



**WRITERS
GUILD OF
AMERICA, WEST**

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Ms. Marlene H. Dortch
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

**SUBJ: In the Matter of Preserving the Open Internet Broadband
Industry Practices, FCC No. GN Docket No. 09-191, WC
Docket No. 07-52.**

Dear Ms. Dortch:

The Writers Guild of America, West (WGAW) is pleased to submit the following reply comments in response to the Federal Communications Commission's (FCC) October 22, 2009 Notice of Proposed Rulemaking.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and new media. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film are written by WGAW members and the members of our affiliate, Writers Guild of America, East. As the representative of content creators, the WGAW supports the creation of rules that codify net neutrality on the Internet. The WGAW first stated its support for Internet Freedom to the Commission in its comments on the National Broadband Plan.¹

Network neutrality is essential to our democratic society as the Internet has replaced the town square as the place for public discourse and the exchange of ideas. We must ensure that all consumers have access and that continued efforts to close the digital divide are not hampered. Guild members are both content creators and consumers, writing and viewing news, commentary and entertainment, and participating in social networking. In addition to the benefits Internet freedom offers to our society, for content creators the Internet also represents an independent and competitive distribution platform. While television and film distribution is controlled by a handful of powerful media conglomerates,

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.

the Internet offers a medium through which anyone with a story can find an audience.

Thus, we must ensure that Internet service providers (ISPs) are not allowed to become gatekeepers, deciding what viewers can see by charging content providers for access. Allowing ISPs to erect barriers to entry will hurt both consumers and content creators, and will stifle the innovation and creativity the Internet empowers. ISPs must be required to remain neutral in the delivery of content through online services, both in the speed of delivery and the cost of delivery. Further, while the protection of copyrighted works is a paramount concern for our members, we do view it as inconsistent with an open Internet. Piracy must be prevented and punished, but not at the expense of net neutrality.

The recent decision by the U.S. Court of Appeals has challenged the FCC's ability to institute net neutrality rules because of the Commission's current classification of broadband services. As a result of this decision, we urge the FCC to act within its authority to reclassify broadband services as a Title II service, or common carrier, and adopt the principles proposed in the Notice of Proposed Rulemaking.

The WGAW is on record supporting codification of the four principles of openness affirmed by the Commission in the 2005 Internet Policy Statement.² We also support the Commission adding a fifth principle of non-discrimination in managing Internet traffic, as well as a requirement that ISPs report to the Commission on their network management practices, the Commission's sixth proposed principle.³ We also support the adoption of principles applying to *lawful* content. Therefore, the WGAW supports the six principles proposed by the Commission in the NPRM, outlined below.

1. *Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from sending or receiving the lawful content of the user's choice over the Internet.*
2. *Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from running the lawful applications or using the lawful services of the user's choice.*
3. *Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from connecting to and using on its network the user's choice of lawful devices that do not harm the network.*
4. *Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its*

² Ibid.

³ Ibid.

users of the user's entitlement to competition among network providers, application providers, service providers, and content providers.

5. *Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications and services in a nondiscriminatory manner.*
6. *Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.*

Network Neutrality Promotes a Competitive Marketplace for Content

A free and open Internet is vital for a competitive marketplace for content and the exchange of ideas. In television, deregulation--most notably the repeal of the Financial Interest and Syndication Rules (Fin-Syn)--resulted in dramatic consolidation among industry players. These rules, repealed in the 1990s, limited the ability of broadcasters to own the content they distributed, and mandated the airing of independently-produced content during primetime hours. Even with the growth in cable channels, a small number of firms substantially control what viewers watch. A recent Government Accountability Office (GAO) study found that, "combining ownership in both primetime programming and basic cable networks, the major broadcasters have controlled a significant share of television programming over the last decade."⁴ The consolidation among studios, networks and cable providers has decreased the opportunities for independent production of television programming. Consolidation such as the proposed merger of NBC Universal and Comcast will only further reduce distribution outlet for content creators. According to Bernstein Research, should the merger be approved, Comcast would control 20 percent of viewing hours on television. Industry consolidation has not been beneficial for writers who face fewer creative and economic opportunities, in turn reducing the creation of jobs for other entertainment industry workers.

