

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

In the Matter of)	
)	
A National Broadband Plan)	GN Docket No. 09-51
For Our Future)	
)	

Comments of the Writers Guild of America, West in Response to the Workshop on the Role of Content in the Broadband Ecosystem

The Writers Guild of America, West (WGAW) hereby submits these comments in response to the Federal Communications Commission workshop titled “The Role of Content in the Broadband Ecosystem” held at the Commission on September 17, 2009.

Charles B. Slocum, on behalf the WGAW, was pleased to testify on the need to preserve an open, non-discriminatory Internet, while also protecting copyrighted works from pirates and thieves.

The Writers Guild wholeheartedly supports Internet Freedom. We also want to protect copyrighted works. As we noted in previous filings, over 8,000 professional writers in our organization rely on the legal sale of works for modest residual payments.¹ These payments are often the lifeblood of working writers, and help these professional artists remain solvent despite the constant uncertainties of employment in the entertainment industry.

However, too often the threat of piracy is used as an argument against Internet Freedom, as if we can not maintain the openness and freedom of the Internet while curtailing access to illegal content. We respectfully disagree.

We believe mechanisms such as graduated response, currently employed by certain ISPs, may provide significant remedies against pirates. In fact, at least one ISP has stated that nearly 90 percent of piracy is curtailed through the first step in the current graduated response regime. Federal law already provides for graduated response techniques to punish pirates. The WGAW suggests that this Commission ask Congress to expand upon provisions of the law. Expansion could include creating expedited,

¹ See Reply Comments of the Writers Guild of America, West, In the Matter of A National Broadband Plan For Our Future, GN Docket No. 09-51.

impartial hearings prior to a user's Internet connection being terminated, as well as greater responsibilities from ISPs to identify and notify pirates of their illegal behavior. Such a request to Congress can be made by this Commission as part of the National Broadband Plan, or as part of a formal rulemaking to preserve an open Internet.

In earlier filings in this proceeding, the WGAW reiterated its opposition to piracy and the need for the FCC to offer clearly proscribed rules to root out pirates from American networks. Specifically, we asked the FCC to explicitly allow for reasonable network management practices to curtail the proliferation of pirated content. In addition, the WGAW argued that network management techniques should not "be used in such a way to offer advantages to certain content providers, or to disadvantage other providers. Network management techniques should be explicitly prescribed by the FCC, they should be tailored to allow ISPs to curtail only illegal web traffic," and the FCC should monitor techniques used to identify and block access to illegal content.²

The Writers Guild of America, West applauds the Commission for announcing its intention to codify strong rules protecting the open Internet. We wholeheartedly endorse the basic components of the rules, and applaud the inclusion of a non-discrimination rule, and the proposal to require transparency of traffic management techniques. However, we are concerned about specific proposals in the NPRM related to reasonable network management that may have unintended consequences -- consequences that may allow certain content providers greater or faster access to consumers, often at the expense of independent creators and independent voices.

I. The Role of Content in Spurring Broadband Adoption

There are many reasons why broadband adoption has grown in recent years in the United States. Without question, the richness and diversity of content found on the Internet has been a major driver of broadband adoption. More Americans are using the Internet for information and to be entertained. Viewers are flocking to the Internet both because of the virtual on-demand ability to access the content you want, when you want it, and because of the richness of content one can find online.

Even a cursory glance at the growth of web video over the past months and years demonstrates this point. For example, from March 2008 to April 2009, Nielsen's Video Census tracked significant growth in web video. Hulu, ABC.com, and MTV Networks Music all experienced triple digit growth over the course of one year.

² See Reply Comments of the Writers Guild of America, West, In the Matter of A National Broadband Plan For Our Future, GN Docket No. 09-51, p. 3.

Chart I: Web Video Growth March 2008 to April 2009

Video Brand	Apr-09 Total Streams (000)	Month-over-Month % Change	Year-over-Year % Change	Share of Streams
Overall Online Video Usage	9,452,996	-2.3%	24.2%	100.0%
YouTube	5,490,204	0.2%	35.5%	58.1%
Hulu	373,290	7.1%	490.4%	3.9%
Yahoo!	203,628	-12.2%	-8.1%	2.2%
Fox Interactive Media	201,362	-3.0%	-38.8%	2.1%
Nickelodeon Kids and Family Network	175,917	-10.3%	15.9%	1.9%
MSN/Windows Live	164,422	-2.7%	9.8%	1.7%
ABC.COM	148,830	-15.9%	144.8%	1.6%
MTV Networks Music	143,356	15.7%	359.6%	1.5%
Turner Sports and Entertainment Digital Network	130,559	-5.1%	60.0%	1.4%
CNN Digital Network	112,469	8.7%	32.7%	1.2%

Source: Nielsen VideoCensus

Note: Includes progressive downloads and excludes video advertising.

