

December 10, 2010

Office of Policy Analysis and Development
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Ave. NW
Washington, DC 20230

Via email to copyright-noi-2010@nita.doc.gov

Re: Notice of Inquiry issued by the Department of Commerce, the U.S. Patent and Trademark Office, and the National Telecommunications and Information Administration on Copyright Policy, Creativity, and Innovation in the Internet Economy. Docket No. 100910448-0448-01

The Independent Film & Television Alliance (IFTA) respectfully submits these comments in response to the Notice of Inquiry issued by the Department of Commerce, the U.S. Patent and Trademark Office, and the National Telecommunications and Information Administration on Copyright Policy, Creativity, and Innovation in the Internet Economy.

I. About IFTA and its Member Companies

Based in Los Angeles, California, IFTA is the non-profit trade association for the independent film and television industry worldwide. IFTA Members consist of over 150 companies from 23 countries, the majority of which are U.S.-based producers and exporters.¹ IFTA regularly provides input to governments around the world on a wide range of copyright, trademark, financing and export issues that impact the independent industry.

IFTA Members are independent production and distribution companies, as well as sales agents, television companies and financial institutions. They produce, distribute and finance some of the world's most successful films. Since 1982, IFTA Members have been involved with the financing, development, production and distribution of 64% of the Academy Award Winning Best Pictures® including *The Hurt Locker*, *Slumdog Millionaire*, *No Country for Old Men*, *The Departed*, *Crash*, *Million Dollar Baby*, *Braveheart*, *Lord of the Rings*, *Dances with Wolves* and *Gandhi*. Other recent IFTA Members films have included *The Twilight Saga: New*

¹ For a complete list of IFTA Members, visit www.ifta-online.org.

Moon, The Expendables, Red, and Tyler Perry's For Colored Girls, to name just a few.

Independent films and television programs are made at every budget level and may be mainstream, commercial or art house. Independent producers and distributors are those companies (apart from the major U.S. studios) that assume the majority of the financial risk for the production of a film or television program and control its distribution in a majority of territories worldwide.

IFTA Members finance, produce, and distribute about 400 feature films and countless hours of television programming annually, accounting for nearly 80% of all films produced in the United States and exported around the world. IFTA Members' collective worldwide sales for 2008 totaled over \$2.8 billion, of which approximately \$2.3 billion came from foreign (non-U.S.) revenue and \$503 million from domestic revenue. Of the export revenue, \$1.7 billion was generated from Europe, \$129 million from Latin America, \$222 million from Asia.²

IFTA also produces the American Film Market (AFM) each year in Santa Monica, California, where more than 8,000 industry leaders and participants from over 70 countries come together to carry out worldwide film and television production and distribution deal-making. Over \$800 million in production and licensing deals are closed each year at AFM. The AFM provides a birds-eye view into the economic interactions that underpin the independent financing and worldwide distribution of audiovisual product and the impact of piracy on the health of the independent industry.

II. Independent Producers' Production Financing Model

Independent producers routinely secure financing and distribution for each project on a one-by-one, country-by-country basis by means of licenses to commercial users (e.g., to film and video distributors, broadcasters, online platforms, etc.). The production, financing and distribution models of independent producers and distributors differ substantially from those of the major Hollywood studios who may self-finance and then control their own distribution through worldwide subsidiaries and affiliates.

Independents work closely with local distributors in each country to secure distribution of each film. The distributors assess the value of the film (gross receipts across all distribution media) based upon many factors including script, director, writer or key cast; subject matter or genre; estimated production budget; and projected season and year of release. In turn, distributors may enter into license agreements with the producer that provide minimum guarantees (minimum license fees to be paid) to secure the exclusive rights to a film or program in a particular territory or region in advance of production. For example, the budget for *The Hurt Locker*, which sought financing in 2006 and 2007, was under \$15 million and was 50% financed by presales to distributors in France, Germany, Italy, Benelux, Brazil, Canada, and Eastern Europe.³

² Information based on IFTA Membership Sales Surveys (1984-2008).

³ Mike Goodridge, *A Locker Full of Gold*, Screen International, Dec. 18, 2009 at 3.

Once enough minimum guarantees are secured from local distributors, those license agreements are then collateralized by financial institutions which loan production funds for the underlying project (or are informally used to support private investment), providing the financial means needed to create the project. Such financing deals are based on the confidence of local distributors and financiers that they will receive the expected return on their investment from the exploitation of the film.

