



**WRITERS
GUILD OF
AMERICA, WEST**

March 24, 2010

Sent Via Email: intellectualproperty@omb.eop.gov

Victoria A. Espinel, Intellectual Property Enforcement Coordinator
Office of Management and Budget
Washington, DC 20050

**RE: Comments Regarding the Coordination and Strategic Planning of the
Federal Effort Against Intellectual Property Infringement.**

Dear Ms. Espinel:

Writers Guild of America, West (WGAW) is pleased to submit comments on the important topic of piracy. We supported the PRO-IP Act and are encouraged that the Federal government is prioritizing this matter. We believe it is critical that all stakeholders engage in a discussion of the problems posed in dealing with piracy as well as solutions that protect copyrighted works and their creators while at the same time balancing public and consumer needs.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and new media. As the bargaining representative of the creators of audiovisual content, the WGAW has a significant interest in the protection of copyrighted works. Guild members rely on residuals – deferred compensation based on the continuing use of creative works – as a form of compensation. Over 40 years ago, the members of our Guild embraced deferred compensation, ensuring that writers and other creative talent would benefit as the programs they created were enjoyed by consumers over and over.

Residual payments are truly the lifeblood of individual writers, and allow this creative community to remain solvent despite the fluctuations and near-constant uncertainties of the entertainment industry. In 2008, professional writers represented by the WGAW received over \$1 billion in income. Of this total, \$286 million came in the form of residual payments for the reuse of original material on DVD, in international sales, syndicated on broadcast and cable channels, sold on iTunes, streamed online and viewed in many other markets. These residual payments constitute approximately 25 percent of total writer income. Residual payments have continued to expand, rising approximately five percent per year over the last five years. The growth in residuals demonstrates the long term value that copyrighted works create and the importance that protecting copyright from infringement has for the entire entertainment community.

Writers and other members of the Hollywood creative community depend on residual payments derived from the reuse of content in order to sustain their careers and support their health and pension plans. These payments essentially serve as R&D for the entertainment industry, allowing writers to develop new material while waiting for their next employment opportunity. Any devaluation of copyrighted content could significantly impact the ability of writers to spend time developing original content. To protect the value of content and the benefits to society that come from the creation of intellectual property, piracy must be addressed.

Given the importance of protecting copyright to members of the WGAW and other entertainment industry workers, we will focus our comments on Part II of the IPEC's request.

II. Piracy Solutions

In recent years, the WGAW along with the rest of the entertainment industry has focused attention on the rise of online distribution of content and the opportunities and threats posed therein. In 2007, the 8,000 members of the WGAW, along with the members of our sister organization Writers Guild of America, East struck for 100 days to ensure fair payments for writers on new media platforms, including the Internet. In recognizing the importance of this market to the future of writers, the WGAW was keenly aware that its growth depends on the protection of copyrighted works. We are determined to curtail piracy as a matter of survival. However, the WGAW would like to emphasize that protection of copyrighted works should be coupled with the promotion of an open Internet. This is why the WGAW has insisted that Net Neutrality or Internet Freedom apply only to lawful content and that reasonable network management is essential to combating online piracy. We believe that the proper approach to piracy, particularly online piracy, must focus not on prior restraint but rather on tools to enforce the law. Crafting solutions to piracy requires surgical precision, not a blow from a blunt object. The WGAW does not believe that the threat of piracy should be used to create new barriers to entry on the Internet, nor to protect deep-pocketed content providers and their business partners from competitive forces. Piracy must not be used as a red herring that allows ISPs or huge content companies to enact a potentially discriminatory scheme of widespread copyright filtering.

While there is not one perfect solution to eliminate piracy, the WGAW believes that the best mechanism for handling piracy may already be at the disposal of rights holders. That solution is graduated response.

Graduated response is a simple idea. Working in conjunction with ISPs, rights holders can send two communications to users that have been identified as viewers or distributors of pirated content. If the individual continues to view or traffic pirated content, that user can have his/her Internet access suspended. An effective and fair graduated response regime will include an impartial proceeding before a user's Internet connection is terminated. As discussed below, some countries have created an impartial and expedited administrative process to penalize chronic offenders. Given the growing use of the Internet as a communication tool, any graduated response mechanism should include a hearing prior to the disconnection of an alleged offender's Internet connection.

