

## Arts+Labs Comments on Commerce NOI – November 18th

Arts+Labs<sup>1</sup>, an alliance of the technology, content and creative communities that aim to build an inclusive digital society by encouraging cross industry collaboration, appreciates the opportunity to respond to the Notice of Inquiry on Copyright Policy, Creativity and Innovation in the Internet Economy. A+L seeks an online environment in which innovation and competition flourish, innovative new content is continually created, and fresh business models can be tested with the knowledge that every participant retains the legal right to the rewards of their creativity. Our members are united by their reliance on intellectual property rights as a fundamental tenet of their business planning and by the conviction that the wholesale digital theft of intellectual property poses a significant threat to the U.S. economy and to the continued evolution of the Internet.

We applaud the Obama administration's strong public commitment to the defense of intellectual property rights generally and the enforcement of laws designed to protect these rights in the online world. As noted by President Obama, Vice President Biden, Secretary of Commerce Locke (and other senior officials), the law is not suspended because theft occurs in the digital world instead of the physical world. As Vice President Biden has observed: "Piracy is theft. Plain and simple. It's smash and grab."<sup>2</sup>

Authors, musicians, filmmakers, inventors, software writers, game developers, journalists and others who earn a living by creating content are entitled to control the sale and distribution of their work. Absent those assurances, these professionals will be discouraged from producing the high-quality work that consumers enjoy when property rights are protected. The result will be diminution in the volume and quality of online content and the loss of the general economic benefits that flow from this work. As Secretary Locke has noted: "This isn't just an issue of right and wrong. This is a fundamental issue of America's economic competitiveness."<sup>3</sup>

Reams of data make clear that online theft exacts a major toll on creative companies, individual artists, and the U.S. economy as a whole. It is somewhat more difficult to measure the loss of digital property than physical inventory, but economic studies make clear the costs are substantial. A 2007 study by economist Stephen E. Siwek estimated that online theft cost the U.S. music and related industries about \$3.5 billion annually.<sup>4</sup> The stunning drop in U.S music industry sales—from \$14.6 billion for physical recordings in 1999 to \$8.5 billion from all sources in 2008—including legal file transfers, is persuasive testimony to the impact of digital theft.<sup>5</sup> A 2005 study by LEK Consulting for the U.S. Motion Picture industry estimated annual losses to online theft of \$2.3 billion.<sup>6</sup>

In real life terms, the problem is well illustrated by the experience of the Academy Award winning film "The Hurt Locker," which grossed little more than \$16 million at the box office, and is the least attended Best Picture winner of recent times, but has been downloaded more than 10 million times without compensation to anybody involved in making the film.<sup>7</sup>

Other independent filmmakers like Greg Carter and Ellen Seidler have had similar experiences. Carter spent \$250,000 to make his film "A Gangland Love Story" and calculates that he has lost more than \$100,000 in potential sales because of online theft. His film was viewed 60,000 times on pirate movie sites in the first three months after its release on DVD. Seidler, who has worked hard to track down thieves and took out a second mortgage on her home to finance her investigatory work, says she has

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<sup>1</sup> Arts + Labs members include, ASCAP, AT&T, Autitude, Blue Pixel, BMI, Cisco, JibJab, Microsoft, NBC Universal, the Songwriters Guild of America, Verizon, and Viacom

<sup>2</sup> Sandoval, Greg, "Biden to File Sharers: 'Piracy is Theft,'" June 22, 2010, CNet News, [http://news.cnet.com/8301-31001\\_3-20008432-261.html](http://news.cnet.com/8301-31001_3-20008432-261.html)

<sup>3</sup> U.S. Commerce Secretary Gary Locke, Remarks on Intellectual Property Enforcement, Belmont University, Nashville, TN, August 30, 2010, [http://news.cnet.com/8301-31001\\_3-20008432-261.html](http://news.cnet.com/8301-31001_3-20008432-261.html)

<sup>4</sup> Siwek, Steven – True Cost of Sound Recording Piracy to the U.S. Economy, Policy Report 188, The Institute for Policy Innovation, August 2007, <http://www.ipi.org/IPI%5CIPublications.nsf/PublicationLookupFullText/5C2EE3D2107A4C228625733E0053A1F4>

