

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

In the Matter of)
)
Petition for Declaratory Ruling that) MB Docket No. 07-____
Internet Video is not Subject to)
Regulation under Title III or Title VI)
of the Communications Act)

**NETWORK2 PETITION FOR DECLARATORY RULING THAT
INTERNET VIDEO IS NOT SUBJECT TO REGULATION
UNDER TITLE III OR TITLE VI OF THE COMMUNICATIONS ACT**

Bruce D. Jacobs
Glenn S. Richards
John K. Hane
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128
Telephone: (202) 663-8000

Jonathan Askin
General Counsel
Network2
115 Broadhollow Rd.
Suite 225
Melville, NY 11747
631.961.1049

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Summary

Network2 respectfully petitions the Commission to declare that Internet Video, including in particular the service provided by Network2, is not subject to regulation under Titles III or VI of the Communications Act as broadcasting or cable services, and that the Commission does not intend to impose new regulations on Internet Video. We use the phrase “Internet Video” to describe video content provided via software applications and delivered over the public Internet.

Internet Video is an American-led phenomenon that allows professionals and non-professionals alike to produce a wide variety of high-quality video content and to make it available to anyone, anywhere, at any time, and at little or no incremental cost to anyone. This is a remarkable achievement. For decades, distribution of video programming required both specialized infrastructure and limited public resources. These substantial barriers to entry resulted in pervasive regulation of the broadcasters and cable system operators that serve as stewards of scarce public resources.

Internet Video shares none of the conditions that provided the rationale for traditional broadcast and cable regulation. From a technical standpoint, Internet Video is simply a piece of code, a software application riding over the Internet Protocol (IP). Internet Video is not tied to underlying network infrastructure in the same ways that cable and broadcast-based video content currently is tethered.

A technology that eliminates previous barriers to free speech, and makes the free press even more accessible to and by all, should remain free of unnecessary regulations that were uniquely intended for the environment of legacy video platforms. Unfortunately, this outcome is far from certain. The European Commission is already threatening to regulate certain

“audiovisual media services,” including specifically content distributed over the Internet through live streaming and webcasting. This and other threats to impose legacy broadcast or cable regulation on Internet Video burden the continued growth of what is emerging as an open and flexible platform for video publishers and a vibrant and diverse source of new content for consumers.

A grant of the requested relief is consistent with the Communications Act; the pro-competitive, deregulatory policy goals of the Telecommunications Act of 1996; and Commission rules and precedent. Grant of this Petition will provide regulatory certainty that will promote additional investment and innovation, continued deployment of broadband facilities, and the United States’ role as a leader in new approaches to the production and distribution of video content over the Internet.

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Network2 respectfully petitions the Commission to declare that Internet Video, defined as “video content provided via software applications and delivered over the public Internet” and including the service provided by Network2, (i) is not subject to regulation under Titles III or VI of the Communications Act as “broadcasting” or “cable services” and (ii) that the Commission does not intend to impose, directly or indirectly, new Federal regulations on Internet Video applications, services or content.

Background

Internet Video. A novelty just a few years ago, Internet Video is already a part of the daily routine of millions of Americans. The diversity of Internet Video production, content, and distribution is remarkable, with thousands of services sharing little more in common than the facts that they are delivered over the public Internet and viewed on electronic displays. There is an astonishing variety of formats and genres produced by international media conglomerates, grade school children, and everyone and everything in between.

For example, Internet Video includes feature length movies, television programs, video blogs, webcasts, home videos, animation, and other genres and formats that challenge categorization. Much Internet Video is available for free; some is provided for rental, sale, or by subscription; some includes advertising and some does not.¹ Formats are optimized for every conceivable variable, from tiny screens with low frame rates to the limits of today's state-of-the-art, high-definition displays. Some content is "live"; other content is streamed for "real time" viewing. Some can be downloaded faster than "real time," and other Internet Video is delivered slowly over long periods of time. Content ranges from traditional categories such as news, politics, sports, comedy, children, politics, art, drama, culture, education, satire, history, marketing, advertising, home video outtakes, and others, to new forms that range from ridiculous to experimental and even sublime.²

Internet Video also has become an increasingly important arena for political discussion and debate, and politicians themselves are beginning to present Internet Video content as a part of campaign strategy.³ The popular video streaming website YouTube (with the slogan "Broadcast Yourself") has begun posting official campaign videos on behalf of announced candidates for higher office, as part of a separate politician channel called "YouChoose '08."