In fact, many of the basic provisions of graduated response are already found in the Digital Millennium Copyright Act (DMCA), passed unanimously by the United States Senate in 1998 and signed by then-President Clinton. Under DMCA, ISPs are provided with certain “safe harbor” provisions if they abide by the copyright protection provisions in the law. For example, if a rights holder notifies an ISP of a site or individual that is trafficking pirated content, the ISP can legally block access to the site. As noted in the bill, there is a remedy for sites/individuals to rebut the assertion and allow access to their site to resume if they prove the site is not distributing illegal content. In addition, provisions of the law allow for an ISP to terminate a user’s Internet access; however, “ISPs generally interpreted the statute as requiring disconnection only where there has been judicial determination of repeat infringement.”¹

Graduated response has gained worldwide attention as a potential solution to digital piracy – a solution that does not create discriminatory barriers to entry on the Internet, nor impede the free flow of traffic over the Internet. For example, France recently adopted a graduated response law, called the “Creation and Internet Law.” The law was strongly supported by copyright holders in France, as well as the Directors Guild of America.² This law allows for an expedited process with a judge prior to the termination of an Internet connection. As reported by The Register, the final bill “leaves it to a judge to order disconnections through an ‘ordonnance pénale’ – a simplified proceeding that doesn’t include the presence of the person accused of copyright infringement unless an appeal is filed.”³ The French law also created a new state agency, the Higher Authority for the Distribution of Works and the Protection of Copyright on the Internet (HADOPI) that facilitates the process of notifying pirates of their illegal trafficking and helps rights holders punish repeat offenders with fines and termination of Internet access. For example, “After first being sent a warning email and then a formal letter by HADOPI, those accused of illegal file-sharing for a third time could be disconnected for up to a year and face a €300,000 fine and jail time. Even those found guilty of ‘negligence’ for allowing others (such as their children) to pirate online material risk a month-long internet suspension and a €1,500 fine.”⁴

Several other countries have contemplated or implemented graduated response mechanisms to eliminate pirated content from their networks. For example, Ireland implemented graduated response after the country’s largest ISP agreed to the practice as part of a settlement with rights holders.⁵ Taiwan has passed a form of graduated response which may not allow for the complete severing of an individual’s access to the Internet, still gives the government authority to “restrict access” to users that are repeat offenders.⁶ New Zealand pursued graduated response, but after meeting some resistance, shelved the plan and continues to look for a new way of implementing

¹ Burger, Jim, “Filtering and Graduated Response Against Online Video Infringers,” available at <http://www.dowlohnes.com/files/upload/infringers.pdf>.

² See Resolution of the Directors Guild of America National Board, French Internet and Creation Law, available at <http://www.dga.org/news/pr-images/2009/dga-french-resolution.pdf>.

³ Modine, Austin. “France Passes Three Strikes Law,” *The Register*, (September 15, 2009), available at http://www.theregister.co.uk/2009/09/15/france_hadop_i_passes_lower_house/.

⁴ Modine, *Ibid.*

⁵ Burger, *Ibid.*

⁶ Burger, *Ibid.*

an aggressive copyright protection law. Italian authorities have promised to implement an approach similar to the French law.⁷

The United Kingdom and the European Union are both pursuing graduated response as a strong deterrent to piracy. The UK's Business, Innovation and Skills Minister, Peter Mandelson, recently told reporters that his administration intends to pursue graduated response to protect rights holders as part of its ongoing discussion of a Digital Economy Bill. Mandelson is quoted as saying, "What we will be putting before parliament is a proportionate measure that will give people ample awareness (of their wrongdoing) and opportunity to stop breaking the rules. It will be clear to them that they have been detected, that they are breaking the law and risk prosecution. It will also make clear that we will go further and make technical measures available, including account suspension. In this case, there will be a proper route of appeal. But it must become clear that the days of consequence-free, widespread online infringement are over."⁸