III. Piracy's Impact on the Independent Film and Television Industry

Due to the unique financing and distribution models for the independent production and distribution industry, piracy has damaging effects beyond lost revenues. Independent production and distribution companies must also contend with the negative impact piracy has on their businesses in other more complex ways which threaten the survival of independent films.

IFTA Members utilize the same local distribution companies worldwide as do the indigenous film producers, and the health of those local distributors and film industries is of the utmost importance to U.S. independent producers. Quite simply, legitimate distributors cannot compete against the pirates when such pirated product is free or nearly free. As the local distributor assesses the value of a proposed film, the local distributors' assessment will reflect declines in, for example, DVD sales because of rampant online piracy in the marketplace. The minimum guarantees to which a distributor is prepared to commit for a new film drop accordingly (and in the case of direct-to-DVD films, may disappear completely). For the producer, the drop in the minimum guarantee translates into loss of production funding and may kill the project completely due to the inability of the producer to secure financing.

Spain, historically one of the strongest export markets for films, provides a clear example of this phenomenon. In 2006, Blockbuster cited piracy as one reason it was closing its 86 stores in Spain: of DVDs viewed in Spanish households, the company contended, 60% were pirated.⁴ Whereas producers used to count on Spanish distributors' minimum guarantee commitments to cover up to 10% of a proposed film budget, advance distribution commitments today are rarely above 3-5%.⁵ This is the direct reaction to rampant online piracy and the almost total collapse of the DVD market as a result of that online piracy.⁶

Moreover, even if a film is financed through other sources, the finished film itself may not be saleable to distributors around the world at a reasonable price or on commercially acceptable terms. Legitimate distributors face lost revenues across the board and may not be able to assume the further financial obligations for marketing and distribution of a further film, especially when there is little DVD revenue and no commercial online marketplace available. Again, producers must limit their own production to meet the reduced demand and lack of financing.

⁴ Michael Hiltzik, *The Casual Purchase of a Counterfeit DVD Shines Light on Piracy*, Los Angeles Times, Jan. 4, 2010 at B1.

⁵ See Elizabeth Guider, *The Going Rate*, The Hollywood Reporter, Oct. 30, 2009 at S-42.

⁶ IFTA is carefully monitoring the situation in Spain and has joined in urging the introduction and approval of legislation and seeking the cooperation of the service providers to provide certain tools available to all rights holders for combating online piracy.

Compounding the problem, independent producers are limited in the ability to shift from traditional business practices to new business practices that might counteract piracy. For example, worldwide same day release (referred to as “day and date” release) may prove an effective method to curb or delay piracy for the major Hollywood studios who own, control or have contractually guaranteed arrangements with distribution platforms worldwide. However, for independents, whose many national distributors release on their own timetable, this release pattern may be virtually impossible to coordinate among its many distributors.

In order to understand more about the damage done to independent films by illegal downloading, file sharing, linking and other forms of unauthorized distribution, IFTA commissioned an online piracy survey monitoring a 90 film sampling of its Members’ films for instances of online piracy. In a three month period of October to December 2009, there were more instances of piracy recorded and detected in the United States on U.S.-owned networks than in any country; over 525,000 instances of P2P infringement in the U.S. were detected during that period for the 90 films in the survey. Illegal downloading in the U.S. is particularly damaging since the first theatrical release of a film often occurs in the U.S. and this provides the first opportunity for pirates to camcord or otherwise copy and duplicate or upload the intellectual property.

One thing is clear, new online business models and opportunities for independent producers in the Internet economy will emerge only when local distributors around the world are assured that the new channels of distribution can be protected from illegal and unauthorized download and streaming and can generate sufficient revenue to support ongoing production. The necessary protections can only be provided by concerted governmental action. If piracy is allowed to further infiltrate the Internet economy and damage the independent film industry, not only are the creative results of the independent producers’ work lost, but the economic benefits that flow to the economy and government will disappear too. The opportunities for independent content on the Internet may be great, but piracy must be addressed with strong intellectual property laws worldwide, effective criminal and civil enforcement and sufficient governmental resources so that investment in content can be recouped and new online distribution models developed providing consumers with the broadest selection of legitimate content.

IV. Responses to Request for Comments

a. How can government policy or intellectual property laws promote successful, legitimate business models and discourage infringement-driven models?

