DVD-ROM will be licensed on reasonable and non-discriminating terms (the “Proposed Licensing Program”).

DVD (or Digital Versatile Discs) refers to a high density CD-sized optical disc in which signals are encoded and stored in digital form and are then read and reproduced by players using an optical read out beam. Relying on basic CD technology, the DVD discs and players allow for an increase of approximately sixty times the storage capacity of a typical CD or CD-ROM. DVD-Video and DVD-ROM are two formats relating to high density optical discs which have been described by Philips, Sony, Pioneer and several other companies in the DVD-Specification for Read Only Disc version 1.0 dated August 1996 and in several updates thereto (a copy of the specification is set forth in Exhibit A hereto).

A single DVD format for video and ROM was defined in an open process by participating companies over the course of several years at the request of various industries—particularly the computer industry—which asserted that multiple DVD formats would delay introduction of this new and beneficial product, increase costs, and much like the incompatible BETA and VHS formats, result in losses to consumers who purchased products based on a format which quickly became obsolete. In defining the

DVD-Video and DVD-ROM formats, input was solicited and received from a variety of industries and an even wider variety of companies throughout the world.

As the format was developed and refined, it became clear that numerous independent companies had been granted patents which were relevant to DVD-Video and DVD-ROM. The three companies submitting this request actively sought to join the licensing of their patents with the patents of other companies which also claimed to have patents which are essential to DVD-Video and DVD-ROM. To date, those efforts have not resulted in any other companies joining the Proposed Licensing Program. Philips, Sony and Pioneer, however, remain willing to include others having essential patents in the licensing program described below.

The companies submitting this request firmly believe that, in the near future, DVD products will be widely marketed by a wide variety of companies. We are also convinced that, once these products are manufactured and distributed in volume, there will be great consumer demand for them. We anticipate that the producers and sellers of DVD discs and players will largely be the companies that currently manufacture and sell CDs and the equipment that plays CDs and CD ROMs. Thus, prospective licensees include manufacturers of consumer audio equipment and computer disc drives. Typically, licensees to manufacture DVD discs will be replicators, as is the case with CDs. In sum, the DVD licenses will be offered to the same classes of sophisticated licensees as are CD licenses, and there is every reason to expect that the transfer of this valuable DVD technology will have the same beneficial effects upon the relevant industries that CD licenses had upon the recorded music industry 15 years ago.

In one respect, licensors of DVD technology face risks and uncertainties that were not faced 15 years ago by the creators of CD technology. During the past year, several different formats have been announced that will compete with various applications of DVD for the favor of consumers. For example, Circuit City and others have developed Digital Video Express (DIVX), a pay-per-play system that allows consumers who have purchased a DIVX-compliant player to purchase a disc at a lower price and to play that disc for a limited period of time without having to return the disc when finished. The disc may later be “re-activated” for additional plays upon payment of additional fees. Various companies have announced that they will offer DIVX discs, including Twentieth Century Fox, the Walt Disney Company, Paramount Pictures, Universal Studios and Dream Works. It is our understanding that DIVX discs will not play on non-DIVX DVD players. In addition, NEC, one of Japan’s largest electronics manufacturers, has announced its intention to introduce Multimedia Video File (MMDF), an optical disc format which is expected to compete directly with certain applications of DVD technology. Other new announced products include TeraStor’s Near Field Recording (NFR) technology and Advanced Storage Magneto-Optical (ASMO). In short, this is an area in which several well-financed suppliers are prepared to compete aggressively with DVD products. Obviously, there also will be competition among those selling DVD products.

Offering a patent license for all essential patents of the three companies under the Proposed Licensing Program will provide several pro-competitive benefits, including (1) reducing the uncertainty of the availability of patent licenses so that those who require a license to manufacture or use a DVD-Video or DVD-ROM product are aware that a license from the three companies easily can be obtained; (2) reducing the royalties that likely would be payable if the three companies licensed their essential

patents on their own; (3) reducing the cost for each prospective licensee of determining on its own the identities of owners of essential patents and the entities from which licenses which must be obtained; (4) reducing other transaction costs of licensees having to negotiate and execute separate licenses; (5) reducing the transaction costs of essential patent holders offering separate licenses thereby allowing for a reduction in the price of the license; and (6) offering the same royalty rate and other conditions to all interested licensees so that no entity manufacturing or selling a DVD-Video or DVD-ROM product will have a price advantage over any other such entity as a result of entering into a license for the essential patents of Philips, Sony and Pioneer.