The enabling technologies, techniques, and interfaces are almost as varied as the content. Internet Video is delivered through client-server sessions, peer-to-peer, and hybrid techniques. Internet Video may or may not be encrypted for digital rights management. It may be viewable

¹ See, e.g., Donna Bogatin, *Who needs YouTube?* Bolt, NBBC, *Network2 on stage in NYC*, ZDNET, January 26, 2007, <http://blogs.zdnet.com/micro-markets/?p=907>.

² See e.g., Walter Mossberg, *It's Not All YouTube—The Web is a Trove of Watchable Videos*, March 1, 2007, <http://online.wsj.com/article/SB117270692265322589.html> (subscription required); *What to Watch on the Web: Online Video May Still Be in Its Infancy, But There is Already a Dizzying Amount to Watch*, November 27, 2006, <http://news.bbc.co.uk/2/hi/entertainment/6178644.stm>.

³ See Chris Cillizza and Dan Balz, *On the Electronic Campaign Trail*, WASH. POST, Jan. 22, 2007, at A1.

“in-line” with a web browser, through open source, multi-platform media player software, proprietary media player software, or even dedicated proprietary hardware.⁴ It may include enhancements such as embedded metatags, subtitles, alternative language tracks, or closed captioning. Some software may not recognize such features even if it can play the video itself. In many cases, the producer or owner of content exercises little or no control over how the content is classified and distributed, and the distributor has little control over how the content is used.

Much Internet Video is repurposed from other platforms, but each day more and more programming is being created specifically for Internet distribution. The tools of high-quality video production are powerful and inexpensive, and producers and publishers have many ways to distribute Internet Video without incurring any marginal costs. For the first time, a video producer or publisher can create programming without regard to the technical or economic imperatives of the delivery platform. The considerable barriers to entry that characterize broadcast and cable services – spectrum licenses, local franchises, dedicated infrastructure, significant commitments of capital, the need for “critical mass” viewership – simply do not apply to Internet Video services. For a society that values open expression, and for an agency that promotes national policies favoring a diversity of viewpoints in electronic media, Internet Video promises public interest benefits that exceed all prior goals for media diversity.

Network2. Network2 provides a free service intended to facilitate growth of a particular kind of Internet Video: original programming created specifically for Internet distribution that is episodic or continually updated and which meets Network2’s standards for technical quality and production value. All Network2 services are available through the Network2 website

⁴ See, e.g., http://www.tivo.com/4.9.24.asp?WT.ac=HPsubbb_unbox; <http://www.akimbo.com/>

<http://www.network2.tv>). The website's core feature is a sophisticated but easy-to-use guide to Internet Video. Network2 is not intended to serve as a portal for posting of video by the general public or for aggregation of re-purposed broadcast content. Network2 offers an array of services to help users find, select, and watch original video content without being forced to sort through innumerable (and sometimes illegitimate) clips of repurposed broadcast and cable content, video blogs, and home video outtakes. Users can select multiple shows to create their own personal video "channels," share their favorite shows with others, transfer content to portable media devices, and rate the content they have viewed.

Network2 does not "host" video: its servers help producers and consumers of Internet Video "find" each other. As such, Network2 may be considered akin to a sophisticated Internet Video program guide service. However, Network2 also performs some functions that are similar to those of traditional network programmers. Network2 identifies programming that meets its standards and organizes that programming into a variety of categories from which users can build their own virtual "channels" of programming.⁵

The Threat of Regulation. Even as innovators and entrepreneurs work to create new video content and to find new ways to distribute it on the Internet, some governments are proposing to impose legacy regulatory regimes on Internet Video. The European Commission recently proposed an update to the Television Without Frontiers directive, now known as the Audiovisual Media Services directive. The directive, which will be considered for passage in May 2007, subjects to regulation anything that could be classified as television service regardless of platform, including "analogue and digital television, live streaming, webcasting and near-

⁵ Other Internet Video providers are focusing on Internet-original content. See, e.g., *Next New Networks*, <http://www.nextnewnetworks.com>.

video-on-demand.”⁶ For purposes of the directive, the European Commission intends to regulate media service providers, defined as all who have editorial responsibility for “the composition of the schedule...or...the programme listing.”⁷ This definition is rightfully disturbing to persons and organizations like Network2 that are committed to providing easy access to high quality, professionally produced, episodic programming through a directory catalogue. If passed, the European Commission would regulate Internet video extensively, including a variety of content restrictions, advertising quotas and sponsorship limits.⁸

