

March 24, 2010

The Honorable Victoria A. Espinel
United States Intellectual Property Enforcement Coordinator
U. S. Office of Management and Budget
VIA E-MAIL: intellectualproperty@omb.eop.gov

Dear Ms. Espinel:

The American Federation of Television and Radio Artists (AFTRA), the Directors Guild of America (DGA), the International Alliance of Theatrical and Stage Employees (IATSE), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA), the Recording Industry Association of America (RIAA), and the Screen Actor's Guild (SAG) (the "creative community organizations") appreciate this opportunity to respond to the request for written submissions issued by the office of the Intellectual Property Enforcement Coordinator (IPEC). See 75 Fed. Reg. 8137 (Feb. 23, 2010).

The creative community organizations represent the companies and people who make and disseminate American motion pictures, television programs, music, and other copyrighted works. The livelihoods of millions of creators and workers depend on the continued growth and vitality of these creative industries. Brief descriptions of each of the creative community organizations can be found at the end of this submission.

Introduction

The creative community organizations all supported enactment of the bi-partisan PRO-IP Act (Pub. L. 110-403), and are pleased to see progress toward the development of the first Joint Strategic Plan called for in that law. We also commend the IPEC for her timely outreach for public input on the Plan. The undeniable fact is that the theft of intellectual property today in its many forms is rampant, and that such theft is and will continue to have a significant adverse economic impact both on the directly affected industries and the United States as a whole. It is similarly apparent that the current patchwork of available enforcement approaches and tools has been inadequate to stem the tide of infringement. There is no reason to believe that, absent changes, things will get better. In fact, there is every reason to believe that the situation will get worse. If we are to make meaningful inroads into the problem, new solutions are required. We hope that this will be the first step in an iterative process for developing, vetting, and implementing an ambitious, flexible and comprehensive plan for attacking the copyright theft and trademark counterfeiting that so fundamentally threaten U.S. economic recovery, current and future job growth, international competitiveness, and the creativity and innovation that have been the hallmark of the content we have created and financed for close to one hundred years.

While that threat takes many forms, the growth of online theft of copyrighted works presents the greatest and most urgent challenge. The Internet in general, and broadband services in particular, offer many new and exciting opportunities to consumers; prime among them are new ways to create, distribute, and enjoy copyrighted works. But, when these networks are

abused to provide widespread unauthorized access to these works, that seriously undermines the incentive to invest in the creation of content for this new medium, or for more traditional distribution channels. U.S. jobs, economic recovery and growth, and U.S. global competitiveness are consequently weakened. Unauthorized worldwide dissemination of full-length copyrighted works is clearly unlawful, under U.S. law and that of most other nations; yet it is pervasive online, and this abuse seriously harms the very content that is critical to enabling the Internet of the future to deliver its full benefits to the American consumer. While in many cases this unlawful activity is stimulated by criminal enterprises that profit from the thefts they promote, it also thrives on the willful ignorance and tacit support of other businesses that are unwilling to take commercially reasonable steps to address it.

Online copyright theft undermines our economy, steals our jobs and threatens our national interest. Marshaling and coordinating the resources of government to attack this problem, including by encouraging other industries to take all reasonable steps to deal with it, should be a principal focus of the Joint Strategic Plan. We welcome this opportunity to work with the Administration on these issues at a time when similar efforts are being undertaken in France, the U.K., Germany, the European Union, and other countries throughout the world.

This submission follows the structure of the request for written submissions. In Part I, we provide information and data on costs to the U.S. economy (including to U.S. jobs) resulting from infringement of copyright in sound recordings, motion pictures, television programs, and other audio-visual works. In Part II, we make recommendations for some features of the Joint Strategic Plan that we believe are necessary to push back the tide of copyright theft – the systematic and organized infringement of copyright on a commercial scale – and thus to ameliorate the harms that this theft inflicts on our economy and our society. In Part III, we offer responses on a few of the supplemental comment topics listed in the request for written submissions.

I. Copyright theft of intellectual property hurts American creators and craftspeople, American consumers, and the American economy

Any assessment of how content theft harms the U.S. economy must begin with an acknowledgement of how critically our economy depends upon industries that rely on copyright protection. Over the past 20 years, the International Intellectual Property Alliance (IIPA) has commissioned a series of economic studies that measure the contributions of the copyright industries as a whole to U.S. economic activity, jobs, and foreign sales and exports. The most recent edition of IIPA’s “Copyright Industries in the U.S. Economy” was released in July 2009.¹ It concludes that:

¹ See Stephen E. Siwek, Copyright Industries In the U.S. Economy: The 2003 – 2007 Report (2009), available at <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>. The Federal Register notice calls for identification of the methodology, assumptions, and data sources underlying estimates of costs of infringement to the U.S. economy. 75 Fed. Reg. at 8137. This information is provided in the text of the cited report. We note that this study employs the methodology endorsed by the World Intellectual Property Organization (WIPO). See WIPO, Guide on Surveying the Economic Contributions of the

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- The core copyright industries² comprised nearly 6 1/2% of the entire U.S. gross domestic product in 2007, and contributed close to one-quarter of the real growth achieved by the U.S. economy as a whole in 2006-07.
- These core copyright industries accounted for 5.6 million U.S. jobs in 2007, comprising more than 4% of the entire U.S. workforce, and the compensation of these employees exceeded the national average by 30%.
- The same core copyright industries were responsible for sales in foreign markets of nearly \$126 billion in 2007, far more than industry sectors such as aircraft, autos, or agricultural products.

The MPAA has also issued periodic reports specifically on the contribution of the motion picture and television industry to the U.S. economy. The most recent report, also being filed by MPAA in response to the IPEC's request for written submissions, found that this sector comprised more than 95,000 businesses, spread across all 50 states, and, further, made \$40.0 billion in direct payments to more than 144,000 businesses large and small across the country. The sector was directly and indirectly responsible for 2.4 million U.S. jobs and \$140.3 billion in wages, and accounted for \$15.7 billion in income and sales tax receipts for governments at all levels.³

Copyright theft undermines the sales, profitability and competitiveness of this important part of the U.S. economy and workforce, and has a significant adverse impact on the economy as a whole. Preventing online theft is essential to promoting the robust availability to consumers of diverse and high quality content – the very creative works that drive consumers to access the Internet. A trio of recent economic studies quantifies this adverse impact, both for the recording

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Copyright-Based Industries (2003), available at

http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf.