The Proposed Licensing Program will be structured to avoid any countervailing aspects that may be deemed anticompetitive. For example, each patent holder will retain the right to license its patents outside the Proposed Licensing Program under whatever terms and conditions it reaches with any prospective licensee, and each prospective licensee will be informed in writing of its option to negotiate such an individual license under reasonable terms and conditions. The Philips personnel who are responsible for the Proposed Licensing Program will play no role in the marketing of DVD products. An independent expert in the art has been retained to insure that the portfolio of patents that will be licensed under the Program includes only those patents which are essential to DVD-Video and DVD-ROM products. Although Philips, Sony and Pioneer have not been successful in having other companies join their licensing program, they remain willing to include any others having essential patents who wish to join. There will be no royalty payable by the licensee unless a licensed patent would be infringed but for the license, information which the licensee may be required to disclose to monitor infringement and royalty payments will not be disclosed to any of the licensors, but only to a third party expert retained by the licensors, patents included in the licenses will be specifically identified in appendices to the license, and Philips, Sony and Pioneer will commit to licensing to any licensee any essential patent rights they may acquire subsequent to the date specified in the license.

Set forth below is a fuller description of the proposed licensing terms and the agreements among the licensors.

The Proposed Patent License

Two licenses (Appended hereto as Exhibits B and C) will be offered, both in substantially the same form. One is for DVD players, the other for DVD discs. A three page "Agreement" sets forth a few basic terms of the license and also specifically incorporates the "Conditions" of the license which are appended to the Agreement.

On the first page of the Agreement, it is specifically noted that Philips, Sony and Pioneer are each willing to license their respective patent rights for optical disc or player manufacturing whether within or outside the standard DVD specifications on reasonable terms and conditions. Thus, any prospective licensee who is dissatisfied with the terms of the Proposed Licensing Program is assured of this alternative.

Article 2 of the Conditions sets forth the terms of the license grant, and provides for a license under Licensed Patents which are defined in Article 1.07 as all patent rights pertinent to DVD discs or players which Philips has acquired the right to license, which have or are entitled to a priority date prior to January 1, 1997, and which are essential to DVD discs or players. Article 1.07 goes on to define as "essential" those patents which are necessary as a practical matter for compliance with the DVD-Video

or DVD-ROM specifications. The license, therefore, includes not only all patents technically necessary to manufacture a product to the standard specifications, but also those which a typical licensee is likely to require. For example, it may be theoretically possible to design around a particular patent at significant additional cost (and without additional benefit), but few, if any, licensees who pay the standard royalty rate for other essential patents would want such patent excluded from the license. Indeed, it is fair to say that most, if not all, licensees would want such patents included.

Article 2.07 describes the method by which patents are selected for the portfolio license. The prospective licensee is specifically informed that Philips has appointed an independent patent expert to evaluate the patents of the three licensors for “essentiality” and that the portfolio included in the license may be amended from time to time based on the results of that evaluation.

In Article 2.03, each licensor agrees to grant a license to each licensee under any essential patent which Philips, Sony or Pioneer acquire the right to license in the future. Thus, to the extent any of the licensors are issued essential patents in the future or other companies join the proposed licensing program, all licensees are guaranteed a license under any such essential patent.

Articles 2.05 and 2.06 set forth the terms of the licensees’ grant of patent rights. For the identical term of the license granted by Philips, Sony and Pioneer, the licensee agrees to grant to the licensors and other licensees (who also agree to the terms of the grant back) a royalty bearing license on essential patents. Thus, the scope of the grant back is virtually identical to the scope of the license itself. The grant back would not create any disincentive to innovate as it specifically allows the licensee to charge a royalty for its grant of a license and would only prevent a particular patent holder from deciding to use its after-acquired patent position to completely block others from competing in a business in which they already have invested substantial resources.

Article 4 sets forth the royalty payments to be made by licensees. The license provides for a \$10,000 payment upon execution of the license (\$5,000 of which may be credited to royalty payments) and a running royalty of \$.05 per disc or 3.5% of the net selling price of a player, with a minimum player payment of \$7.00 until January 1, 2000 and a minimum of \$5.00 thereafter.²

Article 4 makes plain that no royalties are due unless “a Licensed Patent is utilized” and, therefore, there are no royalty paying obligations regardless of whether the 10-year license is in effect if the licensee has adopted new or different technology that does not utilize any of the patents in the portfolio.

Articles 4.09 and 4.10 provide that licensees must maintain and furnish certain information relevant to issues of infringement and appropriate royalty payments, but specify that such information shall be provided to independent experts rather than to any licensor itself.