Successful business models may only be promoted through the development and implementation of a legal framework that addresses the major causes of piracy at the root.⁷

⁷ Certain governments are complacent about online piracy’s damage to existing business models. In countries such as Spain and China, government has failed to take effective legislative or regulatory action to combat the damage that online piracy is causing to their own local creative industries. This “blind eye” allows service providers to build market share and finance network expansion on the basis of consumer demand for programming supplied by pirates and their illegal operations. Governments can prevent piracy (...continued)

Legislation that addresses current risks and mechanisms that fuel online piracy are effective tools to combat online piracy. For example, camcording in cinemas is a major source of illicit online copies of new film releases; laws prohibiting camcording must be enacted and must be vigorously enforced when the film is in the first crucial weeks of release to protect the longer term return on investment of the producers and distributors. Individual rights holders acting on their own behalf cannot successfully combat piracy without an established legal framework and ongoing government and service provider obligations with respect to enforcement.

Notice and takedown regimes must be easily available to all rights holders and the costs of triggering this remedy must not impose monitoring obligations or legal costs that are prohibitive for independent rights holders. The current notice and takedown procedures have been implemented by rights holders with limited impact. Without substantial financial resources to utilize digital content protection technologies such as scanning and electronic notification services on an ongoing basis beginning prior to a film's first release, the current notice and takedown provisions are an insufficient mechanism for many independent producers leaving them with no real alternative protection tools.

Suggested government regulations to address online piracy are outlined in the Anti-Counterfeiting Trade Agreement (“ACTA”) for which negotiations have recently concluded.⁸ The Agreement provides that enforcement in the digital environment must balance the needs of all stakeholders in order “to promote a cooperative effort within the business community to effectively address... copyright infringement.”⁹ Governments could establish a national authority that would require service providers to disclose expeditiously to a rights holder information sufficient to identify a subscriber whose account was allegedly used for infringement where that rights holder has filed a legally sufficient claim of infringement seeking to protect its copyright.¹⁰ Such government action as outlined in ACTA must be uniformly applied worldwide so as not to create a haven for a base of operations for pirates in the worldwide digital marketplace.

IFTA urges adoption of international standards such as these that will provide a worldwide framework for vigorous enforcement against those who illegally profit from or otherwise cause damage to investment in intellectual property. Without confidence in a secure distribution environment, legitimate intellectual property based businesses will not be efficiently established and maintained.

(...continued)

(e.g., no counterfeit Olympic merchandise or pirated broadcasts were allowed in China during the 2008 Olympics), but some chose not to enact or enforce copyright laws.

⁸ See Chapter 2.X: General Obligations with Respect to Enforcement, Anti-Counterfeiting Trade Agreement at http://www.ustr.gov/webfm_send/2379. Participants in the negotiations include Australia, Canada, the European Union (EU) and its Member States, represented by the European Commission and the EU Presidency (Belgium), Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States of America.

⁹ See Chapter 2.18 (3) Enforcement in the Digital Environment, Anti-Counterfeiting Trade Agreement available at http://www.ustr.gov/webfm_send/2379

¹⁰ See Chapter 2.18 (4) Enforcement in the Digital Environment, Anti-Counterfeiting Trade Agreement available at http://www.ustr.gov/webfm_send/2379

b. Have collaborative approaches resulted in the formulation of private graduated response systems?

Aside from the YouTube Content Identification Program, IFTA is not aware of any graduated response mechanism offered by broadband service providers and available to all rights holders. IFTA knows of one privately implemented graduated response scheme- Verizon's "notice forwarding," which was referred to by Sara Deutch, Vice President and Associate General Counsel for Verizon Communications, during a panel at the NTIA PTO Internet Task Force Symposium July 1, 2010.¹¹ Ms. Deutch said that agreements with content owners on copyright protection mechanisms such as notice forwarding arose in the context of private commercial agreements usually tied to content distribution deals. She also noted that such arrangements could encompass broader content protections but are currently limited to rights holders with content selected for distribution by Verizon.

Unfortunately, this type of voluntary arrangement is seemingly available only to select content owners with which Verizon has content distribution deals and does not extend routinely to other infringing content that may be distributed through Verizon's broadband platform.¹² Such private copyright protection schemes lack transparency and provide no solution for rights holders who have no legitimate distribution deal, including independents. Government should have a stabilizing role to play in connection with these forms of private copyright protection systems and not just stand around and encourage problems to be solved privately.