² The “core” copyright industries include only those copyright-related industries whose primary purpose is to produce and/or distribute copyright materials. This excludes other sectors whose revenues are dependent on the “core” industries, such as industries in which only some aspect or portion of the products that they create can qualify for copyright protection; industries that distribute both copyright and non-copyright protected materials to business and consumers; and industries that produce, manufacture, and sell equipment whose function is primarily to facilitate the creation, production, or use of works protected by copyright. Thus, in citing statistics regarding the economic impact of the “core” copyright industries only, this submission takes the most conservative approach available in quantifying that impact. For example, the “total” copyright industries, including a portion of the sectors excluded from the definition of “core” industries, accounted for more than 11% of U.S. GDP in 2007.

³ The MPAA is filing separate comments regarding these statistics in response to the request for written submissions issued by the office of the Intellectual Property Enforcement Coordinator (IPEC), 75 Fed. Reg. 8137 (Feb. 23, 2010).

and audio-visual industries specifically, and for a broader cross-section of copyright-dependent industries as well.

A September 2006 study commissioned by the Institute for Policy Innovation sought to calculate the costs of motion picture piracy, not only on the specific copyright owners whose works were subject to infringement, but also on upstream suppliers, downstream purchasers, and the cascading effects on lost output, lost earnings, lost jobs, and lost tax revenues.⁴ It concluded that the estimated \$6.1 billion lost by MPAA member studios in 2005 translated into economy-wide total lost economic output of \$20.5 billion. This harm was not inflicted on the studios alone, but directly on the millions of hard working men and women whose livelihoods depend on the U.S. creative industries. American workers lost \$5.5 billion annually in earnings because of motion picture piracy, with two-thirds of the losses accruing to workers outside the motion picture industry itself. Copyright theft also stymies new opportunities for jobs, production and innovation. Absent such theft, 141,000 new jobs would have been created nationwide, and federal, state and local governments would have collected \$837 million more in revenues.

In a study released in August 2007, a similar methodology was applied to the infringement of sound recordings.⁵ It calculated total lost output of \$12.5 billion annually. Of the total cost of over 71,000 jobs and \$2.7 billion in earnings attributable to sound recording infringement, more than half of the damage impacted workers outside the recording industry itself, or downstream music retailers. A deficit in tax collections of \$422 million was also estimated as the result of sound recording piracy.

Finally, in October 2007, a similar analysis was undertaken that embraced the business software and entertainment software/video game sectors as well as motion pictures and sound recordings.⁶ This study estimated total lost economic output at \$58 billion, more than twice the estimate of revenue lost by these industries themselves due to piracy. Job losses totaled more than 373,000, amounting to \$16.3 billion in annual earnings, all predominantly afflicting workers in jobs ancillary to the four sectors measured. The study estimated \$2.6 billion in foregone tax revenues at all levels of government.

Understanding the devastating real-life impact of these statistics on American creators, film talent, technicians and craftspeople requires an understanding of the business model under which our industries operate – a model developed to make creativity possible and to enable those who work in this business to earn a living. That business model enables those who work in film, television and music – at all levels – both to earn a living and to benefit from the security of

⁴ See Stephen E. Siwek, *The True Cost of Motion Picture Piracy to the U.S. Economy* (2006), available at <http://www.ipi.org/>. All three of the studies discussed in the text relied on the RIMS II mathematical model maintained by the Bureau of Economic Analysis of the U.S. Department of Commerce.

⁵ See Stephen E. Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy* (2007), available at <http://www.ipi.org/>.

⁶ Stephen E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy* (2007), available at <http://www.ipi.org/>.

health and pension plans. The business model recognizes both the irreplaceable contributions of actors, directors, performers and craftspeople to the creative process, and the reality of a freelance business. Employment in the motion picture and television industries is never guaranteed; workers go from production to production, from employer to employer, often with long periods in between. Similarly, singers and musicians may struggle for years before they are able to earn a living from writing and recording music.

As an acknowledgement of those realities, the individual artists and craftspeople share directly in the revenue that their work generates, in many cases long after its initial release. For film and television, the revenue in which artists and craftspeople participate is generated from the exploitation of their works in secondary markets, after initial distribution on television or in a movie theatre. The revenue from these secondary markets is called “downstream revenue,” and it includes foreign distribution, CD and DVD sales, and repeated airing on free cable or premium pay services. These revenue sources drive investment in the motion picture, television and music industries, while also sustaining artists and craftspeople.

For film artists, residuals and royalty compensation structures represent a significant portion of their income. Likewise, a key source of income earned by recording artists and songwriters is from royalties accrued through the sale and distribution of sound recordings.⁷ Residuals and royalties also play a significant role in funding the health and pension plans for working members of our industries. These benefits provide a guaranteed safety net, and are part of the industry’s long established collective bargaining agreements.⁸

⁷ In 2008:

- For AFTRA recording artists, 90% of income derived from sound recordings was directly linked to royalties from physical CD sales and paid digital downloads.
- DGA Members derived 18% of their compensation from residual payments; and
- SAG members who worked under the feature film and television contract derived 43% of their compensation from residuals.

See Comments of the American Federation of Television and Radio Artists (AFTRA), the Directors Guild of America (DGA), the International Alliance of Theatrical and Stage Employees (IATSE) and the Screen Actor’s Guild (SAG), In the Matter of Preserving the Open Internet Broadband Industry Practices, Federal Communications Commission Docket No. 09-191 (Jan. 14, 2010).

⁸ In 2008, residuals derived from the sales of features to free television and/or feature and free television to supplemental markets (pay television, DVD, viewing on airplanes, etc.) funded:

- 70% of DGA’s Basic Pension Plan;
- 65% of the MPI Health Plan (for IATSE technicians and craftspeople); and
- 36% of SAG’s Health and Pension Plan.