The WGAW's analysis of primetime series on the Fall 2009 network schedule found that, across the five broadcast networks, only 16 percent of series were independently produced. In contrast, 20 years ago under the Fin-Syn regulations, 78 percent of the primetime lineup was independently produced, including such successful shows as *Doogie Howser, M.D.*, *The Wonder Years*, *Cosby Show*, *Who's the Boss* and *Designing Women*. This trend was recently confirmed by the

⁴ United States Government Accountability Office, "Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio," March 2010.

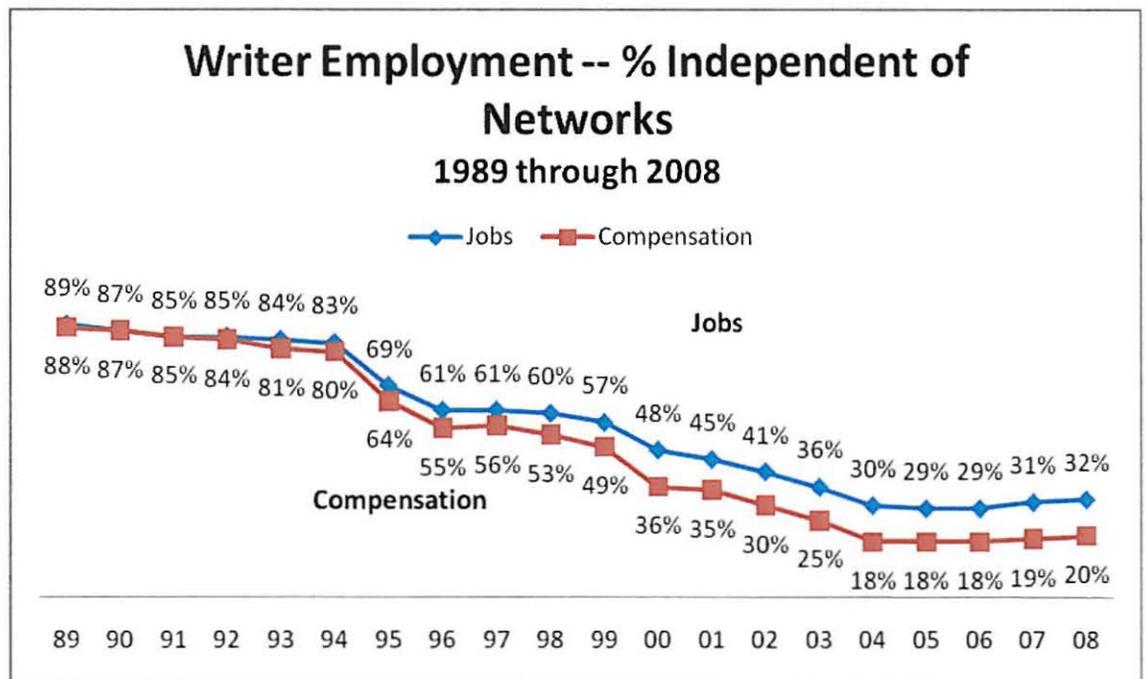
GAO's report on media programming, which found that in 2009 82.5 percent of broadcast primetime hours were from broadcast affiliated studios.⁵

Broadcast Network Primetime Fall TV Series⁶

	1989	1999	2009
Independently Produced Series	78%	28%	16%
Media Conglomerate Produced Series	22%	72%	84%

Source: WGAW Analysis

Because viewers are watching television programming from fewer sources, WGAW members are also faced with fewer options for employment. In 1989, 89 percent of TV writing jobs and 88 percent of TV writing compensation came from outside the conglomerates. Twenty years later, by 2008, those figures had declined to 32 percent and 20 percent, respectively.⁷ The pivotal point was the repeal of Fin-Syn in the early 1990s.



Source: WGAW Records and Analysis

⁵ United States Government Accountability Office, "Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio," March 2010, pp. 13.