IFTA's Vice President and General Counsel Susan Cleary also participated on a panel at the Symposium and pointed out that extended copyright protection beyond what is legally required by the DMCA is a desirable goal for all stakeholders; however, limiting that to only those which have exclusive arrangements with service providers may leave out the majority of independent producers or force these producers to "buy" comparable protections at the cost of entering into less rewarding distribution deals with platforms (or aggregators) as the sole means of obtaining both legitimate carriage and equivalent protection by the service provider.

Comment on Government Mandated Graduated Response Systems

With respect to legislated graduated response schemes, IFTA notes that very few jurisdictions have accepted this form of remedy due to the inability to reach consensus among stakeholders on a way forward, so the experience is somewhat difficult to evaluate. Korea, which has implemented a graduated response mechanism to address online piracy, has reported a decrease in online piracy since the adoption of its graduated response system.¹³ On November 3,

¹¹ Department of Commerce, United States Patent and Trademark Office, National Telecommunications and Information Administration, *Copyright Policy, Creativity, and Innovation in the Information Economy*, panel discussion, July 1, 2010 (available at <http://www.ustream.tv/recorded/8013302>).

¹² See Article on Automated Content Online available at <http://www.automaticcontenttoday.com/i-dont-quite-understand-this/>. For more information about the Verizon copyright notice forwarding program, visit: www.verizon.net/copyrightfaq.

¹³ Minho Kim, Korea Ministry of Culture, Sports and Tourism, presentation at Asia-Pacific Economic Cooperation, Sept. 2010 (available at http://aimp.apec.org/Documents/2010/IPEG/IPEG2/10_ipeg31_033.pdf).

2010, Korea's Ministry of Culture, Sports and Tourism ordered the suspension of 11 online accounts of known copyright infringers.¹⁴ The suspensions follow cases in which three notices of infringement were identified for which violators failed to challenge.

In France, following legislation, public authorities created an independent public body called HADOPI that receives Infringement Statements from the French anti-piracy organization ALPA as a sworn agency representing rights holders. HADOPI is also authorized by law to ask service providers for the identification of the infringers. ALPA monitors the Internet to identify pirated content of an agreed upon list of titles. It then sends Infringement Statements to HADOPI, which then reviews the Infringement Statements and if considered satisfactory, sends a notice to the subscriber. Those receiving three (3) notices in a twelve (12) month period face fine up to €1,500 and/or potentially interruption of services. It is reported that ALPA has been sending 25,000 statements a day since September 2010, and HADOPI has started sending out notices since October 1, 2010. No statistics are available as to the speed or volume of notices sent by HADOPI or consumer response.

In the United Kingdom, the legal framework makes a graduated response regime available to rights holders, but the mechanisms of such systems are not yet in place and the exact structure is not yet determined. The United Kingdom remains in the implementation planning phase of its new Digital Economy Act, which includes notification by the service provider to the infringer, but it is not yet clear if and how the graduated response system will work and whether government will extend the procedure from purely educational notices to actually seeking remedial action for recidivists.

The Digital Economy Act makes it theoretically possible for the UK Government to take tougher measures if initial notification has not resulted in the curbing of P2P piracy, including the deployment of technical measures by service providers to restrict bandwidth on accounts evidencing repeat infringements. Furthermore, the Act also provides for the possibility to introduce site-blocking measures further down the line, to combat this growing form of online copyright infringement; however, the activation of such a clause would have to be the object of an additional – though expedited – parliamentary scrutiny, and it is not certain under the current political climate how the UK Government will proceed.

No matter which country implements a mechanism to combat online piracy, due process safeguards and costs allocations are primary concerns in the analysis and development of any government implemented graduated response scheme.¹⁵ IFTA believes that, at a minimum, a fair and workable system must include adequate notification to the alleged infringer for each instance of infringement and the opportunity for a hearing before a neutral decision making body of any asserted legal defenses prior to imposition of any penalty, including any interruption of services.

¹⁴ *Korean Government Orders Suspension of Online Accounts of Copyright Infringers*, Motion Picture Association, Nov. 3, 2010 (available at http://mpa-i.org/newspress/newspress_korea101103.html).