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Given the role that residuals and royalties play in the lives of creators and craftspeople, the immediacy of the impact of copyright theft on those who work in the industry is clear. Downstream revenue is most vulnerable to and most destroyed by content theft. Furthermore, theft that supplants licensed uses – even of works on which production was completed long ago – cuts into workers’ ability to earn a living today and into the future, and will bring new insecurity to their retirement and health care arrangements. This should underscore that content theft is not, as some would posit, a victimless crime, and that it certainly is not a noble undertaking.

While these studies and data paint a comprehensive portrait of the economic costs of copyright theft to our society, they should not obscure something else that is far harder to quantify but equally as powerful and important to the future of our country: the threat copyright theft poses to creativity, innovation, and culture in our society. This far more intangible contribution cannot be captured in terms of dollars or profit and loss. Making a motion picture or a sound recording comes down to a creative process that is the collaboration of many talented people – with an end result that is personal both to the creator and the audience. The motion pictures, television programs and music that our industries create are a representation to the world of our freedoms, our culture, and our diversity. They are woven into the fabric of our culture and are part of our national heritage. Generations of craftspeople, film and recording artists and creators have learned from and built on the creativity of generations before them – and they have built industries that are like no others in the world.

In this century, unlike the one before it, products of the mind, not muscle, will be what keep our country competitive. As President Obama recently stated, “Our single greatest asset is the innovation and the ingenuity and creativity of the American people. It is essential to our prosperity and it will only become more so in this century.”⁹ There are no more visible examples of this than American motion pictures, television programs and music – and the infrastructure that supports those creations. If this creativity and innovation are diminished by rampant and unchecked theft, the future strength of our country is compromised.

Finally, there are other ancillary costs to be borne in mind. These include:

- The diminishment of opportunities for young people who might want to be directors, actors, musicians, songwriters, performers, and craftspeople to find their way to those professions. There are ever shrinking opportunities to earn a living as creative professionals try to grow their knowledge and skills. Doing so is not an academic

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See Comments of the American Federation of Television and Radio Artists (AFTRA), the Directors Guild of America (DGA), the International Alliance of Theatrical and Stage Employees (IATSE) and the Screen Actor’s Guild (SAG), In the Matter of Preserving the Open Internet Broadband Industry Practices, Federal Communications Commission Docket No. 09-191 (Jan. 14, 2010).

⁹ President Barack Obama, Remarks at the Export-Import Bank’s Annual Conference (Mar. 11, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference>.

exercise. It requires being around those from whom a young artist, performer or craftsman can learn.

- The loss of the lower and mid range films and television programs and songs by less well known artists, and with that the jobs of those who work on them. Because these are cost sensitive works, they will be the first victims of content theft. These are the productions and sound recordings where the greatest diversity of genres and content can be found; they are also the point of greatest access for young people who would like to work in the film, TV and music industries.
- Threats to personal privacy and security through the proliferation of illicit peer-to-peer (p2p) services.
- The loss of many local retail outlets that not only employed thousands of people, but offered an unmatched consumer experience – including, of course, for entire communities nationwide that do not yet have full access to broadband services.
- The fostering of a culture that tolerates theft of creative works of others, diminishes respect for private property, and undermines society's confidence that the long-held rights and freedoms we have come to expect in the offline world will be respected and safeguarded in the evolving broadband driven, digital world.

II. Specific recommendations for accomplishing objectives of the Joint Strategic Plan

The development of this first Joint Strategic Plan under the PRO-IP Act represents a unique opportunity to set priorities that will enable the federal government to tackle more effectively the economic and cultural threats posed by widespread copyright infringement, particularly in the online environment. It will enable the government to demonstrate that there can be a balance between protecting content and utilizing the power of the Internet and digital technology. The creative community organizations offer the following suggestions for input to the development of the Joint Strategic Plan.

A. Mobilization against content theft

While there is much that the federal government can and should do better in combating this significant threat to our economy and society, much more can be accomplished if we can mobilize key players that today are sitting on the sidelines. The enterprises most deeply engaged in online theft could scarcely survive, let alone thrive, without the services of a range of legitimate businesses, from search engines to advertising networks, from payment processors to providers of Internet access and hosting services. As the scope and volume of online infringement reaches unprecedented proportions, the need to encourage cooperation from these service providers and eliminate impediments to that cooperation, long a cornerstone of our copyright enforcement policy, is greater than ever before.

Some progress has certainly been made, as exemplified in initiatives such as the Principles For User Generated Content Services (<http://www.ugcprinciples.com/>) agreed to by a number of copyright owners and providers of UGC services, and in the efforts undertaken by a number of universities to address piracy on their campus networks, as well as in cooperative efforts between some ISPs and copyright owners in the areas of notice forwarding and graduated response. But with limited exceptions, sufficient levels of cooperation have not materialized. Too often today, these businesses turn a blind eye, or at best react passively and selectively to the problem; too few of them take the basic, commercially reasonable steps necessary to educate their customers, identify abuses, and put an end to them.

Among the challenges confronting efforts to thwart copyright theft are the difficulties associated with reaching thieves that are outside of the United States. However, in many instances, these individuals and organizations use intermediaries based in this country to facilitate the infringement of intellectual property online. Cooperation with these intermediaries is vital to a comprehensive response to copyright theft. The following are examples of the use of intermediaries to promote copyright theft:

- Hosting Service Providers: Website hosting in the United States is recognized globally as efficient and cost effective. Many website operators seeking high bandwidth and large storage capacities seek out commercial hosting service providers in the United States.
- Search engines: Popular web search engines are often the primary resource for Internet users to locate links, websites and software that allow users to download and view illegal content. In most cases, typing the name of a movie title with generic qualifiers such as “watch online free” will return numerous web search results for links and resources to illegally download and view that title.
- Ad Networks: Online advertising is the lifeblood of virtually all online content theft. Online advertising networks based in the U.S. are regularly used by infringers to support the operating costs of their illegal websites as well as generate large profits. Online advertising also contributes heavily to the legitimate look and feel of infringing websites, which promotes consumer confusion.
- Payment Processing: A number of U.S. based entities offer online payment services which illegal website operators use to process payments for access to illegal content.
- Domain Name Registrars and Proxy Services: Domain names are the critical link between users and any illegal website. While ICANN provides a dispute resolution process for infringement of intellectual property rights, this process is limited to trademark violations contained in a domain name itself and does not include underlying copyright violations which occur on a website. Furthermore, the use of proxy services designed to conceal the registrant of a domain name, and lax enforcement against false Whois information, frustrate attempts by rights holders to directly address copyright violations with website operators.