The licenses provide for “most favorable nations” terms under which each licensee is assured of receiving the most favorable royalty rate granted any other portfolio licensee under the conditions specified in Article 5. Thus, no similarly situated licensee is given a competitive advantage by the license over any other such licensee.

² Widespread public reports have suggested that the typical disc will retail for approximately \$20-25. The per disc royalty thus amounts to approximately 22% of the retail price of discs, although the royalty typically will be payable by the disc replicator.

Article 10.05 gives each licensor the right to withdraw its own patents from the portfolio license with respect to any licensee which both (1) brings a lawsuit against the licensor for infringement of an essential DVD patent and (2) refuses to license such patents to the licensor on fair and reasonable terms. This provision is necessary to prevent portfolio licensees from taking unreasonable and unfair advantage of the fact that each portfolio licensor already has agreed to license its patent on the open, fair and non-discriminatory terms provided in the portfolio license at royalty rates that are likely considerably lower than what would be payable if patents were licensed individually outside the portfolio license.

Without the provisions of Article 10.05, a portfolio licensee could—while enjoying the considerable benefits of the portfolio license—attempt to extract unreasonable terms for licensing its patents as a result of already being licensed under the portfolio license. Article 10.05 merely “evens the playing field,” returns the parties to the bargaining position each would have been in but for the portfolio license, and creates no competitive issues. This is particularly so in light of each portfolio licensors’ undertaking to license its patents outside the portfolio license. Thus, a licensee who subjects itself to the provision of Article 10.05 by filing suit and refusing to grant a license on fair and reasonable terms is not denied the right to a license for essential patents, just to a license for essential patents on the favorable terms of the portfolio license.

Finally, Article 11.04 provides that any disputes involving the license shall be submitted to arbitration in New York and resolved under New York law. This provides for a certain and cost effective method to resolve disputes.

Agreement Among Licensors

The agreements among Philips, Sony and Pioneer relating to the Proposed Licensing Program are set forth in two bilateral Agreements and Amendment No. 1 thereto, one between Sony and Philips and one identical agreement between Pioneer and Philips. The Agreements and Amendments are appended hereto as Exhibit D.

The Agreements basically set forth the terms under which Philips shall license the three companies’ essential patents and set out many of the same terms which are incorporated in the licenses itself and are discussed above. The Agreements make plain that the Proposed Licensing Program does not in any way impede the companies’ ability to license their patents on their own under any conditions they may negotiate.

Article 2.01 of the Agreement provides that Philips shall offer the portfolio license to “all interested third parties.” Article 5 of Amendment No. 1 further specifies that Philips shall grant licenses “to all interested parties and shall not discriminate against or among potential licensees” although Philips is entitled to seek financial guarantees on royalty payments when required. The Agreements also set out various terms for the collection and distribution of royalties. Although Article 4.03 provides that each party may consult with the others in the event of a good faith belief that an act of infringement has occurred, Article 4.04 provides that each party retains the right to enforce its patents as it sees fit.

Article 7 of Amendment No. 1 sets forth the details of the procedure by which Philips shall retain an independent expert to assure that all patents in the portfolio are essential, and provides the procedure under which patents may be added to the Proposed Licensing Program.

Conclusion

It is anticipated that DVD-Video and DVD-ROM applications will gain widespread acceptance among consumers in the United States and throughout the world. Intellectual property rights granted by the United States and other sovereign nations to numerous unrelated entities could seriously delay if not block the introduction of this new and significant technology. The Proposed Licensing Program described above eliminates one potential impediment to the implementation of DVD-Video and DVD-ROM by allowing all essential patents of Philips, Sony and Pioneer to be offered in a single, non-discriminatory, fair and cost effective licensing program. The Proposed Licensing Program has been carefully crafted in an effort to avoid any competition concerns which may arise from the combining of patents belonging to independent entities within a single license. We respectfully submit that the Proposed Licensing Program has successfully addressed any competition concerns, and that the pro-competitive aspects of the program far outweigh any potential competition issues which may remain.

We will be available at your convenience to provide any further information you may require. We very much appreciate the Division's attention to this matter.

Respectfully,

Garrard R. Beeney

for Koninklijke Philips Electronics, N.V.; Sony Corporation of Japan and Pioneer Electronic Corporation of Japan

DVD Business Review Letter Response

December 16, 1998

VIA FAX

Garrard R. Beeney, Esq.