⁶ For the purposes of our analysis of the Fall television schedules and WGAW member earnings and employment, Sony Pictures Television is considered independent for the entire period, as it is not affiliated with a broadcast network. Warner Bros. Television is considered independent prior to the creation of the WB Network in 1995. Disney Television is considered independent prior to the acquisition of ABC in 1995. Universal is considered independent prior to its 2003 merger with NBC.

⁷ These figures include all TV programming written by WGAW members, not just prime time.

During his campaign for president in June 2008, Barack Obama said, “*The ill effects of consolidation today and continued consolidation are well-documented -- less diversity of opinion, less local news coverage, replication of the same stories across multiple outlets, and others. We can do better.*” The WGAW wholeheartedly agrees and believes a free and open Internet is vital to promoting a competitive marketplace for content.

For writers and consumers, the Internet is a decidedly different commercial landscape than the studio-based film industry or network-dominated television market. While the opportunity to make and view independent content in traditional media has essentially disappeared due to deregulation and consolidation, the Internet poses fewer obstacles to the creation and distribution of independent content. The openness of the Web is rapidly attracting talented writers frustrated with the current system dominated by the media conglomerates.

In 2007-08, members of the Writers Guild of America, East and West, engaged in a 100-day strike. In order to achieve their principal bargaining demands—contractual coverage of the writing of material intended for the Internet and reasonable compensation for material reused on the Internet--writers not only took to the streets, they also took to the Web. Writers created websites, blogs, podcasts, e-mails and videos to get our message out. This outpouring of strike-related content was made possible by an open Internet. In the aftermath of the strike, WGAW members have continued to develop the online video marketplace, creating online content independent of studio or network involvement, including such sensations as *Dr. Horrible's Sing-Along Blog* and *Seth MacFarlane's Cavalcade of Comedy Stars*. A free and open Internet offers creative freedom and diversity for our members, as well as increased choice for consumers. Competition in the market is based on innovation rather than on market power. Without the codification of the principles outlined in the FCC's NPRM, traditional media conglomerates will be able to use their size and strength in other markets to dominate the online marketplace.

Competition among online distributors of content is positive for consumers and content creators alike. Netflix and Amazon are Internet-based businesses that compete with the video distribution business of Time Warner Cable, Comcast and the broadcast networks. The growth of these businesses has resulted in proliferating choices for consumers. Some sites offer ad-supported streaming, some provide on-demand rentals on a subscription or per-title basis, and still others offer downloads for sale. This proliferation of distribution models has driven consumer demand for content. Consumer choice, however, can only flourish on an open Internet.

The Internet offers a viable distribution alternative to traditional media that has never before existed. Now that the Internet has become the next major platform for delivery of entertainment content, WGAW members are poised to bring top-notch, compelling programming to audiences using this new delivery system. As content

creators, our members are seeking a place where they can truly be creative and have the opportunity for their content to compete on the basis of quality rather than the ability to pay for a faster lane to consumers.

Over the past two years, 34 companies have become signatory to our collective bargaining agreement for the purposes of producing Web content. Many of these companies are owned by writers, like the Emmy-nominated company Big Fantastic which was co-founded by WGAW member Doug Cheney. Big Fantastic is an independent company that has taken advantage of the distribution opportunities of the Web and has produced such hits as *Prom Queen*, which was streamed online over 20 million times. The low barriers to entry and limitless distribution opportunities offered by a neutral Internet have allowed small businesses, whose opportunities have been foreclosed in traditional media, to become the incubators of innovation. The WGAW wants this to continue. Under net neutrality, the Internet can serve as an engine for small business growth and job creation.

While the vast majority of employment for WGAW members comes from companies affiliated with the broadcast networks, we do not support giving these companies the ability to purchase faster access to Internet consumers. Without net neutrality, the companies that control traditional media will inexorably gain control over Internet video. Their resources and ability to purchase faster access to the consumer will foreclose opportunities for new entrants, including independent producers and WGAW member-owners. WGAW members are dependent on these companies not by choice but by default. The repeal of Fin-Syn allowed for the consolidation that has led to this concentration. We do want this system replicated on the Internet.