In the wake of the French Internet and Creation Law, the European Union is aggressively pursuing a plan to allow for a "three strikes" provision. As part of their recent deliberations on a package of new Telecom rules, the EU has reached an agreement that if adopted would allow countries to discontinue Internet access for chronic pirates with a few small caveats. Access can be terminated only "with due respect for the principle of presumption of innocence and the right to privacy," and after a "prior, fair, and impartial procedure."⁹ In addition, the EU ministers insisted on a provision that would allow for "timely judicial review."¹⁰

Anecdotally the WGAW has heard from at least one American ISP that the current graduated response techniques provided for in the DMCA have proven very effective at rooting out pirates. One ISP has stated in private discussions that the very first notice to a user stops piracy approximately ninety percent of the time. During the course of an FCC Workshop on the role of content in the broadband ecosystem, a representative for the advocacy organization Public Knowledge referenced a February presentation by Preston Padden of ABC/Disney at the Silicon Flatirons Conference in Colorado where Mr. Padden said "that eighty percent of the time when people get notices from ISPs saying 'I know what you're doing, stop it' they stop it."¹¹

Graduated response is an effective tool because it gives rights-holders remedies against those who pirate content and mandates strong penalties for habitual lawbreakers without interfering with the flow of traffic over the Internet. Other suggested solutions to the piracy problem, including copyright filtering, have the potential to create discriminatory lanes on the Internet, where large and deep-pocketed content providers can "flag" their content as non-pirated, while all other traffic is filtered. Such a scheme could cause delays in certain web video reaching its final destination. Web video watchers often make decisions in seconds, and even the slightest

⁷ Burger, *Ibid.*

⁸ Andrews, Robert, "UK Confirms Plans to Warn, Throttle, Kick Illegal Downloaders," *Paid Content:UK* (October 28, 2009), available at <http://paidcontent.co.uk/article/419-uk-confirms-plans-to-warn-throttle-kick-illegal-downloaders/>.

⁹ Paine, Andre, "EU Says Internet Access Can Be Restricted," *Billboard.biz* (November 5, 2009) available at http://www.billboard.biz/bbbiz/content_display/industry/e3ie21418ac624effebfd1ae0285716d95a.

¹⁰ Paine, *Ibid.*

¹¹ See Transcript, Federal Communications Commission Workshop on the Role of Content in the Broadband Ecosystem, p. 65.

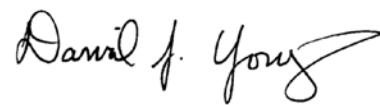
delay may result in viewers clicking through to a different site/video. Lastly, copyright filtering may result in legitimate and legal communications being erroneously identified as illegal traffic. Piracy is a serious problem, but the pitfalls of copyright filtering are simply too problematic to ignore.

Improvements to graduated response should include provisions for the creation of impartial, fair and clear judicial processes before a user's Internet connection is severed. Strong rules, such as terminating the Internet connections of chronic thieves, would seriously diminish the amount of pirated content on American networks. Congress should consider creating expedited administrative procedures to punish those who knowingly steal copyrighted material by prohibiting Internet access for up to one year. Unlike other potential measures, a strong, enforceable graduated response mechanism would not infringe upon the openness and freedom of the Internet.

Piracy is a crime and should be treated as such. The financial well-being of the members of our Guild and the creative community largely depends on the protection of copyrighted works and the strong prosecution of pirates. But to use the threat of piracy to allow for discriminatory practices or to otherwise interfere with the free flow of traffic on the Internet is a solution that would fundamentally alter the open nature of the Internet. Addressing the dangers of piracy will necessitate an ongoing discussion, with new techniques required as technology changes. However, the WGAW believes that many effective tools, most notably graduated response, are already at the disposal of rights holders. The Intellectual Property Enforcement Coordinator can and should recommend reevaluating the current tools available to rights holders to strongly enforce copyright law without eliminating a free and open Internet.

Questions regarding this submission can be directed to Alison Reardon, Political & Legislation Director, Writers Guild of America, West at 323-782-4772 or areardon@wga.org.

Sincerely,

A handwritten signature in black ink that reads "David J. Young". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

David J. Young
Executive Director