Sullivan & Cromwell

125 Broad Street

New York, New York 10004-2498

Dear Mr. Beeney:

This letter is in response to your request on behalf of Koninklijke Philips Electronics, N.V. ("Philips"), Sony Corporation of Japan ("Sony") and Pioneer Electronic Corporation of Japan ("Pioneer") for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. ¶ 50.6. You have requested a statement of the Department of Justice's antitrust enforcement intentions with respect to a proposed arrangement pursuant to which Philips will assemble and offer a package license under the patents of Philips, Sony and Pioneer (collectively, the "Licensors") that are "essential," as defined below, to manufacturing Digital Versatile Discs (DVDs) and players in compliance with the DVD-ROM and DVD-Video formats, and will distribute royalty income among the Licensors.

I. The DVD-ROM and DVD-Video Formats

The Standard Specifications for the DVD-ROM and DVD-Video formats describe the physical and technical parameters for DVDs for read-only-memory and video applications, respectively, and "rules, conditions and mechanisms" for player units for

the two formats.¹ In either format, the DVD offers storage capacity more than seven times that of a compact disc; a single-layer, single-sided DVD, for example, can store 4.7 billion bytes (4.38 GB) of information including audio, video, text, and data. Employing compression technology, a DVD-Video disc can hold a 135-minute feature film on a single side.

The Licensors, along with a number of other producers of consumer electronics hardware, software, or both,² established the Standard Specifications.³ These Standard Specifications appear to implicate the intellectual property rights of numerous firms.

II. The Proposed Arrangement

The proposed arrangement is embodied in two pairs of licenses: two separate but substantially identical licenses to Philips from Sony and Pioneer (the “DVD-Video and DVD-ROM Agreement”); and a pair of standard licenses from Philips to DVD makers (the “Disc License”) and player manufacturers (the “Player License”).⁵ Through these two sets of licenses, Philips aggregates the Licensors’ patents and will disseminate them to users of the DVD-ROM and DVD-Video formats.

A. The patents to be licensed

Under the proposed arrangement, Philips is licensing from the other Licensors those patents that: (i) they owned or controlled as of specific dates in 1997; (ii) are entitled to a priority date before December 31, 1996;⁷ and (iii) are “essential,” which is defined as “necessary (as a practical matter) for compliance with the DVD Video or DVD-ROM Standard Specifications.”⁸ In turn, Philips will sublicense those patents, along

¹ DVD Specifications for Read-Only Disc (the “Standard Specifications”), Part 3: Video Specifications, Version 1.1 (December 1997), § 3.3.1. You have attached the Standard Specifications as Exhibit A to your letter. DVD-Video, which is described in Part 3 of the Standard Specifications, appears to be a subunit of the DVD-ROM format. The DVD-Video specifications indicate that DVD-Video discs shall comply with Parts 1 and 2 of the Standard Specifications, which describe the disc’s physical and file-system characteristics, respectively. *Id.*, § 1.1.

² Each of the Licensors is a leading manufacturer of consumer electronics equipment and software, including both DVD-Video discs and DVD players, and a producer of content, such as feature-length motion pictures, that can be incorporated in DVDs. Upon the completion of the pending sale of its PolyGram N.V. subsidiary to The Seagram Co., Ltd., however, Philips will no longer have a substantial presence in any market for recorded music, film, or other entertainment software, or the production of content for such software.

³ In addition to the Licensors, the publishers of the DVD-ROM Specifications are: Hitachi, Ltd.; Matsushita Electric Industrial Co., Ltd.; Mitsubishi Electric Corporation; Thomson Multimedia; Time Warner Inc.; Toshiba Corp.; and Victor Company of Japan, Ltd. While your letter includes information concerning the process by which these formats were established, you have not requested, and this letter does not offer, an opinion on any competitive issues presented by the development of these formats or any other DVD-related format.

⁵ You have attached the Player License as Exhibit B to your letter, and the Disc License as Exhibit C. I will refer to the Disc and Player Licenses collectively as the “Portfolio Licenses.”

⁷ DVD-Video and DVD-ROM Agreement, Arts. 1.06-1.07. You have confirmed that the term “priority date” means, for any given patent in the Portfolio License, the first date on which the application for that patent, or for a patent on the same invention in another country, was filed. See 35 U.S.C. § 119.

⁸ We understand this definition to encompass patents which are technically essential—*i.e.*, inevitably infringed by compliance with the specifications—and those for which existing alternatives are economically unfeasible. As discussed below, a less concrete definition of the term “as a practical matter” could give rise to difficult competitive issues. Neither Sony’s and Pioneer’s licenses to Philips nor the Portfolio Licenses convey rights to patents that are “essential” by virtue of the DVD formats’ incorporation of

with its own patents that meet the same criteria, in the Portfolio Licenses for use in making discs or players, respectively, that comply with either of those formats.