A replication of this system harms not only independent content creators but also consumers. As the entertainment industry has consolidated from dozens of small suppliers to a handful of multi-national conglomerates, the range of expression has narrowed; the filters gotten finer. Personal expression has become corporate business. Diverse viewpoints have been silenced in favor of middle-of-the-road happy talk. If a storyline does not maximize the profit for a Fortune 500 company, it rarely gets told. As our former president Patric Verrone has said, "Homogenization is good for milk, but bad for ideas." The Internet is quickly becoming our town square, with access available to all Americans for the discussion of ideas, the viewing of news, commentary and entertainment, and for social networking. Without net neutrality, the social benefit of a free and open Internet is lost.

We are by no means proposing to exclude the media conglomerates from the online marketplace. The online performance by these companies to date shows that, even under a regime of *de facto* net neutrality, they are more than able to

compete. According to Comscore, an Internet tracking firm, the media conglomerates held 5 of the top 10 positions in online video sites in January 2010.⁸

Top U.S. Online Video Content Properties* by Videos Viewed January 2010 Total U.S. – Home/Work/University Locations Source: comScore Video Metrix		
Property	Videos (000)	Share of Videos (%)
Total Internet : Total Audience	32,410,886	100
Google Sites	12,816,043	39.5
Hulu	903,078	2.8
Microsoft Sites	491,753	1.5
Yahoo! Sites	435,487	1.3
Viacom Digital	361,228	1.1
Fox Interactive Media	293,008	0.9
Turner Network	283,244	0.9
AOL LLC	241,991	0.7
Vevo	226,125	0.7
CBS Interactive	217,407	0.7

The adoption of the six principles outlined in the Notice of Proposed Rulemaking will ensure the Internet remains an open platform for the free exchange of ideas, news and programming. By requiring ISPs to provide users with access to the lawful content of their choice, consumers and content creators will be protected. By requiring non-discrimination in access to content, the FCC will protect competition online. Critical to all of this is the sixth principle requiring disclosure of network management practices. Sunshine in the best disinfectant and this requirement addresses the potential for any ISP abuse of network management practices.

Network Neutrality Provides Economic Benefits

While the case for net neutrality is strong in the entertainment industry, it is even stronger when one considers the broader social and economic benefits of the Internet. There is universal agreement that the open Internet has brought enormous economic benefits to the U.S. and consumers. It has created an Internet industry and has revolutionized other sectors including retailing, advertising and information technology. Internet policy discussions must feature an accounting of these economic benefits and the public good provided by the Internet. Two recent studies have detailed and predicted the breadth of the economic consequences of

⁸ comScore, “comScore Releases January 2010 U.S. Online Video Rankings,” March 8, 2010, http://www.comscore.com/Press_Events/Press_Releases/2010/3/comScore_Releases_January_2010_U.S._Online_Video_Rankings.

the Internet. The first study, by The Institute for Policy Integrity (IPI) called *Free To Invest* is explicitly in support of net neutrality with its sub-title: *The Economic Benefits of Preserving Net Neutrality*.⁹ The second study by Hamilton Consultants, Inc., is also concerned with an open Internet with a more specific focus of preserving the integrity of information collected on consumers.¹⁰ Its findings; however, go far beyond this issue

IPI's report focuses on the importance of maintaining the Internet as a unified network of sites and users. Actions that would privilege certain sites and types of content would violate the equal standing that Internet participants now enjoy and risk fragmenting the Internet space. Current benefits depend, according to IPI, on network effects. These effects, often used to analyze the benefits of using software, refer to the fact that an individual's benefits in participating in a network depends on the extent of the network. Additional users acquire benefits by joining, but what is more important, new members increase the benefits of existing network members.

The concept of network benefits is the foundation of the Internet. Information such as reviews of products or movies is shared among the users of a website. The more reviewers there are the more useful reviews there are to members of the network. As the nation's broadband system continues to be built out, more network participants join and the expanding universe enhances the experience of everyone. This type of thinking is behind the National Broadband Plan.