- Social Networking: Social networks are increasingly being used by the operators of infringing websites to promote illegal websites, communicate with large “fan” bases and spam links to infringing content. Social networks are now important tools in the promotion and optimization of illegal websites.

As part of the Joint Strategic Plan, the Administration should work to get these relevant parties mobilized. Encouraging these intermediaries to work with content owners on a voluntary basis to reduce infringements, and assuring these intermediaries that such cooperation will not be second-guessed, should be top priorities that call for the personal intervention of senior government officials if necessary.

B. Visibility

The Joint Strategic Plan should call for an annual White House Summit on intellectual property and the U.S. economy, at which relevant agency heads would be invited to report on the progress of their agencies over the past year. Increased and consistent public visibility of the issue will support the cross-industry mobilization that is required.

C. National policy on cooperative efforts to protect lawful content online

It is time to enunciate clearly a national policy supporting meaningful and effective efforts to combat unlawful content online, and to examine systematically whether any federal or state laws or regulations are preventing or impeding service providers and other intermediaries from taking the steps necessary to cooperate in detecting and dealing with illegal activities, including copyright infringement, that are taking place on their networks or through the use of their services. In particular, private parties should retain maximum flexibility to continue to develop technological innovations that combat online copyright theft, and to enter into agreements to deploy and use these technologies. While these principles should be reflected in the FCC’s current Net Neutrality proceeding, and in the National Broadband Plan, other areas of the law should also be canvassed, as discussed below; and as legal impediments to the necessary cooperation are identified, they should be reduced or eliminated as soon as possible.

D. A focus on the online environment

The enforcement challenge facing the U.S. government in the copyright sector remains multi-faceted and subject to rapid change. But, as noted above, we know that the major threat to our industries is playing out in the online environment. The Joint Strategic Plan must acknowledge this fact, and must call for an increased strategic focus on combating copyright theft in the digital networked environment. We must identify what works and what is not working to meet this challenge, and implement best practices that will have the greatest impact in turning the online environment from a thieves’ bazaar to a safe and well-lit marketplace where creators can offer their goods and consumers can shop in security, rather than being invited to steal and taught to disrespect legitimate property rights. The IPEC should coordinate a comprehensive review of existing laws and policies to ensure that the enforcement responsibilities of the federal government are keeping pace with the rapidly changing face of organized, sophisticated and technologically adept copyright theft online. Each agency

participating in the advisory committee should identify any legislative, regulatory, or policy change needed to move more effectively against this menace to our economy, society and culture. The review should be given high priority and should be completed within 120 days.

The dynamic character of online copyright theft necessitates this review. The marketplace for creative content has evolved over the past decade in ways that could never have been imagined. While this evolution has provided unprecedented opportunities for creation and consumption of content, it has also caused significant challenges to creators and legitimate distributors. The online environment has been dramatically transformed by technological and market developments, both with respect to the nature and scope of the online infringement challenge, and with respect to the effectiveness and flexibility of the technological tools available to meet it. For example, while the dawn of the Internet may have provided us with a glimpse of the possibilities for business, networking, and communication, the problems caused by illicit p2p networks, user-generated content sites, and abuse of social networking sites were largely unforeseeable. In addition, the evolution of subscription-based and ad-supported services such as online lockers, direct streaming sites and linking sites impose new barriers to enforcement.

The exponential growth of illegal activity through these offerings has made it increasingly difficult for content owners to take effective measures. Many of these sites and businesses are specifically constructed to abuse the system and avoid copyright liability. Content owners and authorities need tools to address these illegal activities and the services that facilitate them. Among the issues we confront are the following:

- Notice and Takedown in a high-volume environment. While early practice may have been satisfied by a highly individualized, case-by-case process for dealing with hosted or linked infringing content, the reality has long been otherwise. Works or links taken down are quickly put back up. Also, the volume of infringing works and links is overwhelming. Even when works or links are removed, delays in doing so can often result in thousands – even millions – of additional acts of infringement. Copyright owners who own or manage large portfolios of works should be able to make available for service providers’ reference an authoritative and readily usable database of works or digital files; and service providers should be expected not only to take these files down, when they are identified online directly or when the service provider receives a takedown notice about one of them, but also to employ reasonable efforts to keep them off, by prohibiting the uploading or linking to infringing content previously subject to a takedown notice. Service providers should not find their claims to safe harbor status in jeopardy when they agree to monitor and block infringing content in this way; to the contrary, such cooperation should be encouraged as anticipated by Congress in enacting the safe harbor.

Similarly, copyright owners are faced with real-time, unauthorized streaming of telecasts of their works. In such an environment, a delay of just one hour or more in responding to a takedown request renders the notice-and-takedown process wholly ineffective. Copyright owners increasingly need to be able to rely on the cooperative efforts of sites that facilitate such conduct to block or remove infringing retransmissions in real-time.

