

December 10, 2010

*Via electronic filing: copyright-noi-2010@ntia.doc.gov*

Office of Policy Analysis and Development, NTIA  
U.S. Department of Commerce  
Room 4725  
1401 Constitution Avenue, NW  
Washington, DC 20230

Re: Comments of Beachbody, LLC in Response to the Notice of Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy

Dear Internet Policy Task Force:

Beachbody, LLC (“Beachbody”), welcomes this opportunity to submit these comments in response to the Commerce Department’s Notice of Inquiry pertaining to copyright policy, creativity, and innovation in the Internet economy (“NOI”).<sup>1</sup> As a company that relies heavily on the Internet to advertise and sell our products, we appreciate the Commerce Department’s focus on combating Internet piracy and increasing benefits to rights holders of creative works that are accessible online.

Beachbody is a leader in in-home fitness and weight-loss solutions based in Santa Monica, California. Founded in 1998, the company’s core purpose is to provide products and services that help people achieve their goals and lead healthy, fulfilling lives. Beachbody is a medium-sized company with approximately 300 employees and 2009 earnings of nearly \$400 million. Beachbody’s divisions include: Beachbody®, a line of in-home fitness and weight loss products and services; Beachbody Beauty™, a line of beauty and skin care products; and Team Beachbody®, which includes a network of more than 40,000 independent “Coach” distributors as well as a dynamic online support and fitness community. The company’s core offerings are in-home fitness DVDs and kits, including our most popular product, the P90X® Extreme Home Fitness kit. These fitness DVDs and kits are geared toward helping all types of people meet their individual fitness, weight loss, and wellness goals, and include peer support, calendars, easy-to-follow fitness and nutrition guides, fitness equipment, and supplements. Beachbody is extremely proud to offer products and services that increase consumers’ health and wellness, especially at a time when diseases related to poor health and obesity are of such critical importance and continue to rise to staggering levels in the United States.

While Beachbody’s fitness programs have seen significant growth as the country attempts to improve its health, reduce healthcare costs, and combat the obesity epidemic, we need the government’s assistance to help ensure that online infringement does not undermine the creativity and innovation of legitimate entities that conduct much of their business online. We describe our experience addressing online piracy and provide our recommendations below.

---

<sup>1</sup> Notice of Inquiry, Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 61419 (Oct. 5, 2010).

While Beachbody's fitness programs have seen significant growth as the country attempts to improve its health, reduce healthcare costs, and combat the obesity epidemic, we need the government's assistance to help ensure that online infringement does not undermine the creativity and innovation of legitimate entities that conduct much of their business online. We describe our experience addressing online piracy and provide our recommendations below.

## **1. Counterfeiters Profit from Creative Industries That Advertise, Sell, and Distribute Content Online**

The NOI has asked creative industries to describe what challenges they have encountered in developing business models that offer content online while counteracting online infringing activities.<sup>2</sup> As Americans have sought to improve their health and well-being, Beachbody and its brands have grown significantly over the past few years online. However, as Beachbody has grown, counterfeiters have unfortunately seized an opportunity to profit from our well-known products and valuable intellectual property ("IP"). Such counterfeiting has resulted in the loss of substantial revenue for Beachbody and the 40,000 independent business owners in the United States who rely on Beachbody's products for income. This loss, in turn, has meant fewer jobs, less tax revenue, and fewer health and fitness options for consumers.

In order to combat this rampant piracy, Beachbody has been forced to employ multiple strategies at considerable cost. For example, such actions have included working with the U.S. Customs and Border Protection ("CBP") and the U.S. Immigration and Customs Enforcement ("ICE") to identify and seize piratical products as well as to prosecute the parties involved. To date, Beachbody has registered over 38 copyrights and trademarks with CBP, including the P90X® word mark and copyright for the P90X® Extreme Home Fitness kit. The company has also shared information regarding suspected pirates with CBP, and is working to train CBP officials regarding authentic versus pirated products. Additionally, Beachbody has been developing an even more proactive national strategy to target imports of pirated Beachbody goods and further strengthen its relationships with ICE, CBP, the FBI, and other federal, state and local law enforcement agencies to meet this goal. Beachbody sends hundreds of cease and desist notices each month to operators of websites that sell piratical Beachbody merchandise, the vast majority of which are in China.

As a result of our efforts, in the first three quarters of 2010 alone, Beachbody removed over 65,000 online marketplace listings for counterfeit products with an estimated retail value of close to \$500 million. Beachbody has also taken legal action against over 4,500 websites selling counterfeit Beachbody product, and has worked to remove more than 2,500 Sponsored Links on sites such as Google, Yahoo!, and Bing.