At the level of economic benefits, businesses are willing to invest because the Internet network is large. Content production, to paraphrase Adam Smith, is limited by the extent of the Internet. And, even if some investment in websites displaces other forms of investment, especially for large businesses for whom Internet commerce is simply an add-on, the investments of smaller businesses would not occur without access to the network of potential customers on the Internet. Independent producers, foreclosed from traditional media because of significant financial requirements of television production and preference by the networks for airing in-house content, are able to invest on the Internet because of the direct access to consumers. The major point made by Inimai M. Chettiar and J. Scott Holladay in the IPI study is that Internet investment is principally investment in content, broadly construed, not in Internet infrastructure. It is the latter, however, that is often put forward as the characteristic investment in the Internet space.

The second recent study of the economics of the Internet, by Hamilton Consultants, was made in conjunction with John Deighton and John Quelch, both of the Harvard Business School. Deighton and Quelch view the Internet from the

⁹ Chettiar, Inimai M. and J. Scott Holladay, "Free to Invest: The Economic Benefits of Preserving Net Neutrality," *Institute for Policy Integrity*, New York University School of Law, January 2010.

¹⁰ Hamilton Consultants Inc., Dr. John Deighton and Dr. John Quelch, "Economic Value of the Advertising-Supported Ecosystem," *iab*, June 10, 2009.

standpoint of the revenue streams that fund it and the value added by each of the 14 industries involved in the Internet. The revenue streams are on measure of the impact of the Internet economy. The total value of \$175 billion is “funded” by \$20 billion in payments for advertising services, \$85 billion in payments for merchandising services, and \$70 billion in payments to ISP. The analysis is valuable because it provides perspective on the importance of the ISPs, whose contribution is roughly 40% of the revenue base of the Internet. And while this surely gets the ISPs, collectively, a seat at the table, it does not suggest that their interests should trump those of other Internet stakeholders.

Deighton and Quelch offer an alternative approach by looking at the Internet economy from the perspective of fourteen industry groups that make up a large part of it. These groups contribute a total of \$121 billion value added to the Internet economy. ISPs contribute \$18.1 billion or 15 percent of this total. While the two procedures do not produce directly comparable numbers, both make the ISPs a minority stakeholder.

Why, then, do the ISPs occupy center stage in the debates over net neutrality? The answer lies in the business model of these companies. In contrast to AOL when it was an independent business, the current ISPs have additional business segments, some complementary to, but others competitive with, providing Internet service. Today’s ISPs have the option of using their Internet businesses to enhance or protect their other businesses. For example, they bundle Internet service with telephone as well as cable television services. Bundle pricing is a competitive strategy and has led to severe competitive pressure on companies providing only phone service. One could argue that bundle pricing is clearly advantageous for consumers, though the ISPs could be said to be cherry picking as their infrastructure is in the more populated parts of the country.

Protection of other businesses is a troublesome issue. Many have argued persuasively that ISPs have a stake in diminishing the openness of the Internet. Many ISPs also operate a cable television business, which is based on a model of restricting subscribers’ access to content. ISPs which also provide cable television access are the toll takers for the television industry and in this role they ensure a flow of revenue that encourages investment in programming, which often benefits Guild members. While advocating for a more inclusive program investment incentive and easier access for a wider range of programming, we also recognized the contribution of the tolls collected. Yet we continue to believe that the cable model is inappropriate for the Internet, at least insofar as it is accomplished by prioritizing content or establishing tiers favoring established media companies over independent producers.

Copyright Protection and Network Neutrality are NOT mutually exclusive

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. 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 in effect 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 diminish the ability of writers to spend time developing new content. Strong enforcement of copyright law benefits society as well. The ability to generate revenue through the exploitation of intellectual property provides funds that can be reinvested and fuel further innovation in many industries, including entertainment. Piracy threatens the ability to sustain and develop content. To protect the value of copyrights and to preserve the benefits to society that come from the creation of intellectual property, piracy must be addressed.

Let us be clear: the WGAW is committed to curtailing piracy as a matter of survival. However, we believe that the proper approach to online piracy must focus not on prior restraint but on tools to enforce the law. 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. Just as important, piracy must not be used as a diversionary tactic that allows ISPs or huge content companies to enact a potentially discriminatory scheme of widespread copyright filtering.