- Removing Impediments to Rights Holder Monitoring. In the current enforcement environment, copyright owners often bear the initial burden of monitoring the online environment for instances of infringement. This premise is undermined when service providers limit the functionality of automated crawlers or similar reasonable and lawful technological means for identifying infringements, or when they deny copyright owners or their agents reasonable access to the provider-controlled online venues where infringement occurs. Right holders must have the ability to search for infringement online that is commensurate with the scope of infringing activity that they must combat. However, they should also be expected to apply robust, standards-based monitoring and verification techniques so that service providers and consumers can be confident that the findings are valid
- Repeat Infringers. The threshold statutory obligation of service providers to identify and deal with repeat infringers has been woefully neglected, even as it has assumed increasing importance in a technological environment in which Internet access service provider hosting is no longer the main source of infringing content disseminated across the Internet. At the same time, more should be required of hosting providers to take reasonable steps against repeat infringers, such as terminating the accounts of bloggers or renters of online lockers who repeatedly use these mechanisms to make infringing content available. Such terminations are already provided for by statute.¹⁰
- Apps/Widgets. Services or sites that allow or encourage users to post applications or widgets that facilitate infringement should take on the responsibility of disabling such programs that are predominantly used to infringe other works.

Of course, online enforcement efforts have to take into account the rise of illegal business models dependent on stolen content to make their money. These illicit businesses have no intention of paying for content that others financed and created, and directly threaten the investment in, and creation of, content in the future.

E. A central role for the IPEC and the advisory committee

The overwhelming Congressional endorsement of the PRO-IP Act in 2008 provides an excellent framework for development of the first Joint Strategic Plan. As a high priority, each agency listed in the Act should promptly identify the high-level official(s) who will represent it on the interagency intellectual property enforcement advisory committee chaired by the IPEC.¹¹ The President should also use his authority under PRO-IP to identify additional agencies that are sufficiently “substantially involved” in efforts to combat copyright theft to warrant their inclusion in the advisory committee.¹² One such agency is the Department of the Treasury,

¹⁰ See 17 U.S.C. § 512(i)(1)(A).

¹¹ See section 301(b)(3)(A) of the PRO-IP Act.

¹² See section 301(b)(3)(A)(i)(IX) of the PRO-IP Act.

which should work with U.S. financial institutions to ensure that criminal organizations cannot readily use legitimate online payment mechanisms to facilitate the theft of intellectual property.¹³

F. Strengthening the effort within agencies

The Administration should encourage the head of each agency identified in the PRO-IP Act to establish an IP Task Force, reporting to the agency head, in order to develop an agency-specific strategic plan (in cooperation with the IPEC) that maximizes the capabilities of that agency in its efforts to protect U.S. intellectual property. The IP Task Force recently instituted by the Department of Justice provides a model for these structures.¹⁴ Additionally, the Plan should reflect the clear Congressional intent that agencies across the government must step up their efforts to make intellectual property enforcement a priority, and that agencies must be accountable for the success of those efforts.

G. Full funding for new enforcement programs

The Plan should ensure that the important new programs authorized by the PRO-IP Act are fully funded and become operational as soon as possible.¹⁵ These include the local law enforcement grants program; the enhancement of forensic and investigative resources within the Department of Justice and the FBI; and the additional funding for hiring and training agents and prosecutors, and for acquiring forensic resources.

H. Identifying and implementing enforcement priorities

The Joint Strategic Plan certainly should call for adequate funding and resourcing of the enforcement efforts of all federal agencies. In addition, it should encourage the interagency advisory committee to consider specific techniques for identifying and implementing enforcement priorities against copyright theft, and to adopt some as soon as possible. These could include:

- The planned release of a blockbuster motion picture should be acknowledged as an event that attracts the focused efforts of copyright thieves, who will seek to obtain and distribute pre-release versions and/or to undermine legitimate release by unauthorized

¹³ See Gregory F. Treverton, et al., *Film Piracy, Organized Crime and Terrorism*, at xii (2009), available at <http://www.rand.org/pubs/monographs/MG742/> (“DVD piracy, which has a higher profit margin than narcotics and minimal risks of enforcement, is attractive around the world as an element of criminal portfolios that also include drugs, money laundering, extortion and human smuggling.... [T]his report provide[s] compelling evidence of a broad, geographically dispersed, and continuing connection between film piracy and organized crime.”).

¹⁴ Press Release, U.S. Department of Justice, *Justice Department Announces New Intellectual Property Task Force as Part of Broad IP Enforcement Initiative* (Feb. 12, 2010), available at <http://www.justice.gov/opa/pr/2010/February/10-ag-137.html>.

¹⁵ See sections 401-403 of the PRO-IP Act.

distribution through other channels. Enforcement agencies (notably within DOJ and DHS) should plan a similarly focused preventive and responsive strategy. An interagency task force should work with industry to coordinate and make advance plans to try to interdict these most damaging forms of copyright theft, and to react swiftly with enforcement actions where necessary. The Department of Homeland Security, and U.S. Immigration and Customs Enforcement, in particular, have been proactive in thinking about strategies in this area. A pilot program in this area could provide a model for more proactive enforcement strategies against a much broader range of infringements. And, while the blockbusters may be the greatest target of pirates and illegal sites, this is not to ignore the huge impact that content theft has on the financially vulnerable lower and mid-size budget films who are hugely affected by any amount of infringement. They too must be built into proactive enforcement strategies.

- The government should develop a process to identify those online sites that are most significantly engaged in conducting or facilitating the theft of intellectual property. Among other uses, this identification would be valuable in the interagency process that culminates in the annual Special 301 report, listing countries that fail to provide adequate and effective protection to U.S. intellectual property rights holders. Special 301 could provide a focus on those countries where companies engaged in systematic online theft of U.S. copyrighted materials are registered or operated, or where their sites are hosted. Targeting such companies and websites in the Special 301 report would put the countries involved on notice that dealing with such hotbeds of copyright theft will be an important topic of bilateral engagement with the U.S. in the year to come. (As noted above, while many of these sites are located outside the U.S., their ability to distribute pirate content in the U.S. depends on U.S.-based ISP communications facilities and services and U.S.-based server farms operated commercially by U.S.-based companies.)
- Customs authorities should be encouraged to do more to educate the traveling public and entrants into the United States about these issues. In particular, points of entry into the United States are underused venues for educating the public about the threat to our economy (and to public safety) posed by counterfeit and pirate products. Customs forms should be amended to require the disclosure of pirate or counterfeit items being brought into the United States. The Administration should also provide strong support for those provisions of the Customs Facilitation and Trade Enforcement Reauthorization Act (S. 1631) that build on the PRO-IP Act approach and that provide additional tools and resources for expanding and improving the Department of Homeland Security's efforts to combat international trademark counterfeiting and copyright theft.
- Many of the most popular illegal sites are operated by overseas operators that use services in the U.S. such as payment processors, advertising brokers and ISP hosting services. These services allow such foreign infringers to attract Internet users in the United States with their illicit offerings, give their unlawful operations an air of legitimacy, and produce a steady stream of income from this patently illegal activity. Enforcement agencies (notably within DOJ and DHS) should consider a strategy to bring enforcement actions that target foreign site operators' use of facilities and services here in the United States. An interagency task force should: (1) work with the industry to

identify the most popular and damaging sites, (2) identify where they utilize services in the U.S. that further their illegal activity, and (3) target those sites with aggressive and swift enforcement actions where appropriate.