In contrast to the European movement to regulate video on the Internet, the Canadian Radio-television and Telecommunications Commission (CRTC) has issued an order exempting video on the Internet from regulation. The CRTC exempted “persons who carry on, in whole or in part in Canada, broadcasting undertakings of the class consisting of new media broadcasting undertakings, from any or all of the requirements of Part II of the Act or of a regulation thereunder. New media broadcasting undertakings provide broadcasting services delivered and accessed over the Internet.”⁹

The lack of an established policy framework in the United States is already fostering uncertainty about possible regulation of new methods of video distribution. If it looks and sounds like television, some ask, why shouldn't it be regulated like television?¹⁰

⁶ *Directive of the European Parliament and of the Council on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services*, at recital 14(a), COD (2005) 0260, available at http://ec.europa.eu/comm/avpolicy/docs/reg/modernisation/proposal_2005/avmsd_cons_amend_0307_en.pdf

⁷ *Id.* at recital 17.

⁸ *Id.* at Articles 3-4.

⁹ *Exemption Order for New Media Broadcasting Undertakings*, Public Notice CRTC 1999-197, available at <http://www.crtc.gc.ca/archive/ENG/Notices/1999/PB99-197.HTM>. (December 17, 1999)

¹⁰ *See, e.g. Program Access Debate*, Communications Daily, March 5, 2007 at p. 7 (“it’s unclear how myriad rules would apply to online video companies considered pay-TV providers, including those on programming quality,

Discussion

Even the threat of regulation can chill innovation and entrepreneurship, divert previous resources away from further growth and development of Internet Video, and send money and innovation abroad.¹¹ Network2 believes a clear statement from the Commission confirming a “hands off” approach to Internet Video will encourage more people and organizations to make more high quality video available over the Internet. The Commission should step forward now to reassure entrepreneurs, investors, and all others that the United States offers a highly favorable environment for experimentation and growth in new forms of video and video distribution via the public Internet.¹²

Broadcasters and cable operators are subject to pervasive regulation. These regulations generally arise out of direct statutory mandates, and in many cases constrain First Amendment protections based on the unique market and technical attributes of purveyors of those media. A number of the regulations are directed at ensuring a diversity of media sources or guaranteeing access to facilities that may be scarce (broadcast spectrum) or scarce for practical or economic reasons (cable systems). These regulations include the Commission’s rules governing broadcast and cable ownership, political broadcasting, leased access, must-carry, and others.¹³ In effect, these regulations attempt to ensure minimum levels of diversity in ownership of media facilities,

closed captioning and customer service”); *see also* *VDC Corp. v. Turner Network Sales, Inc.*, Program Access Complaint, January 19, 2007.

¹¹ *Cf. In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4802 ¶ 5 (2002) (“broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market”) (cited with approval in *National Cable Television Association v. Brand X Internet Services*, 545 U.S. 967, 1001-02 (2005)).

¹² This Petition does *not* seek to exempt content that is illegal *per se* from federal or state laws based on its distribution using the Internet. The Petition seeks only to leave unregulated the Internet distribution of video content that is unquestionably legal even if it looks and sounds like material distributed by regulated television distributors.

¹³ *See* 47 C.F.R. § 73.3555 (ownership); 47 U.S.C. §§ 312(a)(7), 315 (political broadcasting); 47 C.F.R. §§ 73.1940-44, 73.4185, 76.205-09 (political broadcasting); 47 U.S.C. § 532 (leased access); 47 U.S.C. § 325(b)(3)(B) (must-carry).

minimum levels of public access to those facilities, and carriage of programming that may be important, even if not commercially viable. Such regulations are drawn to mitigate unique attributes of cable TV and broadcast TV that simply do not apply to Internet Video. As discussed below, the difference between broadcast and cable television on one hand, and Internet Video on the other hand, is not the content itself, but the way it is distributed.

A. The Commission should declare that Internet Video providers do not fit the definition of a broadcast station or a cable system

Network2's technical facilities, like those of all Internet Video providers, consist primarily of software, computers, and servers connected to the Internet. Unlike broadcast and cable television services, Network2 does not own or operate transmission facilities and does not use licensed or even unlicensed spectrum. Network2 today does not even host video, it simply aggregates links and provides tools that make finding relevant Internet Video content easy to find and flexible to use, including an in-browser viewer that eliminates the need for the user to operate a separate media player application in most cases. More fundamentally, though, as explained further below, Internet Video by its nature is completely disaggregated from any underlying network infrastructure.