The Writers Guild would like to point out that 7 of the top 10 online video sites are owned by the incumbent media conglomerates. Certainly the major media companies have realized the power of this new distribution system and have pushed content online with the hope of continuing their control of the entertainment market. This should cause us all concern as we contemplate the future of online content, specifically video content.

Americans are not only watching more videos online, but they are also spending more time watching videos. As the chart below illustrates, every age demographic is spending more time in front of a computer to watch online videos, with nearly every group seeing double digit percentage increases.

Chart II: Americans are Watching More Online Video, Longer

	Nov-08 Time per Viewer (min)	Apr-09 Time per Viewer (min)	% Change Over 6 Months
Total	178	206	16%
Male	209	249	19%
Female	151	170	12%
2 - 11	113	116	3%
12 - 17	178	190	7%
18 - 24	303	349	15%
25 - 34	253	296	17%
35 - 49	187	243	29%
50 - 64	122	139	14%
65+	67	81	21%

Source: Nielsen VideoCensus

As Charles Slocum testified during this workshop, “Content is why the Internet matters.”³ As the Guild has testified elsewhere, consolidation in traditional media has diminished opportunities for independent content creators to own and control their content.⁴ The WGAW often reminds this Commission of the detrimental effects of the repeal of the Financial Interest and Syndication Rules in the 1990s. Their repeal has allowed for a mere handful of companies to own and control the overwhelming majority of content that makes it onto the television screen.

In contrast, an open Internet promises a flurry of new content, as creators experiment with new forms of entertainment. Already, over the past few years, content creators of all kinds have taken to the Internet to create compelling, dramatic fare. For example, WGAW member Ruth Livier created her own web program called “Ylse,” a program targeted to Hispanic Americans. The program is sometimes in Spanish,

³ See Transcript, Federal Communications Commission Workshop on the Role of Content in the Broadband Ecosystem, p. 55.

⁴ See Reply Comments of the Writers Guild of America, West, In the Matter of A National Broadband Plan For Our Future, GN Docket No. 09-51. See also Peterman, Steve, “Testimony before the United States House of Representatives, Telecommunications and Internet Subcommittee.” May 6, 2008, available at: http://archives.energycommerce.house.gov/cmte_mtgs/110-ti-hrg.050608.Peterman-testimony.pdf ;

sometimes in English and sometimes in Spanglish. Another example is from WGAW member Brent Friedman, who created the very popular web series “Gemini Division.” Other examples abound. With the growth of online video noted above, and substantial growth in online advertising revenue, we can expect independent online video to continue to grow.⁵

For the WGAW, an open Internet is simply “Fin Syn” for the Internet. An open Internet allows writers creative control over their product, while maintaining the rights to their programs. In the absence of constraints on ownership in traditional television programming, an open Internet offers among the best opportunities to reach an audience without relying upon incumbent studio systems. Preserving this access to viewers is a key objective for the WGAW. And far beyond our own concerns, we believe avoiding a consolidated media system is essential for the vitality of American public discourse and our precious Democracy. The Internet has powered a new cadre of citizen journalists, and created a multitude of ways for Americans to read, share and comment on news and other happenings. As more Americans access the Internet for entertainment content, news and information, we do not want to repeat the same mistakes our country has made in traditional media. We want to preserve the freedom and open access of the Internet.

II. A Solution to Piracy: Graduated Response

The WGAW believes this Commission should emphatically state its opposition to piracy, and create clear, precise measures to deter and curtail the trafficking of pirated content. Crafting solutions to piracy requires a surgeon’s precision, not a blunt hammer. We do not believe that the threat of piracy should be used to create new barriers to entry on the Internet, to provide competitive advantages for deep-pocketed content providers, to eavesdrop indiscriminately on the communications of Americans, or to enact a potentially discriminatory scheme of widespread copyright filtering

In fact, the WGAW believes a solution to our country’s piracy problem 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 shown below, some countries have created an impartial and expedited administrative process to penalize chronic offenders. Given the growing use of the Internet as a communications tool, any graduated response mechanism should include a hearing prior to the disconnection of someone’s Internet connection.