III. Selected supplemental comment topics

1. Suggest methods to improve the adequacy, effectiveness and/or coordination of the various Federal departments, agencies and programs that are charged with enforcement of intellectual property.

Coordination between federal law enforcement agencies and organizations representing copyright owners, while already significant, could be improved. For example:

- Federal enforcement agencies should provide clear guidance to right holders on:
 - How they prioritize classes of IP crimes;
 - Which departments accept IP criminal referrals, with a listing of current contact information;
 - Departmental criteria for accepting IP criminal cases for investigation; and
 - Detailed procedures for providing timely notice of acceptance or denial of cases.
- Meetings between federal enforcement agencies and private industry should be conducted periodically to discuss current trends in IP theft and ways to improve the process of submitting and advising on the status of criminal referrals. Mechanisms should be established to provide victim rights holders information on the status of referred cases in a timely fashion.

4. Provide examples of existing successful agreements, in the U.S. or abroad, that have had a significant impact on intellectual property enforcement, including voluntary agreements among stakeholders or agreements between stakeholders and the relevant government.

In seeking to protect their copyrighted content from unauthorized copying and redistribution, content owners have worked for more than 15 years with consumer electronics (CE) and information technology (IT) companies to develop and implement content protection technologies. Starting with the introduction of the DVD as a new digital platform for distribution of high quality audiovisual content to consumers, content companies have worked on a voluntary, market-driven basis with CE and IT companies to develop and implement technological protection measures that will allow consumers to seamlessly and transparently enjoy copyrighted works while diminishing the risks of infringement. These efforts have resulted in the formation of a number of groups that license various content protection technologies under license agreements and governance rules that have been negotiated and agreed to among various stakeholders from across the content, CE and IT industries. Examples

include the DVD Copy Control Association that licenses the CSS technology used to protect DVDs; the Advanced Access Content System Licensing Administrator that licenses the AACSS technology used to protect high definition content on Blu-ray discs and other formats; the Digital Transmission Licensing Administrator that licenses the DTCP technology used to protect digital motion picture, television and other content against unauthorized interception and copying in the home and personal environment (e.g., between a digital set top box and digital video recorder, or between a personal computer and a digital TV); and the 4C Entity that licenses, among other technologies and uses, the CPRM and CPPM technologies used to protect audio content on the DVD audio format.

Content owners have played an active role not just in the formation of and/or participation in these various groups, but also as “adopters” of these various content protection technologies, by employing them on works prior to their distribution to the public, or negotiating for their implementation in distribution agreements. In addition, content owners and the groups that license these content protection technologies have relied upon the anti-circumvention provisions of the Digital Millennium Copyright Act (“DMCA”) to enforce against the hacking of these various technologies.¹⁶

While the development, implementation and enforcement of these various content protection technologies and licenses represent substantial achievements of the private sector (supported by the legal framework of DMCA and other laws) in taking pro-active steps to reduce the risks of piracy and enforce the integrity of the copyrights owned by content companies, these efforts provide only a partial solution to the problem of copyright theft. The federal government has an important role to play in the civil and criminal enforcement of these laws. Moreover, whether via an unauthorized camcorder recording made in a movie theater or a rip of a DVD made using an illegal piece of hacking software, unauthorized copies of copyrighted works eventually make their way to the Internet. Therefore, other means and tools – both public and private – still need to be embraced and employed to address in a comprehensive manner the critical problem of copyright theft.

9. *Suggest how state and local law enforcement authorities could more effectively assist in intellectual property enforcement efforts, including whether coordination could be improved, if necessary, and whether they should be vested with additional authority to more actively participate in prosecutions involving intellectual property enforcement.*

The use of state labeling laws has been tremendously useful in addressing infringing hard-copy music and movie product. Such state causes of action are not preempted by federal law, and allow state agencies to address IP crime with local manpower and resources. State labeling laws that define unauthorized online file sharing and streaming as a felony would provide state and local law enforcement with jurisdiction to investigate and prosecute online theft of intellectual property.

¹⁶ See 17 U.S.C. section 1201 et seq.

State and local law enforcement authorities may more effectively assist in IP enforcement efforts by having access to federal funding dedicated to supporting criminal IP investigations and prosecutions. Section 401 of the PRO-IP Act is a good starting point.

State and local law enforcement agencies could use existing state consumer protection laws to investigate and enforce violations by p2p networks that expose consumers to intrusion, viruses and revelation of personal data.¹⁷ Advertising and payment processing gives the illegal sites the patina of legitimacy which induces consumer confusion and massive violation of copyright.

Federal agencies can assist with this process by effectively communicating to state and local authorities that such funding is available (for example, through the PRO-IP Act), offering support for the application process, and establishing reasonable deadlines for submission of application materials.

10. Describe the adequacy and effectiveness of the reporting by the various agencies responsible for enforcing intellectual property infringements, such as the reporting of investigations, seizures of infringing goods or products, prosecutions, the results of prosecutions, including whether any further voluntary reporting of activities should be made, in keeping with other federal law.

There is a high degree of inconsistency with regard to the frequency that federal law enforcement officers and prosecutors advise the victims of IP crimes of the status of investigations and prosecutions. While it is fully understood that the integrity of ongoing investigations and prosecutorial strategies must not be compromised, regular updates and feedback on cases in progress would be useful to private industry.