Initially, each Licensor has designated its “essential” patents for inclusion in the Portfolio Licenses; there are 115 patents in all for the manufacture of DVD players, and 95 for the manufacture of the discs themselves. However, the Licensors have retained a patent expert to review the designated United States patents and make an independent determination as to their “essentiality.” His determination, reflecting his “best independent judgment,” is to be based on information he obtains from the Licensors, others in the industry, and the advice of technical experts he may retain. The review, which is already underway, will not entail an examination of validity. Should the expert determine that a patent initially designated as “essential” is not, Philips will exclude it from the Portfolio Licenses. However, licensees that have already taken the Disc or Player License shall have the option to retain their licenses to the newly excluded patent.

While one of the license documents indicates that the patent expert is to be “appointed” by Philips, the letters that the Licensors will send to the expert state that all of them are retaining him. Further, the letters state that the expert’s conclusions will have no bearing on either his compensation or any Licensor’s future retention of him or his law firm.

As noted above, the DVD-Video and DVD-ROM Agreements ensure only that the Licensors’ “essential” patents with filing dates before December 31, 1996, and which were owned or controlled by the Licensors as of November 24, 1997 (or, in Pioneer’s case, October 1, 1997) will be part of the Portfolio Licenses. You have stated to us that, as of December 1, 1998, no Licensor has indicated that it owns or controls an “essential” patent that falls outside these bounds. Should such a patent emerge, however, the DVD-Video and DVD-ROM Agreements commit the Licensors to licensing it, “at fair and reasonable conditions,” to any licensee under the Portfolio Licenses, either through Philips or individually.

B. The joint licensing arrangement

1. The licenses from Sony and Pioneer to Philips

Sony and Pioneer have granted Philips nonexclusive, sublicensable licenses on their “essential” patents to enable Philips to grant licenses “to all interested parties . . . to manufacture, have made, have manufactured components of, use and sell or otherwise dispose of” discs and players that conform to the Standard Specifications. The licenses obligate Philips to grant licenses on the “essential” patents for use in conformity with the specifications nondiscriminatorily to all interested third-parties. All three Licensors, however, remain free to license their “essential” patents independently of the Portfolio Licenses, including for uses outside the DVD-ROM and DVD-Video formats.

The licenses from Sony and Pioneer also establish the Portfolio Licenses’ royalty rates. The Player License per-unit royalty is to be 3.5% of the net selling price for each player sold, subject to a minimum fee of \$7 per unit, which drops to \$5 as of January 1, 2000. The Disc License royalty is to be \$.042 per disc sold. In addition, each Portfolio License requires a \$10,000 initial payment, half of which is creditable against the

per-unit royalties. Philips' licenses from Sony and Pioneer separately set the latter two firms' share of these royalties, again on a per-unit basis. The allocation of royalties among the Licensors is not a function of the number of patents contributed to the pool. To ensure the receipt of their agreed royalties, Sony's and Pioneer's independent auditors may audit Philips' books and records up to once a year.

While each of the Licensors retains sole discretion to pursue infringers, the licenses from Sony and Pioneer require each Licensor to notify the others before initiating any enforcement action and provide for sharing of joint infringement litigation expenses.

2. The Portfolio Licenses

As authorized by its licenses from Sony and Pioneer, Philips' licenses to disc and player manufacturers will be for use in conformity with the Standard Specifications. However, the Portfolio Licenses will notify potential licensees that all the Licensors are "willing to license their respective patent rights for optical disc manufacturing, whether within or outside of the DVD-Video and DVD-ROM Standard Specifications . . . on reasonable terms and conditions." They will warn potential licensees that licenses from other intellectual property owners may be necessary for compliance with the formats. A "Most Favourable Conditions" clause will entitle the licensee to the benefit of any lower royalty rate Philips grants to another licensee under "otherwise similar and substantially the same conditions."

Each Portfolio License will have a term of ten years from the license's effective date, subject to termination for a limited number of reasons.³⁷ To verify royalties owed and paid, Philips may appoint an independent accountant to audit its licensees' books and records up to once a year and may require licensees to provide the accountant with additional information for that purpose. The Portfolio Licenses also require licensees to provide, on request, information for review by a patent expert to determine whether a particular product infringes any of the licensed patents and, thus, triggers royalty obligations. The licensees' obligation to provide information to the independent accountant and patent expert extends only to the information necessary to determine the amount of royalties owed or whether they are owed at all.