¹⁵ For example, the new graduated response mechanism adopted in France requires that participating rights holders bear the burden of costs of extensive online monitoring, estimated at nearly \$1 million annually for the local industry.

c. What are the processes employed by rights holders to identify infringers for the purposes of sending takedown notices?

Takedown notices must contain certain elements to be valid under the DMCA including “identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed” and “information reasonably sufficient to permit the service provider to locate the material.”¹⁶ This information is often difficult and expensive for the rights holder to obtain and provide to service providers in a timely fashion to prevent damage to its copyright content.

Rights holders may monitor for infringement and send written notices manually, but this is time consuming, inefficient and far from comprehensive. Rights holders may also use digital content detection technologies like fingerprinting and watermarking that automatically locate unauthorized content and employ content protection service providers to monitor the Internet, identify unauthorized content and send electronic takedown notices to Internet service providers.¹⁷ These technologies enable monitoring services for anti-piracy purposes; enable filtering to identify and block content on the Internet; and can support tracking of copies to source. However, while these services are often employed by major studios to apply to an ongoing series of films destined for worldwide release, the services are not easily adapted to the needs and economics of independents who are releasing individual pictures on a territory by territory basis through different distributors.

d. What processes do internet intermediaries employ in response to takedown notices? Are the responses sufficiently timely to limit the damage caused by infringement?

The Internet is a vast worldwide marketplace leaving many rights holders unable to effectively patrol and protect their content. The copyright protection obligations for service providers under the DMCA are not enough in the current Internet environment to effectively combat the infringing activity they are meant to address. Even if the takedown notices succeed in removing the infringing copy, rights holders are faced with a seemingly endless stream of pirated content and an endless game of round robin as the illegal content is immediately reposted in another location often by the same user. In the meantime, decisions that further narrow the effectiveness of the established legal framework jeopardize independents’ ability to protect their content.

The DMCA was implemented over 12 years ago when streaming of full-length content over the Internet was barely imaginable, and the statutory protections and related judicial precedents today fail to provide the necessary legal framework to adequately protect rights holders. For instance, under the DMCA, service providers are only legally obligated to respond to notices which contain all elements provided for in Section 512 since only such notices convey

¹⁶ 17 U.S.C. §512 (c) (3i-vi)

¹⁷ Fingerprinting includes embedding a unique identification code onto each copy of audio and/or video content that can later be used to identify the content by comparing it with reference fingerprints stored in databases. Watermarking embeds an imperceptible data set into the audio and/or video content, which enables tracking and investigation of the copyright infringement and the individual(s) responsible.

actual knowledge to the service provider,¹⁸ thus triggering the provider's obligations to take down the illegal material. However, gathering such information for the tidal wave of infringements that can occur daily is cost and resource intensive. To compound the problem, the statutory time period of 48 hours for response is often too long when millions of illegal copies can proliferate on the Internet overnight. Once uploaded, the damage is immediate and harsh, stifling the ability of rights holders to commence legitimate transactions and generate revenue because they are unable to compete with free.

The *Viacom v. YouTube* case is the most recent illustration of the difficulties of adopting the DMCA to certain forms of infringement on the Internet. In that case, the District Court held that the DMCA does not obligate a service provider to monitor and takedown infringing materials without actual knowledge of the infringement and "information reasonably sufficient" to locate the material, e.g., the URL of the unauthorized content.¹⁹ Thus, it held that YouTube is in compliance with the DMCA safe harbors when it removes only the specific clips identified in DMCA notices, and not other clips which infringe the same works.²⁰

Viacom is appealing the decision, and IFTA supports Viacom's legal positions as set forth in the amicus brief filed by IFTA and MPAA in the U.S. Court of Appeals for the Second Circuit.²¹ The problems that arose in the *Viacom v. YouTube* fact pattern demonstrate how quickly content once posted on the Internet can proliferate and how purveyors of that content can use multiple mechanisms to invade control. While we disagree with the court's determination of the knowledge requirement, the case is illustrative of the lack of enforcement tools provided by the DMCA.