Detailed annual reports should be submitted by federal agencies setting forth the results of their efforts to enforce against IP crimes, including descriptions and quantities of items seized, the number of defendants charged, and a listing of successful prosecutions. Pursuant to the Pro-IP Act, DOJ is already making such reports.

12. Suggest ways to improve the adequacy, effectiveness and/or coordination of the enforcement training and technical assistance provided by the U.S. Government, including (but not limited to): a. Identification of specific countries or geographical regions that could benefit from U.S. Government training and technical assistance and the program areas where training and assistance should focus; b. Suggestions for how to leverage resources or partnerships to broaden the impact of U.S. Government training and assistance; and c. Suggestions to enhance industry participation in relevant training programs.

¹⁷ See, e.g. United States Federal Trade Commission, Widespread Data Breaches Uncovered by FTC Probe (2010), available at <http://www.ftc.gov/opa/2010/02/p2palert.shtm>.

The U.S. Government should consider coordinating and sponsoring a few well organized and comprehensive IP enforcement training programs annually that include participation by all federal law enforcement agencies and prosecutor offices dedicated to addressing IP crime. Such an effort would preserve federal resources and allow for more effective participation by private industry, which can be spread thin when asked to attend multiple events by separate agencies throughout the year.

14. Suggest specific methods to limit or prevent use of the Internet to sell and/or otherwise distribute or disseminate infringing products (physical goods or digital content).

The creative community organizations provide specific suggestions related to this topic in section II above. In addition:

- An accelerated review of criminal referrals involving pre-release music and movies should be established by federal law enforcement authorities, as this is one of the most damaging forms of online copyright theft and requires immediate attention and swift action.
- There are several technologies and methods that can be used by network administrators and providers, including many that are already used for spam and virus protection. These include:
 - Technologies to detect, monitor (and filter) traffic or specific files based on analysis of information such as protocols, file types, text description, metadata, file size and other “external” information;
 - Content recognition technologies such as digital hashes, watermark detection, and fingerprinting technologies;
 - Site blocking, redirection with automated warning systems/quarantine of repeat offending sites;
 - Bandwidth shaping and throttling;
 - Scanning infrastructure (the ability to subscribe to RSS-style data feeds as sites get new postings of content and links (for linking, streaming, and locker sites); and
 - Consumer tools for managing copyright infringement from the home (based on tools used to protect consumers from viruses and malware).

Network administrators and providers should be encouraged to implement those solutions that are available and reasonable to address infringement on their networks. The government should implement policies that encourage, rather than impede,

investment and innovation in the area of technology solutions to infringement and counterfeiting.

- Efforts should be made to educate online advertisers, financial payment services providers, and the general public about the risks and dangers of websites and services dedicated to selling infringing goods and/or making unauthorized content available to the public.
- The U.S. Government, through its activities on the Governmental Advisory Committee of ICANN, must advocate preserving public access to accurate Whois data as a critical enforcement tool for IPR owners and law enforcement. This includes the proposals for improvements to ICANN contractual standards put forward by a consortium of law enforcement agencies from 7 countries, including the U.S.

15. Provide information on the various types of entities that are involved, directly or indirectly, in the distribution or dissemination of infringing products and a brief description of their various roles and responsibilities.

The following types of technologies are currently used to disseminate illegally copied motion picture, television and music content online:

- Video on Demand Streaming: These websites include those which provide users the ability to watch illegal copies of movie, television and music video content for free without installing a program or first downloading a complete file. Streaming websites allow users to click and instantaneously view content streamed to their computer.
- Peer-to-Peer: These networks allow users to download complete copies of illegally copied movie, television and music content for free using a “client” program installed on their own computer. The client program facilitates the simultaneous download of an illegal movie or television file from other users in small, quickly downloaded parts.
- Pay to Download: These include websites that charge users to download illegally copied movie, television and music content either on a per download, subscription, or advertising-supported basis.
- Usenet: Usenet allows the distribution of movie and television content through a series of connected news servers. Users subscribe to paid news group services to access illegal movie and television content stored on Usenet servers around the world.

16. *Discuss the effectiveness of recent efforts by educational institutions to reduce or eliminate illegal downloading over their networks. Submissions should include recent specific examples.*

The ideal university approach is a combination of a clear campus policy, consistent enforcement, and effective use of technology, along with convenient access to legal alternatives. Universities showing success in addressing the issue of illegal downloading on campus networks are using a combination of practices including: (a) educating students about the campus policy; (b) enforcing the policy on the campus network, including prohibiting use of file-sharing systems predominantly used for unauthorized sharing of copyrighted content on the university's local area network, and sending automatic notices informing users that their activities are not anonymous and that the infringing material and p2p software must be removed before logging back onto the network; (c) encouraging students to use a legal service; and (d) adopting a technological solution (e.g., in-house methods of blocking infringing transmissions and/or blocking and filtering technologies offered in the marketplace by companies such as Audible Magic, Enterasys, Mirage Networks and Red Lambda).

Examples given at one Congressional hearing offer a glimpse of the significant network relief – and savings – offered by at some of these technologies:

- Arizona State University's Technology Officer testified that the school's "adoption of CopySense [w]as one of the easiest technical adoptions we have undertaken ... " He noted that once installed it began rejecting about 5% of the university's overall traffic, without a noticeable increase in calls to their help-desk or a single complaint about interference with legitimate network uses.¹⁸
- The University of Utah testified that since it began using Audible Magic, in conjunction with a network monitoring strategy that targeted bandwidth hogs, the number of notices it received from the RIAA and MPAA had declined by more than 90%. After implementation, the school's Information Security Office spent only about 3 person-hours per week dealing with network abuse issues. Without the technology solutions, it estimated it would require at least one additional full-time employee to respond to complaints.¹⁹

¹⁸ The Role of Technology In Reducing Illegal File Sharing: A University Perspective, Before the H. Comm. On Science and Technology, 110th Cong. (2007), statement of Dr. Sannier, available at http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/full/05june/sannier_testimony.pdf.