## **2. Combating Piracy Places a Significant Financial Burden on Small and Medium-Sized Enterprises**

For a medium-sized enterprise with limited resources, such as Beachbody, the cost of combating online piracy is a significant financial burden. By dedicating significant time, money, and effort to combat infringement, Beachbody is forced to divert valuable resources from its

---

<sup>2</sup> 75 Fed. Reg. at 61422.

other business interests, leading to a loss of sales and a slow-down both in the growth of revenue, as well as in the creation and production of new and innovative products. The impact of this infringement has also extended beyond Beachbody itself, resulting in reduced tax revenue, fewer fitness options for consumers, and has likely meant the loss of job growth, as any potential expansion of the business is tempered by the severe piracy issue.

As a medium-sized company, Beachbody lacks the resources of larger entities continuously and effectively to combat this piracy. For example, merely preparing and sending a relatively simple cease and desist order to an operator of an infringing website – in addition to sending a similar letter to the host of such website – requires Beachbody to research the owner of the website, prepare a letter that specifically identifies each infringing aspect of the website, provide citations to relevant laws, and attach copies of relevant copyrights and trademarks. This process must be repeated for each of the hundreds of infringing websites that we identify every month. Moreover, most website operators fail to respond to these notices, which requires further legal action to be taken – and, because the vast majority of the owners are in China, any further action is essentially futile. As a result, it is not realistic or financially possible for a company of our size to employ the veritable armies of consultants, investigators, and attorneys that are necessary to further effectively combat this piracy.

### **3. Online Copyright Infringement from China Has Been Particularly Troublesome**

The Commerce Department has asked for comments on stakeholders' experiences with foreign countries in reducing online copyright infringement.<sup>3</sup> Despite Beachbody's successes and our ongoing efforts to work with CBP and ICE, pirated Beachbody exports continue to flow from China. It has been Beachbody's experience that Chinese authorities are unwilling to take action to stop the manufacture and export of counterfeit and piratical products. As these illegitimate exports from China continue unabated, Chinese authorities often stand by, refusing to take action. Indeed, despite Beachbody's strong anti-counterfeiting efforts to date, the amount of piratical exports from China continues to increase.

Due to China's inaction, we have been forced to play a virtual game of "whack-a-mole" in the United States, whereby we try to find pirated Beachbody merchandise that may be in any box among the thousands of imports that enter through dozens of U.S. ports every day. While stopping these pirated goods from entering the country at their source would be more effective, such as the place of manufacture or Chinese ports, we cannot do so alone.

As a medium-sized entity, Beachbody needs the support of the U.S. Government to cut off this rampant piracy at the source by pressuring China to recognize and enforce Beachbody's rights to its intellectual property. Beachbody is simply asking that China, like the United States and other countries, play by the rules, respect global intellectual property standards, and take action against the manufacturers of this counterfeit and piratical merchandise.

### **4. Bad Actors Move Swiftly to Avoid the Ramifications of Takedown Notices**

---

<sup>3</sup> 75 Fed. Reg. at 61423-61424.

The NOI has asked for comments on the effectiveness of sending takedown notices and stakeholders' experiences with online copyright infringement by users who change URLs, ISPs, locations, and/or equipment to avoid detection.<sup>4</sup> While most of Beachbody's sales take place in the United States, the majority of the IP violations we encounter flow from China. Each day, Beachbody sees both U.S. and Chinese-based websites selling counterfeit versions of our products on both a "retail" and "wholesale" basis. All of the infringing products offered for sale on these websites are sourced from China. To combat this issue, Beachbody routinely sends notices to these sellers, their ISPs, the search engines through which they advertise, and anyone else involved in the transactions. The merchants, however, simply change user names or ISPs and continue their business virtually unabated.

##### **5. The U.S. Government Should Take a Proactive Role in Assisting Stakeholders Combat Online Piracy Both Abroad and Domestically**

The Internet Policy Task Force has asked commenters to make any generalizations about policy decisions that may help creators earn a return for their efforts. Additionally, the NOI has requested input on how government policy can promote legitimate businesses and discourage infringement-driven models.<sup>5</sup> Beachbody supports a policy of active U.S. Government engagement in combating online piracy both abroad and domestically. Due to the significant resource constraints experienced by small and medium-sized entities, such as Beachbody, the U.S. Government's assistance is especially vital in helping to identify and stop infringement.

On the international front, Beachbody recommends that the U.S. Government take a more proactive role in directly engaging with the Chinese Government to convince it to take a more focused and effective approach to identifying and stopping infringement at its source. Many U.S. Government programs focus on stopping infringement when products arrive at ports in the United States. With dozens of ports handling thousands of packages and containers on a daily basis, however, it is often difficult, if not impossible, to spot infringing merchandise when it enters the United States. Rights holders often have detailed information regarding the exporters of infringing products at their source of manufacture or can provide officials with lists of legitimate manufacturers in China, making it easy to spot infringing merchandise at its source. Nevertheless, to date, Chinese officials have been reluctant to use this information to conduct raids on factories and/or prevent the export of illegitimate merchandise. Chinese authorities have also often forced rights holders to jump through many hoops and provide voluminous amounts of information for them to take action.