The balance struck by Congress when drafting the DMCA between the obligations of rights holders and service providers (and particularly the notice and takedown and safe harbor provisions) was carefully considered and as noted in the Senate Report of 1998 intended to provide incentive for the service providers and rights holders "to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." The lower court decision in *Viacom v. YouTube* throws into jeopardy this delicate balance and may entirely eliminate the incentive to cooperate by service providers and is of significant concern to IFTA and the independent film and television industry.²² Given advances in technology, e.g., the more accurate monitoring and identification technologies that exist today, it may be timely for legislation to enhance the DMCA safe harbor provisions to encourage use of modern, reasonable

¹⁸ 17 U.S.C. §512 c(3)(B)(i)

¹⁹ *Viacom Intern. Inc. v. YouTube, Inc.*, 2010 WL 2532404 (S.D.N.Y.), 95 U.S.P.Q.2d 1766 (June 23, 2010). The court held that to be effective, "representative lists" must be accompanied by "information reasonably sufficient to permit the service provider to locate the material."

²⁰ *Id.* at 16 (citing 17 U.S.C. §512 (c)(3)(A)(iii))

²¹ See BRIEF FOR MOTION PICTURE ASSOCIATION OF AMERICA, INC. AND INDEPENDENT FILM & TELEVISION ALLIANCE AS *AMICI CURIAE* SUPPORTING APPELLANTS, *Viacom Int'l, Inc. et al. v. YouTube, Inc. et al.*, No. 10-3270 (2d Cir.) (filed Dec. 10, 2010).

²² Neither IFTA nor its members are parties to this case. However, the ruling of the lower court significantly narrows the intended application of key provisions of the DMCA and impairs independent producers and distributors from protecting their copyrighted works within the established legislative framework.

technology to better track and protect content as it pops up in varying forms and locations across the web.

Accordingly, it may be that the framework for DMCA safe harbors and the notice and takedown regime needs to be revisited to create more effective forms of online copyright protection in connection with service providers. In addition, government may look to whether some form of industry wide graduated response scheme is proper. It should also look for ways that will simplify the cooperation among stakeholders to combat repeat infringers.

Of course, voluntary initiatives by service providers that are accessible by all rights holders must continue to be encouraged. For instance, one effective monitoring, identification and blocking/takedown procedure by an online service provider is the YouTube Content Identification Program.²³ The Program allows rights holders to submit their content to YouTube for fingerprinting, and YouTube will automatically block or remove any unauthorized uploads of that content upon detection. IFTA also applauds Google's recent announcement regarding improvements to its DMCA notice and takedown protocols as well as its Autocomplete and AdSense programs to better address online piracy problems.²⁴ That said there are instances where voluntary agreements may not be sufficient or cannot be achieved without action or direct mandate by the government.

One proposed government response with significant potential for addressing online piracy can be found in the recently introduced Combating Online Infringements and Counterfeits Act (S. 3804) ("COICA"). The COICA provides new tools with which the Department of Justice can efficiently fight piracy, including the authority to locate and suspend the domain names of domestic websites devoted to pirate and counterfeit content.²⁵ For foreign-based pirate sites, COICA allows the Attorney General to request a court order requiring service providers to block access to the sites, credit card companies to suspend processing transactions for them, and ad networks to suspend serving ads to the sites. The Attorney General may also publish a list of pirate sites, and service providers, credit card companies and ad networks would have immunity from taking action against any site located on the list.²⁶ If enacted, the Bill will benefit all stakeholders in intellectual property based industries, providing for government action against pirate sites without forcing private companies to take up costs and expenses of litigation against service providers and potentially leading to lawsuits against their own customers.

The Senate Judiciary Committee and its leadership are to be commended for the recent unanimous and bipartisan message that American innovation and creation will be protected so that further intellectual property can be financed, created and legitimately offered to the public.

²³ See YouTube's website at: http://www.youtube.com/t/content_management.

²⁴ See *Making Copyright Work Better Online*, Google Public Policy Blog (posted Dec. 2, 2010) available at <http://googlepublicpolicy.blogspot.com/2010/12/making-copyright-work-better-online.html>.

²⁵ "Critics of the legislation argue that this bill would hurt free speech, encourage censorship in foreign countries, and cripple the technological infrastructure on which the Internet runs. Not only is this criticism unfounded, but more robust enforcement of digital copyrights would likely lead to a stronger Internet ecosystem and more innovative content and services for consumers." Daniel Castro, *Better Enforcement of Online Copyright Would Help, Not Harm, Consumers*, Information Technology & Innovation Foundation (October 2010).

²⁶ See *Id.* for additional online copyright enforcement tools proposed by COICA.