<sup>5</sup> Recording Industry of America, 2008 Consumer Profile, <http://76.74.24.142/CA052A55-9910-2DAC-925F-27663DCFFFF3.pdf>

<sup>6</sup> L.E.K., "The Cost of Movie Piracy," prepared for the Motion Picture Association of America, May 2006, [http://www.archive.org/stream/MpaaPiracyReort/LeksummarympaRevised\\_djvu.txt](http://www.archive.org/stream/MpaaPiracyReort/LeksummarympaRevised_djvu.txt)

<sup>7</sup> Berr, Jonathan " 'The Hurt Locker' Producers Launch Lawsuit Attack Against Pirates,," *Daily Finance*, May 12, 2010, <http://www.dailyfinance.com/story/media/the-hurt-locker-pirate-lawsuits/19475089/>

found at least 2,000 copies of her movie “And Then Came Lola” on the Internet. She says that at least 60 Websites offer free links to the film and that it has been downloaded about 25,000 times.<sup>8</sup>

While Seidler’s individual detective work is impressive, it hasn’t had much impact on theft. It is also not easily replicated by other independents who typically lack the financial resources to hire attorneys for enforcement activity, and may not have the time or technical knowledge to track piracy on their own. Current law requires websites to remove illegal copies and links upon notification by the rights holder. While beneficial, this notice and takedown approach is insufficient to the task and places an impossible burden on independent artists to identify acts of piracy.

In some instances, illegal operations also benefit from the enabling behavior of legal businesses which earn revenue from advertisements on pirate websites. As Seidler observed on her web site “Profits from Pirates,” legitimate companies “seemed to be (indirectly) generating income through the placement [of] advertising on websites featuring streams and download links to pirated films... there, ads generate income for operators of these pirate websites and massive profits for ad providers.”<sup>9</sup>

Beyond the immediate financial impact of digital theft, Arts+Labs is deeply concerned about the chilling effect of online theft on creative work and the likelihood that it will deprive Internet users of attractive content by forcing some artists to abandon creative activity. Left unattended, the continued violation of intellectual property rights – especially by commercial operations dedicated almost exclusively to illegal distribution of copyrighted works – will jeopardize the continued viability of the Internet as a safe and reliable distribution network for creative content. While individual artists and large content creators alike are excited by the opportunity presented by the Internet to reach a global audience, they require some reasonable assurance that their rights will be respected and that the Internet does not become a safe haven for digital thieves to operate with impunity.

There are no magic bullets for digital piracy. Technological change has simply made it too easy to steal. But Arts+Labs believes that the combined strength of multiple strategies can discourage behaviors that enable commercial-level piracy and also make it less profitable. We cannot completely dislodge the pirates anymore than we can root out all crime in the physical world. But we can reduce its impact and make the Internet environment safer from digital theft and its negative effects on content creators and their partners, individual artists and Internet users alike. Here’s what we have in mind:

1. Vigorous government enforcement of intellectual property rights

The pirates should feel besieged. Commercial websites created primarily for digital theft should be shut down by enforcement agencies whenever possible. Arts+Labs strongly supports and encourages more enforcement efforts such as the seizure earlier this year of pirate websites and their assets by Customs agents and U.S. Attorneys offices.

We also are encouraged by the bipartisan effort of Senator Patrick Leahy, Orrin Hatch and the other co-sponsors of the “Combating Online Infringement and Counterfeits Act,” to create an enhanced enforcement framework that provides the Department of Justice with new tools that will enable it to act with greater speed against online theft while remaining responsive to the burdens placed on Internet intermediaries and without short-circuiting appropriate judicial process. This legislative template which would target “the worst of the worst” online distributors of unlawfully infringing content, attempts to construct a narrowly tailored and balanced effort to rein in the most open and notorious digital thieves, while also protecting privacy and minimizing the likelihood of excessive and frivolous suits against legal websites. While the legislative process, including public input, may identify some necessary adjustments in legislative language, Arts+Labs considers this bill an important step in the right direction.