Beachbody thus respectfully recommends that the U.S. Government directly engage with the Chinese Government to apply pressure to recognize and enforce rights holders' valuable intellectual property. Specifically, Beachbody strongly believes that the funding, staffing, and mission of CBP and ICE attaché offices in China must be expanded to ensure a higher level of cooperation and enforcement efforts with their Chinese counterparts. Such a policy would help ensure that action is immediately taken to intercept and destroy infringing merchandise before it is exported.

---

<sup>4</sup> 75 Fed. Reg. at 61423.

<sup>5</sup> 75 Fed. Reg. at 61422.

On the domestic front, Beachbody has worked with, and been highly impressed with, the dedication of officials from CBP, ICE, and the Office of the U.S. Intellectual Property Enforcement Coordinator. These government offices have been responsive to Beachbody's concerns and have expressed a willingness to take action to combat infringement of our products. CBP, in particular, has been willing to work closely with Beachbody to learn how to identify infringing merchandise in order to increase seizures at the border. As a result, from January through September 2010, CBP made over 390 seizures of over 18,000 pirated Beachbody products from China. Seizures continue to occur at many sea ports and mail facilities, including San Francisco, Milwaukee, Cincinnati, Chicago, and Long Beach. Beachbody is optimistic that the number of seizures will continue to increase as CBP becomes more familiar with Beachbody's products.

Despite these successes, however, one significant constraint on the ability for small and medium-sized entities, such as Beachbody, to work effectively with CBP to combat the counterfeiting and piracy of their products is the lack of specific information sharing between CBP and rights holders. Currently, information shared by CBP with rights holders is often restricted to general and non-specific information that appears on customs entry records, instead of providing rights holders with the best information available. Customs entry records often do not contain the critical information needed properly to target the importers and distributors of infringing merchandise. For example, the actual manufacturer generally will not be reflected on a customs entry record, but may be on a vessel manifest. We therefore recommend that the U.S. Government adopt a policy of greater information sharing between those government entities working to stop the infringement and rights holders. Such a policy would help ensure that rights holders receive the very best detail sufficient to permit an infringement determination. Additionally, this kind of policy would help rights holders quickly to pursue civil and/or criminal remedies – a critical step in ending the “whack a mole” cycle that many companies experience.

## **6. Collaborative Approaches Help Address Online Copyright Infringement**

The Commerce Department has asked stakeholders to provide comments on their experiences with collaborative approaches to addressing online copyright infringement.<sup>6</sup> Beachbody supports establishing new disciplines in foreign markets that would allow for increased effective enforcement of IP rights. We appreciate that such IP rights enforcement disciplines have been set forth in recent U.S. free trade agreements (*e.g.*, those found in the U.S.-Korea Free Trade Agreement), including creating higher penalties to deter IP rights infringement, establishing better mechanisms within and at the border (including guaranteed *ex officio* authority to conduct raids) for government authorities to counter counterfeit and piracy operations, and the like. We understand that this expansion is taking place with the negotiations for the Trans-Pacific Partnership (“TPP”), and support further expansion of such disciplines into other key foreign markets.

Beachbody also supports the TPP negotiation discussions pertaining to providing small and medium-sized entities specific rights and obligations. Often a small or medium-sized entity's company-specific issues are lost in the more systemic discussions that typically take place at a government-to-government level. With respect to IP rights, we recommend

---

<sup>6</sup> 75 Fed. Reg. at 61423.

establishing a permanent bilateral mechanism between the United States and each of the TPP parties – akin to the “case referral mechanism” between the U.S. and China (albeit in an expanded form to cover all IP rights issues) – whereby company-specific issues can be raised, and resolution sought between the two governments.

Additionally, we appreciate efforts to finalize the Anti-Counterfeiting Trade Agreement (“ACTA”), and urge the U.S. Government to encourage other countries to join this Agreement.

**7. Legal Remedies Could Be Better Formulated to Help Address Internet Piracy**

The NOI has asked whether stakeholders would recommend improvements to existing legal remedies or new remedies to deal with infringing content on a more timely basis, and whether litigation is an effective option for preventing Internet piracy.<sup>7</sup> Allowing for expedited enforcement against repeat offenders and increased transparency to the parties exporting and distributing infringing content would greatly assist small and medium-sized entities, such as Beachbody, to fight the ongoing “whack-a-mole” issue.

\* \* \*

Beachbody thanks you for the opportunity to provide these comments and looks forward to working with you on these important issues. Please do not hesitate to contact me with any additional questions at (310) 883-9000.

Sincerely,



Jonathan Gelfand  
Senior Vice President and General Counsel  
Beachbody, LLC

---

<sup>7</sup> 75 Fed. Reg. at 61422-61423.