IFTA will continue to work with Senators Leahy and Hatch and other industry stakeholders in support of enactment of this significant legislation.²⁷

e. What are stakeholders' experiences with developing collaborative approaches to address online copyright infringement?

Other than an informal meeting with YouTube counsel regarding YouTube's Content Identification Program, IFTA has not had the opportunity to engage in discussions on behalf of its member companies with service providers regarding extra measures or collaborative efforts in the U.S. to address online copyright infringement beyond that which is provided in the DMCA. However, IFTA is aware of instances in which service providers have worked with content providers with whom they have exclusive distribution arrangements to develop private voluntary content protection protocols, e.g., Verizon's "notice forwarding" initiative.

As mentioned in the graduated response discussion above, while effective private agreements may be used as one of the tools to combat online infringement, they are only "effective enforcement" if they are available to all rights holders. In order to rely upon these arrangements as a substitute for direct government action, government must ensure that private industry agreements are transparent, achieved with the engagement of all content producers and, in particular, establish a framework that effectively address online infringement with due respect for the rights of copyright owners and of the public.

f. In confronting the challenges of online infringement, to what extent have all relevant stakeholder groups, such as independent creators, participated in or had a window on collaborative approaches to curb online infringement? How can government best encourage collaborative approaches within the private sector?

Industry solutions must include all stakeholders and be effective for independents. However, to date, comprehensive and inclusive collaborative private industry discussions have yet to occur. As the trade association for the independent film and television production and distribution industry worldwide, IFTA's primary experience with "collaborative" approaches to curb online infringement has been through advocacy in public consultations such as this. Collaborative approaches within the private sector have either not taken place or have omitted the perspective of independent content creators.

Given the technological complexities of online piracy, as well as the social and financial implications, it is desirable to have the direct involvement of all shareholders, including the content owners, technology providers and broadband companies, in crafting effective means to recognize and prevent online piracy. However, there are inherent risks in allowing self-selected groups to undertake such a function.

IFTA strongly believes that government must act as convener of such groups and exercise oversight to ensure: (1) that all stakeholders are actively included and involved in "industry at large" discussions and solutions; (2) that the policy and technology solutions that

²⁷ Chris Tribbey, *Anti-Piracy Bill advances to Senate*, Home Media Magazine (Nov. 18, 2010) available at <http://www.homemediamagazine.com/piracy/anti-piracy-bill-advances-senate-21195>.

emerge must be realistic for all copyright holders and address actual piracy (not merely the “risk” of piracy); and (3) that the public’s right to enjoy legal access to new legal services, applications and content without interference is preserved.

g. Are independent creators able to fully exploit the Internet platforms for the distribution of their works, and if not what barriers have been encountered?

As a result of media consolidation, independent creators are facing increasing barriers to access vital distribution platforms on the Internet. For example, a major video destination site such as Hulu is owned by media conglomerates that have the incentive to act as “gatekeepers” to accord prized positions and favorable terms to affiliated content. In addition, the U.S. broadband marketplace is dominated by just a few major players with Comcast 19.3%, ATT 21.1%, Verizon 11.3%, and Time Warner 10.8%, making up over 62% of the broadband market.²⁸ These conglomerates increasingly are acquiring a flow of content to feed their distribution platforms through merger, acquisition or exclusive partnerships (or “output deals”) with other media conglomerates.

As the major broadband providers continue to align commercial interests and form exclusive partnerships with aggregators and major content producers,²⁹ effective regulations are essential to ensure that the Internet remains an “open” distribution platform that provides equal access to all content providers. Without such regulations, the economic forces evident in traditional media will inevitably push broadband providers to prefer their own content, services and applications, discriminate against lawful, independent content, services and applications, and deprive the public of access to competing offerings. Consequently, the quantity, quality and diversity that arise from competition will be lost.

In addition, significant transaction costs exist for both rights holders and platforms that limit the potential for commercial exploitation of independent content on the Internet. The lack of a universal encoding standard drives up costs of making content available to multiple platforms. Rights holders with a small number of titles also find it difficult to exploit rights directly with platforms since for platforms the costs in negotiating single picture deals are similar to those for multi-picture deals, but the revenue prospects differ substantially. In addition, platforms are often unwilling to invest in content with uncertain revenue prospects, e.g., independent content without major theatrical or television credentials. While the Internet offers a new way of presenting content to consumers, the significant transaction costs for rights holders and platforms create barriers for independents trying to exploit content on the Internet.