Network2 does not engage in broadcasting within the meaning of the Communications Act because it does not transmit programming (or anything else) using radio frequencies. 47 U.S.C. §153(6) defines "broadcasting" as "the dissemination of radio communications intended to be received by the public." In turn, 47 U.S.C. §153(33) defines "radio communication" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds."

Network2 also is not a cable system. 47 U.S.C. §522(7) defines a “cable system” as a “facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service...and which is provided to multiple subscribers within a community.” Network2 operates only over the public, interconnected Internet, the most “open” transmission path for electronic communications that exists. The public Internet is not only open, it is dynamic: the possible combinations of distribution paths change every time a routable IP address is registered. Network2 does not “generate signals”; rather, it serves packets of data. Network2 editorially selects, aggregates, and publishes hypertext links that point to video programming. It does not serve “subscribers,” because all Network2 services are free and many can be accessed even without registration. In any event, 47 USC §522(7)(b) explicitly exempts from the definition of a “cable system” any entity that “serves subscribers without using any public right-of-way.” As discussed, Network2 operates only over the public Internet.

From a technical standpoint, Internet Video is not at all similar to broadcast or cable-based video content. At its heart, Internet Video is software code, completely separate and apart from any underlying infrastructure. In particular, Internet Video is constituted by individual data packets, carried by the Internet Protocol over the public Internet. This is nothing like the video content that is carried in analog or digital streams over closed, proprietary networks that are owned and operated by regulated broadcast and cable companies. In brief, where Internet Video lives in the modular, untethered world of the Internet, other forms of video provided by the traditional media companies are tied inextricably to those companies’ networks and facilities.¹⁴

¹⁴ For a more comprehensive analysis and explication of how communications law and regulation should track the different “layers” of the Internet, see Richard S. Whitt, *A Horizontal Leap Forward: Formulating A New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587 (2004).

As new Internet Video services are launched and evolve, they will reflect every imaginable combination of features that technology permits. Some will, and some already do, charge fees for their services, either on a subscription or per-use basis. Many will host video on servers connected to the Internet, or will provide peer-to-peer tracking and other value added services. Some may be optimized for distribution over wireless links yet will remain available to all over the public Internet. Network2 expects its own Internet Video services to grow and evolve. Accordingly, Network2 requests a declaration that no Internet Video service is subject to regulation as a broadcaster or cable system under Titles III and VI of the Communications Act.

B. The Commission should declare that it does not intend to regulate Internet Video applications, services, or content

1. Refraining from unnecessary regulation will protect important First Amendment Rights

The Commission does not directly regulate video content; rather, its regulation of video content is incidental to its regulation of specialized communications facilities used to distribute video. Notwithstanding the First Amendment, the Supreme Court has upheld a number of governmental constraints on broadcasters based on the unique physical attributes of the broadcast medium.¹⁵ In doing so, the Court has relied on the scarcity of available broadcast frequencies¹⁶ and the “invasive” nature of free over-the-air broadcasting.¹⁷

¹⁵ See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-389, 396-399 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

¹⁶ “Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.” *Red Lion, supra.*, 395 U.S., at 388; see also *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973).

¹⁷ *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989).

Similarly, the Court has cited conditions unique to cable infrastructure, including its inherent “bottleneck” or “gatekeeper” character, as justification for regulation of cable operators.

In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 656 (1994) the Court wrote:

[there is] an important technological difference between newspapers and cable television. * * * A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications * * * The same is not true of cable. When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.

The scarcity conditions that have been held to justify limits on the First Amendment rights of these content distributors in the context of services regulated under Title III, and the gatekeeper rationale that has justified regulation of video services under Title VI, simply do not apply to Internet Video.¹⁸ The resources needed to launch a new Internet Video service and to make it available to consumers everywhere are plentiful and becoming less costly day by day. Unlike broadcast spectrum and cable franchises, Internet Video is demand limited, and demand is growing exponentially with supply “as if increase of appetite had grown by what it fed on.”¹⁹ No Internet Video provider’s service precludes anyone else from providing a competing service, and in a very real sense one Internet Video provider enables the next.