⁵ eMarketer, “Online Video Ad Spending Cools, Still Popular,” <http://www.emarketer.com/Article.aspx?R=1006896> (February 2, 2009).

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 can have access to their site 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.”⁶

Graduated response has caught worldwide attention as a potential solution to digital piracy – a solution that does not create discriminatory barriers to entry on the Internet, and does not 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.⁷ Despite the courts frustrating earlier versions of the law due to the lack of a judicial proceeding prior to a user losing access, a revised version was passed in September that allows an expedited process with a judge prior to terminating 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.”⁸ The law also created a new state agency, the Higher Authority for the Distribution of Works and the Protection of Copyright on the Internet or HADOPI that helps facilitate 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.”⁹

Several other countries have contemplated or implemented graduated response mechanisms to curtail 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.¹⁰ Taiwan has passed a form of graduated response. While it may not allow for completely severing an individual’s access to the Internet, the law gives the government authority to “restrict access” to users that are

⁶ Burger, Jim, “Filtering and Graduated Response Against Online Video Infringers,” available at <http://www.dowlohnes.com/files/upload/infringers.pdf>

⁷ 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>

⁸ Modine, Austin. “France Passes Three Strikes Law,” *The Register*, (September 15, 2009), available at http://www.theregister.co.uk/2009/09/15/france_hadopi_passes_lower_house/

⁹ Modine, *Ibid.*

¹⁰ Burger, *Ibid.*

repeat offenders.¹¹ New Zealand pursued graduated response, but after meeting some resistance, they shelved the plan and continue to look for a new way of implementing an aggressive copyright protection law. Italian authorities have promised to implement something similar to the French law.¹²

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 their 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."¹³

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."¹⁴ In addition, the EU ministers insisted on a provision that would allow for "timely judicial review."¹⁵

Anecdotally we have 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. A particular ISP has stated in private discussions that the very first notice to a user results in stopping piracy approximately 90 percent of the time. During the course of this workshop, Gigi Sohn of Public Knowledge referenced a February presentation by Preston Padden of ABC/Disney at the Silicon Flatirons Conference in Colorado where Mr. Padden said "that 80 percent of the time when people get notices from ISPs saying 'I know what you're doing, stop it' they stop it."¹⁶

Graduated response is an effective tool because it allows rights holders to have remedies against those that pirate content and encompasses strong penalties for habitual

¹¹ Burger, *Ibid.*

¹² Burger, *Ibid.*

¹³ 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/>

¹⁴ 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

¹⁵ Paine, *Ibid.*

¹⁶ See Transcript, Federal Communications Commission Workshop on the Role of Content in the Broadband Ecosystem, p. 65.

lawbreakers without interfering with the flow of traffic over the Internet. Other potential solutions to the piracy problem such as copyright filtering have the potential of creating discriminatory lanes on the Internet, where certain 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 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.

Expanding upon the graduated response techniques contained in the DMCA may fall outside of the purview of this Commission. Given the need to identify impartial, fair and clear judicial processes before severing a user’s Internet connection, this issue may be best left to Congress to determine. However, the WGAW strongly recommends this Commission consider, as part of its current NPRM on Preserving an Open Internet, asking Congress to expand upon the graduate response provisions of the DMCA and develop more aggressive techniques of identify, notify and punish users that are distributing pirated content. Strong rules, such as terminating the Internet connections of chronic thieves, would seriously deter the amount of pirated content on American networks. Congress could create expedited administrative procedures to punish those who knowingly steal copyrighted material by prohibiting Internet access for up to one year. And unlike other potential measures, a strong, enforceable graduated response mechanism would not infringe upon the openness and freedom of the Internet.

III. Conclusion

Piracy is a crime and should be treated as such. But to allow for discriminatory practices or to otherwise interfere with the free flow of traffic is “to proscribe a medicine worse than the illness.”¹⁷ The diversity of content on the Internet is why the Internet matters. This Commission must exercise great caution before enacting rules that would infringe on the openness of our country’s most innovative communications system. Many effective tools are already at the disposal of rights holders, including graduated response. This Commission can and should recommend reevaluating the current tools available to rights holders to find and prosecute pirates.

¹⁷ See Transcript, Federal Communications Commission Workshop on the Role of Content in the Broadband Ecosystem, p. 55.