Finally, as mentioned above, online piracy has also severely inhibited independent creators’ ability to exploit content on the Internet. Unlike the major studios, independents are unable to secure more effective private content protection arrangements beyond those provided to the general public (e.g., YouTube Content ID Program and Google’s recently announced content protection enhancements). Service providers offer companies with which they license content increased content protection mechanisms, which are normally unavailable to independents because they are not in a position to negotiate exclusive content distribution deals.

²⁸ See Attachment A: *Market Share of Top Four Broadband Providers in the U.S.A.*

²⁹ See Attachment B: *Broadband Providers and Content Provider Partnerships.*

However, these types of preferred private copyright protections should be available to all content providers, regardless of commercial leverage.

V. Conclusion

IFTA applauds the Department of Commerce for commencing this Notice of Inquiry and other related NOIs to gather comments from all stakeholders on such important issues. Public consultations such as this will provide invaluable information and establish strong foundations for the government and stakeholders to move forward with economic development on the Internet, addressing online piracy comprehensively and encouraging private and transparent voluntary mechanisms which encompass the interests the needs of all stakeholders and the public.

Respectfully Submitted,

Independent Film & Television Alliance

Jean M. Prewitt
President and Chief Executive Officer
10850 Wilshire Blvd., 9th Floor
Los Angeles, CA 90024-4321

Appendix A

Market Share of Top Four Broadband Providers in the U.S.A.

	Total Subscribers (in millions)	Market Share (%)
Comcast	15.7	19.3
ATT	17.1	21.1
Verizon	9.2	11.3
Time Warner Cable	8.8	10.8
Total Broadband Subscribers in U.S.	81.2	
Total U.S. Broadband Market Share of 4 Companies		62.6

Data Sources

[Subscription Total is from June 2009 \(OECD Dataset 1c\)](#)

[Comcast Source: Corporate Overview Sept 2009, \[www.comcast.com\]\(http://www.comcast.com\)](#)

[Verizon source: 3q 2009 news, \[www.verizon.com\]\(http://www.verizon.com\)](#)

[ATT source: corporate profile, \[www.att.com\]\(http://www.att.com\)](#)

[Time Warner Cable source: company highlights, \[www.timewarnercable.com\]\(http://www.timewarnercable.com\)](#)

Appendix B

Broadband Providers and Content Provider Partnerships

Broadband Provider	Service	Content Partner(s)
Comcast	Comcast on Demand	Pending acquisition of NBC-Universal.
Time Warner (Road Runner)	On Demand	Actual content-production arms, including New Line Cinema, Time Inc., HBO, Turner Broadcasting System, The CW Television Network, TheWB.com, Warner Bros. Entertainment, Kids' WB, The CW4Kids, Cartoon Network, Boomerang, Hanna-Barbera, Ruby-Spears Productions, Adult Swim, CNN, DC Comics, and Warner Bros. Games. (http://www.timewarner.com/corp/aboutus/our_company.html).
Verizon	FiOS	HBO, Showtime, Starz, The Movie Channel, Encore, Flix, IFC and Sundance.
Cox	Movies on DEMAND	HBO, Showtime, Starz, Cinemax, Disney.
Qwest	qZone, Starz™ Play	Disney, Fox, Lionsgate, MGM, Sony, Universal and Warner Bros.
Charter	Charter on Demand	Nickelodeon, Comedy Central, MTV, Food Network, HGTV.
Optimum Online (Cablevision Systems)	iO TV, Movies on Demand	HBO, Starz, Encore, Showtime, Disney, Cinemax.
AT&T	U-verse	Cinemax, Flix, indieplex, retroplex, Showtime, Starz, MGM, The Movie Channel.
America Online	Aol Video.	ABC, A&E, CBS, Comedy Central, The CW, Crackle Originals, FOX, FX, Hulu, NBC, Showtime, SnagFilms, and USA.
CenturyLink (formerly Embarq)	On Demand	HBO, Cinemax, Showtime, Starz.
Cellco Partnership DBA Verizon Wireless	V Cast Videos	Paramount Pictures, ABC Mobile, CBS Mobile, FOX Mobile, NBC Prime,
MSN (Microsoft)	Xbox LIVE	Content supplied via Zune. Original programming through the Safran Company.