¹⁸ Network2 does not propose that regulations otherwise applicable to content carried by broadcast stations or cable systems should not apply to versions of that content actually carried over those systems simply because the content is also available through Internet Video. Rather, Network2 asks that, to the extent that content is delivered over the public Internet, it not be regulated. Such a ruling would not affect content that is also transmitted over regulated video distribution platforms, to the extent of such transmission.

¹⁹ WILLIAM SHAKESPEARE, *HAMLET*, Act I, Scene 2, line 144.

Similarly, the “bottleneck” attribute of cable television service is inapplicable. Short of malicious code, which is illegal in any event, no Internet Video provider can block access to any other. Many Internet Video services do the opposite: the Network2 service itself is a tool to help consumers find *other* Internet Video providers.

Regulations that pass First Amendment muster based on unique attributes of the broadcast and cable distribution platforms fail when applied outside those narrow contexts. First Amendment restrictions on *the distribution of video content* by broadcasters and cable systems do not justify First Amendment restrictions on the video content itself. There is no jurisprudential basis for regulating video content in and of itself differently than books, music, newspapers, compact discs, or any other sort of content. The Internet is agnostic as to form of content: essentially the same message may be rendered as text, as a still image, as sound, or as video. A claim that Commission regulation could reach the Web editions of stories printed in *The Washington Post* or the *Wall Street Journal* – including their political commentary – would be dismissed out of hand. Would anyone argue that the same words should be regulated if they are distributed as spoken words, rather than text, through the same websites, or if a video of the speaker is included?

Websites and other Internet-based services that focus on publishing and distribution of video content should be entitled to the same First Amendment deference that applies to publishers of text. How content a consumer accesses over the Internet is rendered – as text, audio, still pictures, video, or something else altogether – should be irrelevant to the level of First Amendment protection enjoyed by the provider and the consumer of the content. As the Supreme Court has held, “[t]he choice of material...and the decisions made...constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental

regulation of this crucial process can be exercised consistent with First Amendment guarantees.”²⁰

2. The proliferation of video on the net services will enhance competition and increase the number of electronic “voices”

The Commission has long sought to ensure that individuals will be able to choose among the highest number of diverse sources in obtaining information, and has been instructed by Congress to encourage “diversity in the multichannel video programming market and the continuing development of communications technologies.”²¹ Diversity is best accomplished by competition among content producers and content distributors, and toward this end “the Commission’s rules have encouraged new competitors in the market for the delivery of video programming.”²² Competition, however, is not spontaneously created and must be fostered by creating a marketplace that is “conducive to investment, innovation, and meeting the needs of consumers.”²³ Internet Video promises diversity that is unbound by limits of geography, time, critical mass, economic imperatives, technical conventions, or even established genres and formats. Indeed, the Internet has enabled the global availability of news content – text, audio, and video – that is too limited in scope or appeal to be carried by mass media.²⁴ Broadcast and cable regulations that were drawn to enhance competition and diversity in the face of high

²⁰ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

²¹ 47 U.S.C. § 548, section 628. *See also* §47 USC 533(f)(2)(g) (in adopting cable effective competition rules FCC should “not impose limitations which would impair the development of diverse and high quality video programming”).

²² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-191, ¶ 5 (2001).

²³ *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, ¶ 2 (1999).

²⁴ *See* Gerard Seenan, *Forget the Bloggers, It’s the Vloggers Showing the Way on the Internet*, THE GUARDIAN, August 27, 2004, available at <http://www.guardian.co.uk/international/story/0,3604,1278235,00.html>. *See, e.g.* <http://tv.oneworld.net> (showcasing member videos regarding various themes including the environment, HIV/AIDS and community initiatives); <http://www.tropisms.org> (highlighting videos regarding life in areas such as Ethiopia and Chernobyl).

barriers to entry, ironically, will stand as the greatest barrier to achieving a quantum increase in diversity in the video marketplace. Regulation of Internet Video can only limit and thus harm diversity, and will disproportionately burden the smallest and most diverse sources. The smallest publishers of Internet Video and those targeting the smallest and most narrow of audiences may escape regulation simply by ceasing production and publication, by not producing in the first place, or by moving their production and publishing offshore to a more favorable regulatory environment. In the end, speech would be stifled for no cognizable benefit and, ironically, consumers would be denied the very diversity and choice that existing video distribution policy seeks to foster.