One of the grounds on which Philips may terminate a license relates to the licensees' grantback obligation: Portfolio licensees must grant the Licensors and fellow licensees a license, "on reasonable, non-discriminatory conditions comparable to those set forth herein," on any patents they own or control that are "essential" to either disc or player manufacture in conformity with the Standard Specifications. As noted above, this obligation is reinforced by Philips' right to terminate without notice the license of any licensee that, after having refused to grant a Licensor a license on an "essential" patent it owns, sues that Licensor for infringement of that patent.

III. Analysis

As with any aggregation of patent rights for the purpose of joint package licensing, commonly known as a patent pool, an antitrust analysis of this proposed licensing program must examine both the pool's expected competitive benefits and its potential

³⁷ Philips or its licensee may terminate the license on 30 days' notice for the other party's default. Philips also may terminate for licensee bankruptcy, failure to pay royalties, and without notice in response to a licensee's lawsuit against any Licensor for infringement of an "essential" patent that licensee owns or controls, after the licensee has refused that Licensor's request for a license.

competitive hazards. In particular, one expects that a patent pool “may provide competitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation.”⁴⁴ At the same time, “some patent pools can restrict competition, whether among intellectual property rights within the pool or downstream products incorporating the pooled patents or in innovation among parties to the pool.”⁴⁵ Accordingly, the following analysis addresses (i) whether the proposed licensing program is likely to integrate complementary patent rights and (ii), if so, whether the resulting competitive benefits are likely to be outweighed by competitive harm posed by other aspects of the program.

A fundamental premise of the following analysis is that the patents to be licensed are valid. This is a legitimate presumption with any patent.⁴⁶ On the other hand, persuasive evidence to the contrary would undermine virtually any licensing arrangement: “A licensing scheme premised on invalid or expired intellectual property rights will not withstand antitrust scrutiny.”⁴⁷ Unaccompanied by legitimate intellectual property rights, restrictions on licensors or licensees are highly likely to be anticompetitive. None of the information that you have provided us warrants abandonment of the presumption of validity as to any of the patents to be licensed.⁴⁸ Should the Department subsequently receive information that undercuts this presumption, its enforcement intentions as to the proposed arrangement might be very different.

A. Integration of Complementary Patent Rights

If the Licensors owned patent rights that could be licensed and used in competition with each other, they might have an economic incentive to utilize a patent pool to eliminate competition among them. A pool that served that purpose “would raise serious competitive concerns.”⁴⁹ In combining such substitute patents, the pool could serve as a price-fixing mechanism, ultimately raising the price of products and services that utilize the pooled patents. If, on the other hand, the pool were to bring together complementary patent rights, it could be “an efficient and procompetitive method of disseminating those rights to would-be users.”⁵⁰ By reducing what would otherwise be

⁴⁴ Department of Justice-Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (“IP Guidelines”), § 5.5.

⁴⁵ Letter from Joel I. Klein to Gerrard [sic] R. Beeney, Esq., June 26, 1997 (“MPEG-2 Business Review Letter”), 9 (citing *IP Guidelines*, § 5.5).

⁴⁶ See 35 U.S.C. § 282 (in an action for infringement, “[a] patent shall be presumed valid”); *Genentech, Inc. v. Novo Nordisk, A/S*, 108 F.3d 1361, 1364 n.2 (Fed. Cir. 1997).

⁴⁷ MPEG-2 Business Review Letter, 9 (citing *United States v. Pilkington plc*, 1994 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. 1994)).

⁴⁸ At the same time, it is worth noting that the pool does not seem well equipped internally to eliminate any patents whose validity becomes dubious. The proposed arrangement provides no internal screen for catching those patents, either at the outset of the pool or thereafter. The expert’s role, for example, is to assess essentiality, not validity. Nor is there a mechanism for weeding out patents later held invalid. In contrast, the pool established for the joint licensing of patents essential to the MPEG-2 compression standard automatically excludes patents conclusively held invalid or unenforceable. Since the Licensors here are not allocating royalties on a per-patent basis, no Lessor has an incentive to challenge the validity of any particular patent of another.

⁴⁹ MPEG-2 Business Review Letter, 9.

⁵⁰ *Id.*

three licensing transactions to one, the pool would reduce transactions costs for Licensors and licensees alike. By ensuring that each Licensor's patents will not be blocked by those of the other two, the pool would enhance the value of all three Licensors' patents.

One way to ensure that the proposed pool will integrate only complementary patent rights is to limit the pool to patents that are essential to compliance with the Standard Specifications. Essential patents by definition have no substitutes; one needs licenses to each of them in order to comply with the standard. At the same time, they are complementary to each other; a license to one essential patent is more valuable if the licensee also has licenses to use other essential patents.