As the WGAW noted in its comments in response to the workshop on the Role of Content in the Broadband Ecosystem, we believe that the best mechanism for handling piracy is graduated response, a solution that may already be at the disposal of rights holders.¹¹

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

¹¹ See Comments of the Writers Guild of America, West, In Response to the Workshop on the Role of Content in the Broadband Ecosystem, GN Docket No. 09-51.

pirated content, that user can have his/her Internet access suspended. An effective graduated response regime will include the right to an impartial review 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 the 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."¹²

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.¹³ The 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."¹⁴ 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."¹⁵

¹² Burger, Jim, "Filtering and Graduated Response Against Online Video Infringers," available at <http://www.dowlohnes.com/files/upload/infringers.pdf>.

¹³ 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>.

¹⁴ 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/.

¹⁵ Modine, *Ibid*.

Several other countries have contemplated or implemented graduated response mechanisms to eliminate pirated content from their networks. For example, Ireland adopted graduated response after the country's largest ISP agreed to the practice as part of a settlement with rights holders.¹⁶ 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.¹⁷ New Zealand pursued graduated response, but after meeting some resistance, shelved the plan and continues to look for a new way of implementing an aggressive copyright protection law. Italian authorities have promised to implement an approach similar to the French law.¹⁸

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."¹⁹

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."²⁰ In addition, the EU ministers insisted on a provision that would allow for "timely judicial review."²¹

Anecdotally, the WGAW has heard from at least one American ISP that the current graduated response techniques provided for in the DMCA have proved

¹⁶ Burger, *Ibid.*

¹⁷ Burger, *Ibid.*

¹⁸ Burger, *Ibid.*

¹⁹ 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/>

²⁰ 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.

²¹ Paine, *Ibid.*

effective in rooting out pirates. One ISP has stated in private discussions that the very first notice to a user stops piracy approximately 90 percent of the time. During an FCC Workshop on the Role of Content in the Broadband Ecosystem, a representative for the advocacy organization Public Knowledge cited a February 2009 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.”²²

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 preferential “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 destination. Web video watchers often make decisions in seconds, and even the slightest delay may result in viewers clicking through to a different site or video stream. Finally, copyright filtering may result in legitimate, authorized communications being erroneously identified as illegal traffic. Piracy is a serious problem, but the pitfalls of copyright filtering are simply too problematic to ignore.

A mature graduated response regime should be characterized by fair and efficient judicial processes, accompanied by escalating penalties. Strong measures, such as terminating the Internet connections of chronic thieves, would seriously diminish the amount of pirated content on American networks. Escalating penalties could include prohibiting Internet access for a set period of time for those who knowingly steal copyrighted material. 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 wellbeing of the members of our Guild and the creative community at large depends on the protection of copyrighted works. But to use the threat of piracy as a justification for discriminatory practices or otherwise to interfere with the free flow of online traffic is a solution that would fundamentally alter the open nature of the Internet. Addressing the problem 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.

Conclusion

²² See Transcript, Federal Communications Commission Workshop on the Role of Content in the Broadband Ecosystem, p. 65.

The WGAW strongly supports the codification of the six principles proposed by the Commission. We believe preserving a free and open Internet is in the best interest of our democratic society and makes good economic policy. The creation of the Internet has fundamentally altered our society, because it has operated under the principles of network neutrality “freedom” since its inception. The WGAW urges the FCC to act quickly to reclassify broadband services, or common carrier, under Title II, in light of the recent U.S. Court of Appeals decision. This is a critical juncture for the Commission. The WGAW urges promoting non-discrimination in managing Internet traffic, and that ISPs are subject to transparency and enforcement under FCC ruling making. We also strongly support the adoption of principles applying to *lawful* content, which will help to eliminate piracy.

Thank you for this opportunity to comment in this rule making process. For additional information or follow-up please contact either Ellen Stutzman, Director for Research at 323—782-4660 or Alison Reardon, Political and Legislation Director at 323-782-4772.

A handwritten signature in black ink, appearing to read 'D. Young', with a large, sweeping flourish at the end.

David Young
Executive Director