¹⁹ The Role of Technology In Reducing Illegal File Sharing: A University Perspective, Before the H. Comm. On Science and Technology, 110th Cong. (2007), statement of Dr. Wright, available at http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/full/05june/wight_testimony.pdf.

- In one particular university example, use of Audible Magic resulted in an 80% decrease in total network traffic in one month, a 71% decrease in the number of users of p2p applications, and p2p traffic dropping from 20GB per day to basically zero in less than one week.²⁰

20. *Provide specific suggestions on the need for public education and awareness programs for consumers, including a description of how these programs should be designed, estimates of their cost, whether they should focus on specific products that pose a threat to public health, such as counterfeit pharmaceuticals, or whether should they be general infringement awareness programs.*

Much can and should be done in the area of public education regarding the importance of intellectual property and the laws governing intellectual property. The Copyright Alliance, of which many signatories to this submission are members, addresses education more directly in its comments.

Conclusion

In this submission, we have outlined the threats to intellectual property that have cost tens of thousands of jobs, made a detrimental impact on the creativity and innovation which are the hallmark of the industries we represent, and impeded the ability of a legitimate legal marketplace to reach its true potential. Both governmental agencies and the creative industries must be provided with the tools necessary to more effectively address existing and emerging threats and illegal activity.

These tools, it must be emphasized, are critical, but they are means to an end. That end is a dynamic, content-rich, readily accessible, and hassle-free marketplace that excites and engages consumers, while it also compensates those who, for almost a century, have made it possible for American movies, music and other media to entertain and educate audiences around the world. We will continue to do our part: seeking out and embracing innovative new models, transforming how we do business to serve the 21st century consumer and offering fans countless new ways to enjoy their favorite content. The steps we identify in this submission are designed to bolster these efforts and ensure that both the existing and emerging business models attain their full potential to serve and satisfy both the public and those who create content.

²⁰ The Role of Technology In Reducing Illegal File Sharing: A University Perspective, Before the H. Comm. On Science and Technology, 110th Cong. (2007), statement of Mr. Ikezoye, available at http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/full/05june/ikezoye_testimony.pdf.

Respectfully submitted,

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

DIRECTORS GUILD OF AMERICA

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES

MOTION PICTURE ASSOCIATION OF AMERICA

NATIONAL MUSIC PUBLISHERS' ASSOCIATION

RECORDING INDUSTRY ASSOCIATION OF AMERICA

SCREEN ACTORS GUILD

DESCRIPTIONS OF CREATIVE COMMUNITY ORGANIZATIONS

1. American Federation of Television and Radio Artists

AFTRA members are the people who entertain and inform America and work as actors, singers, journalists, dancers, announcers, comedians, disc jockeys and other performers in television, radio, cable, sound recordings, music videos, commercials, audiobooks, non-broadcast industrials, interactive games and all formats of digital media. Founded in 1937, AFTRA today provides its more than 70,000 members nationally a forum for bargaining strong wages, benefits and working conditions and the tools and upward mobility to pursue their careers with security and dignity. From new art forms to new technology, AFTRA members embrace change in their work and craft to enhance 21st century American culture and society.

2. Directors Guild of America

DGA was founded in 1936 to protect the economic and creative rights of Directors. Over the years, its membership has expanded to include the entire directorial team, including Unit Production Managers, Assistant Directors, Associate Directors, Stage Managers, and Production Associates. DGA's 14,000 members live and work throughout the U.S. and abroad, and are vital contributors to the production of feature films, television programs, documentary features, news and sports, commercials, and content made for the Internet and new media. DGA seeks to protect the legal, economic, and artistic rights of directorial teams, and advocates for their creative freedom.

3. International Alliance of Theatrical Stage Employees

IATSE is the labor union that represents technicians, artisans, and craftspersons in the entertainment industry, including live theater, motion picture and television production, and trade shows. IATSE was formed in 1893 and has over 110,000 members. Through its international organization and its autonomous local unions, IATSE seeks to represent every worker employed in its crafts and to help them obtain the kind of wages, benefits, and working conditions they need for themselves and their families.

4. Motion Picture Association of America

The Motion Picture Association of America, Inc. (MPAA) serves as the voice and advocate of the American motion picture, home video and television industries from its offices in Los Angeles and Washington, D.C. Its members include: The Walt Disney Studios; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLLP; and Warner Bros. Entertainment Inc.

5. National Music Publishers' Association

The National Music Publishers' Association (NMPA) is the largest U.S. music publishing trade association with over 2,500 members. Its mission is to protect, promote, and advance the interests of music's creators. The NMPA is the voice of both small and large music publishers, the leading advocate for publishers and their songwriter partners in the nation's capital and in

every area where publishers do business. The goal of NMPA is to protect its members' property rights on the legislative, litigation, and regulatory fronts. In this vein, the NMPA continues to represent its members in negotiations to shape the future of the music industry by fostering a business environment that furthers both creative and financial success.

6. Recording Industry Association of America

The Recording Industry Association of America is the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes our members' creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA® members create, manufacture and/or distribute approximately 85% of all legitimate sound recordings produced and sold in the United States.

In support of this mission, the RIAA works to protect intellectual property rights worldwide and the First Amendment rights of artists; conduct consumer industry and technical research; and monitor and review state and federal laws, regulations and policies. The RIAA® also certifies Gold®, Platinum®, Multi-Platinum™, and Diamond sales awards as well as Los Premios De Oro y Platino™, an award celebrating Latin music sales and its new Digital Sales award.

7. Screen Actors Guild

SAG is the nation's largest labor union representing working actors. Established in 1933, SAG has a rich history in the American labor movement, from standing up to studios to break long-term engagement contracts in the 1940s, to fighting for artists' rights amid the digital revolution sweeping the entertainment industry in the 21st century. With 20 branches nationwide, SAG represents over 120,000 actors who work in film and digital motion pictures, television programs, commercials, video games, industrial shows, Internet, and all new media formats. SAG exists to enhance actors' working conditions, compensation, and benefits and to serve as a powerful unified voice on behalf of artists' rights.