A broader inclusion criterion than essentiality carries with it two anticompetitive risks, both arising from the possibility that there may be substitutes for patents included in the pool. Consider, for example, a situation where there are several patented methods for placing DVD-ROMs into packaging—each a useful complement to DVD-ROM manufacturing technology, but not essential to the standard. A DVD-ROM maker needs to license only one of them; they are substitutes for each other. Inclusion in the pool of two or more of those patents would risk turning the pool into a price-fixing mechanism. Inclusion in the pool of one of the patents, which the pool would convey along with the essential patents, could in certain cases unreasonably foreclose the competing patents from use by manufacturers; because the manufacturers would obtain a license to the one patent with the pool, they might choose not to license any of the competing patents, even if they otherwise would regard the competitive patents as superior. Limiting a pool to essential patents ensures that neither of these concerns will arise; rivalry is foreclosed neither among patents within the pool nor between patents in the pool and patents outside it.

If our understanding of the criterion “necessary (as a practical matter)” is correct, then it appears that the Licensors intend to license through the pool only complementary patents for which there are no substitutes for the purposes of compliance with the Standard Specifications. Some uncertainty arises from this definition's imprecision: Unlike the MPEG-2 pool, which required actual technical essentiality for eligibility, this pool introduces the concept of necessity “as a practical matter.” On its face, this latter standard is inherently more susceptible to subjective interpretation. An excessively liberal interpretation of it could lead to the inclusion of patent rights for which there were viable substitutes. In that event, the pool could injure competition by foreclosing such substitutes.

Based on what you have told us, however, the definition of “necessary (as a practical matter)” that the expert will be employing is sufficiently clear and demanding that the portfolio is unlikely to contain patents for which there are economically viable substitutes. Thus, so long as the patent expert applies this criterion scrupulously and independently, it is reasonable to expect that the Portfolio will combine complementary patent rights while not limiting competition between them and other patent rights for purposes of the licensed applications.

The structure of this pool, however, creates some concern about the expert's ability to apply this criterion entirely independent of the Licensors. While you have stated that the patent expert will be “independent” and demonstrated that his independence is a term of the licenses from Sony and Pioneer to Philips, the expert is being retained directly by the Licensors, who have an incentive to combine in the pool any of their

competing DVD-related patents and to foreclose others' competing patents.⁵⁶ Without more, there would be justifiable skepticism that this structure would ensure a disinterested review of the "essentiality" of the patent rights put forward.

However, in furtherance of the provision for independence in the licenses from Sony and Pioneer to Philips, each Licensor has assured the U.S. expert in writing that the expert's compensation and future retention will not be affected by his determinations as to essentiality; the same assurance will go to the Japanese patent expert as well. These assurances, of course, are no guarantee. Their continuing fulfillment is necessary to the expert's independence and, consequently, to the likelihood that the portfolio will contain only complementary patents without foreclosing competition. Whether they will be sufficient as well as necessary remains to be seen.

Although the patent-expert mechanism is flawed, the Department is willing to base its present enforcement intentions on your representation that the combination of the Licensors' contractual commitment to independence and their written assurances to the expert will insulate him from their interests sufficiently to ensure that the Portfolio Licenses will contain only those patent rights of the Licensors that all DVD-Video and DVD-ROM licensees will need. In that case, the proposed arrangement would serve the procompetitive purpose of combining complementary technologies into a package that will be likely to lower costs to makers of DVD-Video and DVD-ROM discs and players. If, nevertheless, these assurances prove insufficient either to ensure the expert's ability to function independently and objectively or to ensure that the pool will contain only essential patents, the Department's enforcement intentions as to the proposed arrangement might be very different.

B. Foreclosure of Competition in Related Markets

As mentioned above, the Licensors are competitors in markets vertically related to the licensed technology—not only in "downstream" markets such as the manufacture of DVD discs and players, but also in the creation of content, such as feature-length films, that is incorporated in DVD discs. Consequently, the question arises whether this pool is likely to impede competition in any of those markets, not only between any given Licensor and licensees, but also among the Licensors themselves.