2. Market competition that offers consumers attractive alternatives to pirate sites

Arts+Labs has long believed that one of the most important responses to piracy is to provide consumers with attractive alternatives to pirated good such as legal websites and devices for accessing creative content in a reliable, safe and easy way. We are pleased that a dynamic and innovative marketplace has developed a number of options that are gaining favor

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<sup>8</sup> Verrier, Richard, “Independent Filmmakers Feel the Squeeze of Piracy,” *Los Angeles Times*, September 28, 2010, <http://articles.latimes.com/2010/sep/28/business/la-fi-ct-film-pirate-20100928>

<sup>9</sup> Seidler, Ellen, “Who Profits from Online Piracy,” June 9, 2010, <http://popuppirates.wordpress.com/>

with large numbers of consumers. The success of iTunes, Netflix, Hulu, and the Kindle, among others, illustrate that innovation can work in a competitive marketplace providing participants in the Internet ecosystem have the freedom to work together and test new business models.

Government can assist pro-consumer innovation through policies that embrace experimentation with new business models so that consumers decide what prevails. We are concerned, however, that proposed regulations under consideration by the FCC – described in more detail below -- could undermine such innovation by blocking some new business concepts and collaborations that enable content owners to compete with digital thieves.

### 3. Cooperative efforts by all members of the Internet ecosystem against digital thieves

In addition to partnerships that lead to new business models for legal content, Arts+Labs also encourages continued cooperation among Internet participants against digital theft. For example, voluntary agreements between content holders and network operators to notify individuals of possible copyright infringement appear to raise consumer awareness of piracy and discourage downloading of illegal content. In a March 24, 2010 filing, U.S. Intellectual Property Enforcement Coordinator Victoria Espinel of Verizon observed that its notice forwarding program is helping reduce alleged infringements with only minimal customer complaints.<sup>10</sup>

Government policymakers should encourage continued cooperation among private entities, including the possible use of technological means to help combat piracy and enable new forms of legal content delivery, while also insisting on due process and respect for the privacy rights of Internet users.

### 4. Regulatory policies that support private sector partnerships to protect IP

The protection of intellectual property is not only a concern for enforcement agencies. It must also be a shared priority for every government department and independent agency, and the effect on enforcement should be a core consideration in the development of public policy, rules, and regulations. Ideally, rules and regulations should enable vigilant enforcement of intellectual property rights. At a minimum, rules and regulations should not impair the ability of law enforcement or of rights holders to protect IP.

As noted above, Arts+Labs is concerned that proposed rules, now pending at the FCC as part of its Open Internet proceeding, may have the unintended effect of undermining a range of legitimate efforts to curtail illegal copying and online distribution of copyrighted material. By potentially prohibiting innovative collaborations that enable content owners to differentiate themselves from commercial operations and websites that base their business on the theft of online content, the proposed rules would create a safe haven for thieves and bar strategies that would enable creators to choose how and when their works are distributed online, just as they do in the offline world.

### 5. International cooperation against digital pirates

Because illegal behaviors on the Internet cross multiple jurisdictions, IP protection efforts will increasingly require coordination with law enforcement authorities across national lines. In addition to reaching out to international governments to coordinate efforts against intellectual property theft, U.S. enforcement agencies should monitor international enforcement activities aimed at digital theft in order to assess their effectiveness and possible application to intellectual property protection efforts by the United States.

Arts+Labs does not commend or oppose any of the specific initiatives occurring around the world, but we believe the various international experiments can provide helpful lessons for U.S. policymakers.

Some argue that the revolution in technology demands a laissez-faire attitude towards copyright rules. Arts+Labs strenuously disagrees. In our view, successful societies require a common set of principles—including respect for creators' rights to protect

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<sup>10</sup> Verizon, response to request for comments by the U.S. Intellectual Property Coordinator, (Federal Register Volume 75, Number 35, FR Doc. 2010-3539) March 24, 2010

their own work product, earn fair compensation for their creativity, and determine how and when their creations can be used by others. The Internet age has provided artists and other content creators with an unprecedented opportunity to share their work with the widest possible audience – an audience that literally spans the globe. But it also has exposed them to an unprecedented risk that their work will be wrongly misappropriated by others without any compensation for creators, without their consent, and often without their knowledge. Meeting this challenge requires both our collective creativity and an ongoing, long-term commitment by both the government and the private sector.

Respectfully submitted,

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