3. Refraining from unnecessary legacy regulation will foster increased broadband penetration and speeds

The entrepreneurs and institutions of the United States pioneered the Internet and have largely charted the course of its evolution. Increased broadband penetration remains a top telecommunications policy goal and many are calling for universal broadband service.²⁵ While many observers worry that broadband penetration and average broadband “speeds” in the United States lag behind those of its trading partners,²⁶ one reason that is ignored may be that the United States already has the world’s most robust and competitive market for non-Internet video services. Video services are bandwidth intensive, and demand for video services disproportionately increases demand for broadband connections and higher broadband “speeds” as compared to other Internet content and applications.

²⁵ See, e.g., FCC Chairman Kevin Martin’s op-ed, *Why Every American Should Have Broadband Access*, FINANCIAL TIMES, April 3, 2006, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266258A1.pdf.

²⁶ See, e.g., Richard Hoffman, *When It Comes to Broadband, U.S. Plays Follow the Leaders*, INFORMATION WEEK, February 15, 2007, available at <http://www.informationweek.com/story/showArticle.jhtml?articleID=197006038>.

Network2 and many other services provide platforms for Internet-original content that in most cases are not available through other video distribution channels, and this unique content encourages consumers to embrace broadband. The Commission has acknowledged a belief among industry observers that widespread adoption of streaming video will only be possible if connection speeds significantly increase over those currently achieved over cable and DSL broadband.²⁷ Others contend that many users are likely to switch to broadband only when there is sufficient “broadband-only content.”²⁸ Ironically, the EU’s move to regulate the content stemming from all “broadcasting activities” will tend to discourage Internet distribution of programming of the highest technical quality and production value – precisely the type of programming that is available through Network2.

4. Refraining from unnecessary legacy regulation will encourage investment in the United States

The Internet is the only form of electronic media distribution that operates seamlessly across vast geographic and political borders. Because Internet Video production tools and playback software travel as easily as the content, even regional technical standards are irrelevant. Regulation that does not thwart innovation altogether may well cause it – and its economic benefits – to be exported to the most accommodating country. Governmental regulation increases the risk that Internet Video will become another “offshore” undertaking. Broadcasters and cable operators cannot take their operations “offshore”; for providers of Internet Video (including Internet Video operations of traditional broadcasters and cable operators), the cost of moving their operations offshore is inconsequential. As one observer has noted, imposition of legacy video distribution policies on Internet ventures could backfire because attempts to impose

²⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, MB Docket No. 05-255 (released March 3, 2006) at ¶ 137.

²⁸ See T-Mobile Online, *Growing Online Markets*, at <http://www2.t-online.net/dyn/c/58/36/14/5836142.html>.

onerous regulations might stifle innovation from legitimate firms and encourage efforts to provide similar services from offshore servers, leading to an ongoing game of cat-and-mouse if regulatory authorities were to impose such policies.²⁹

Conclusion

Unlike almost all other forms of electronic media distribution, Internet Video observes few geographic, political, and regulatory boundaries. Thus, even the actions of other nations can compound regulatory uncertainty for Internet Video providers. Will a provider in one country face burdensome or limiting regulations that a competitor in another country will escape? Where should new Internet Video businesses be incorporated, built, hosted, and operated? The question is not academic: the European threat to impose traditional broadcast and cable regulation on Internet Video creates substantial uncertainty for Internet Video providers. Because regulation affects choices about investment of human and financial capital, the requested declaratory relief will open the way for the continued growth of Internet Video, with all of its benefits.

²⁹ Philip J. Weiser, *The Future of Video: New Approaches to Communications Regulation*, THE ASPEN INSTITUTE (2007) (available from www.aspeninstitute.org).

Therefore, Network2 respectfully petitions the Commission to declare that Internet Video, including in particular the service provided by Network2, is not subject to regulation under Titles III or VI of the Communications Act as broadcasting or cable services, and that the Commission does not intend to impose new regulations on Internet Video.

Respectfully submitted,

NETWORK2

By: 

Bruce D. Jacobs
Glenn S. Richards
John K. Hane
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1125
202.663.8077
bruce.jacobs@pillsburylaw.com
glenn.richards@pillsburylaw.com
john.hane@pillsburylaw.com

Jonathan Askin
General Counsel
Network2
115 Broadhollow Rd.
Suite 225
Melville, NY 11747
631.961.1049
jaskin@network2.tv

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