Based upon what you have told us, the proposed licensing program does not appear to have any such anticompetitive potential in the markets in which the licensed technology will be used. First, the agreed royalty is sufficiently small relative to the total costs of manufacture that it is unlikely to enable collusion among sellers of DVD players or discs. Second, the proposed program should enhance rather than limit access to the Licensors' "essential" patents. Because Philips must license on a non-discriminatory basis to all interested parties, it cannot impose disadvantageous terms on competitors, let alone refuse to license them altogether. Should the agreed pool royalty prove economically unrealistic, each Licensor's ability to grant licenses on its own to users of the Standard Specifications provides a backstop. Third, the extent of Philips' ability to

⁵⁶ Because the royalty allocation is unaffected by each Licensor's share of the patents in the Portfolio License, the Licensors have no financial incentive to exclude each other's non-essential patents. In the MPEG-2 pool, in contrast, the joint licensor, which retained the expert, was an entity separate from the patent owners with no intellectual property of its own at stake. Moreover, the pool members themselves had a strong incentive to exclude non-essential patents, since their share of the royalties was a direct function of the number of essential patents they held.

audit licensees, through independent accountants, is unlikely to afford it anticompetitive access to competitively sensitive proprietary information, such as cost data. Sony's and Pioneer's similarly limited right to an annual audit of Philips' conduct as joint licensor should not create any greater likelihood of collusion. Nor does there seem to be any facet of the proposed program that would facilitate collusion or dampen competition among the Licensors in the creation of content for software.

C. Effect on Innovation

Because only already-filed “essential” patents and patent applications are required for inclusion in the Portfolio, the program does not discourage the Licensors from continuing research and development that may relate to the standard.⁵⁸ Further, the Licensors are free to license their “essential” patents for purposes that compete with the DVD-Video and DVD-ROM standards.

Ordinarily, patent license grantback provisions might be expected to raise the question whether, by reducing licensees’ incentives to innovate, they threaten competitive harm that outweighs their procompetitive effects. Here, however, the proposed grantback provisions are so narrow that they are unlikely to raise significant issues. Their scope is commensurate with that of the Licenses: They cover only “essential” patents. A licensee’s non-“essential” improvements remain its own and may be licensed or not, as the licensee wishes. Thus, the grantback obligation seems unlikely to apply to further innovation within the DVD-ROM and DVD-Video formats. Instead, it is far more likely to force cross-licenses, on “reasonable, non-discriminatory conditions comparable to those” of the Portfolio Licenses, from owners of already extant “essential” patents. In requiring licensees to offer the Licensors and fellow licensees access, on reasonable terms, to whatever “essential” patents they own or control, the Portfolio Licenses ensure that no licensee may take advantage of the benefits of the pool while exploiting its own market power over users of the Standard Specifications. The grantback provision is likely simply to bring other “essential” patents into the Portfolio, thereby limiting holdouts’ ability to exact a supracompetitive toll from Portfolio licensees and further lowering licensees’ costs in assembling the patent rights essential to their compliance with the Standard Specifications. While easing, though not altogether eliminating, the holdout problem,⁶⁰ the grantback should not create any disincentive among licensees to innovate.

In the current circumstances, the proposed ten-year term of the license does not pose significant concerns. The Portfolio Licenses authorize only a limited field of use for the licensed technology—the manufacture and sale of products that comply with the Standard Specifications; they do not limit licensees’ other options. Licensees may

⁵⁸ At the same time, the exclusion of patents with a priority date of December 31, 1996 or later, and those acquired by a Licensor only after November 24, 1997 (October 1, 1997 for Pioneer), could create anticompetitive costs for Portfolio licensees if any Licensor did not honor its commitment to make such patents available at reasonable rates. Transaction costs to licensees would almost certainly be somewhat lower if these later patents were included in the pool, instead of being subject to separate negotiations. However, the fact that this pool might not enable the realization of all potential efficiencies of pooling patents in this area does not mean that the efficiencies that it does create are insubstantial or that the arrangement is anticompetitive or unlawful.

⁶⁰ Any non-manufacturing owner of an “essential” patent, in contrast, can still be a holdout, having no need for either Portfolio License.

seek presently unknown methods of complying with these standards, or they may support altogether different product standards. The absence of any renewal clause puts potential licensees on notice that they will be facing a new market-based negotiation for access to the technology on the expiration of the Portfolio Licenses ten years hence. The uncertainty of market conditions at that time makes it impossible to speculate on the degree of power, if any, the Licensors will hold over any future technology licensing market.

IV. Conclusion

Based on the information and assurances that you have provided us, it appears that the proposed arrangement is likely to combine complementary patent rights, thereby lowering the costs of manufacturers that need access to them in order to produce discs and players in conformity with the DVD-Video and DVD-ROM formats. Your assurances and information indicate that the proposed arrangement is not likely to impede competition, either in the licensing or development of technology for use in making DVDs, players, or products that conform to alternative formats, or in the markets in which DVDs and players compete.

For these reasons, the Department is not presently inclined to initiate antitrust enforcement action against the conduct you have described. This letter, however, expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. ¶ 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

/ s / Joel I. Klein
