

## Comments of Time Warner Inc.

Time Warner Inc. appreciates the opportunity to contribute to the development of the first Joint Strategic Plan against counterfeiting and infringement by providing the following comments in response to the request for written submissions issued on February 23, 2010 by the Office of the Intellectual Property Enforcement Coordinator (IPEC). See 75 Fed. Reg. 8137 (Feb. 23, 2010).

Time Warner Inc. (Time Warner) is a global leader in media and entertainment with businesses in television networks, filmed entertainment and publishing. Our operating divisions – Time Inc., Home Box Office, Turner Broadcasting System and Warner Bros. Entertainment – maintain unrivaled reputations for creativity and excellence as they keep people informed, entertained and connected. Time Warner actively seeks to offer consumers the widest variety of options in how they receive content, and to maximize the benefits of new digital distribution technologies. A few of the ways our divisions are doing this are by: (i) distributing content via DVD, and in high definition with interactive features on Blu-ray; (ii) delivering content through subscription services; (iii) making content available for Video on Demand (VOD), rental models, and permanent download via cable and satellite as well as a variety of Internet and mobile based services; (iv) licensing the streaming of our content in paid, advertising supported and free models; (v) enabling consumers to interact with our content by making certain content available for embedding on consumer websites, blogs, social networking and user generated content sites; (vi) using video tools and other “widgets” to bring content to consumers’ desktops, make video searching easy both on our own websites like CNN.com, and through video search engines like Truveo; (vii) encouraging consumer-level syndication of certain content on broadband, wireless and websites; and (viii) allowing consumers to create and comment on our content and share it with others.

At the same time, all our businesses depend on strong copyright and trademark protection for our creative works and our global brands, and thus all are adversely affected by infringement of these intellectual property rights, in terms of revenues, jobs and profits. While the full range of infringing activity directed against Time Warner’s copyrights and trademarks is broad and diverse, online infringement remains the primary threat. Pirated versions of our copyrighted works are pervasively available online, and the epidemic of cybersquatting and other online trademark infringements shows no sign of receding. For example, at any given time, there are hundreds of thousands of unauthorized postings of Turner copyrighted materials on popular video-sharing sites, including full-length versions of creative works such as cartoons. Unauthorized streaming or downloading of virtually any HBO program occurs online within 24 hours after the program is telecast. Indeed, it is common for HBO programs transmitted to East Coast subscribers to be pirated online within the 3-hour window before the same program is aired to West Coast viewers. The great majority of search engine listings for Warner Bros. film and television titles are for access to pirate product, even though our company makes its digital content available online on an authorized basis via a variety of consumer-friendly online services. All of our divisions are forced to expend considerable time and resources in dealing with these nearly ubiquitous online infringements – time and resources that could otherwise be invested in the creation of new works.

As the locus of the most commercially significant infringements shifts increasingly into the online sphere, it should be a top priority of the Joint Strategic Plan to ensure that the federal government has the legal tools, the technical and forensic expertise, and the funding and other resources needed to confront this problem effectively. In this regard, the Administration should press for full funding for the initiatives contained in sections 402 and 403 of the PRO-IP Act.<sup>1</sup> These programs will strengthen the Justice Department's capacity to investigate, prosecute and convict those who engage in criminal copyright infringements online, with particular stress on operations connected to organized criminal enterprises.<sup>2</sup>

With regard to Part I of the IPEC request, Time Warner notes that other submissions, including those of the Motion Picture Association of America (MPAA) and the Copyright Alliance, are providing comprehensive statistical information about the substantial adverse impact of piracy and counterfeiting on the U.S. economy. Time Warner joins in those comments. We provide additional examples, illustrative of our company's experiences, in this response.

Part I also asks about the threats to public health and safety caused by piracy and counterfeiting. While these harms are popularly assumed to be associated with product lines in which Time Warner is not involved, such threats also occur in relation to counterfeiting of our products and infringement of our trademarks. For example:

- Cybersquatters have employed domain names confusingly similar to globally recognized brands, including CNN, to attract unwary consumers to look-alike websites that provide inflammatory fake "news stories" about matters of great public importance, such as pandemics or armed conflicts. Such activity, which is founded on blatant trademark infringement, presents a real potential to undermine public safety.
- More broadly speaking, online trademark abuse such as cybersquatting often provides a gateway to other online misconduct that directly threatens the security of the public. For instance, consumers lured to a cybersquatting site may also be persuaded to surrender personal data as part of a phishing scheme, or may unwittingly suffer a "drive-by download" of malicious software applications or spyware that threaten network security. The trademark infringement inherent in the cybersquatting activity, as well as the trademark and copyright infringements committed in the course of creating the "look-alike" site to fool consumers, are the predicate for these further wrongful acts.
- Counterfeit consumer products that abuse leading brands owned by Time Warner could also present public health threats. For example, counterfeit BEN 10 branded toys were seized and destroyed by customs officials in Australia because of excessive lead levels that could have harmed children. Such hazardous counterfeit goods often present

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<sup>1</sup> Prioritizing Resources and Organization for Intellectual Property Act of 2008, Public Law 110-403 (Oct. 13, 2008) ("Pro-IP Act").

<sup>2</sup> See Gregory F. Treverton, et al., *Film Piracy, Organized Crime and Terrorism* (2009), available at <http://www.rand.org/pubs/monographs/MG742/> (discussing links between organized crime, terrorists, and intellectual property infringement).

environmental dangers as well, given that disposing of or destroying them can lead to soil or air contamination.

With regard to Part II of the Federal Register request, Time Warner strongly supports the priority accorded to better coordination of federal enforcement efforts against copyright piracy, consistent with the PRO-IP Act, which created the post of Intellectual Property Enforcement Coordinator. One goal should be to make better use of private sector technical assistance and expertise in criminal enforcement. For example, while law enforcement frequently coordinates with Time Warner on criminal counterfeiting cases involving our products, there have been instances in which our company was unaware of the case until after it had concluded and the counterfeit goods had been destroyed. Enforcement agencies and right holders would benefit from increased transparency regarding indictments and streamlined processes that are easy to navigate regardless of which agency a right holder is communicating with.

Similarly, Time Warner and other companies have experience in reaching out to similarly situated stakeholders in other countries in support of improved copyright and trademark protection and enforcement. These efforts have been especially important in helping improve the dialogue about intellectual property protection in developing countries – an area in which we face substantial challenges. Since the Act calls for the Joint Strategic Plan to establish procedures for such consultations “with interested groups within other countries,” the IPEC could play a valuable role both in encouraging the governments of developing countries to support intellectual property protection and enforcement and in identifying additional opportunities that would fill gaps in this effort.<sup>3</sup>

A brief case study regarding certain pirate DVDs from China illustrates how improved coordination is needed to help address a serious piracy problem that impacts our company.

Warner Bros. has taken some unusual steps to reduce the opportunities and incentives to pirate its video product in China. Warner Bros. entered the Chinese market early, partnering with the China Audiovisual division of the Ministry of Culture in 2004 for a joint venture to produce and distribute DVDs. Our studio also sought to reduce the prime window of opportunity for pirates by accelerating the release of DVDs in China. These licensed DVDs were priced at only \$US1 higher than pirate product, and Warner Bros. has supported a number of civil and criminal enforcement actions against Chinese pirates of its DVD product. Moreover, for the past year, Warner Bros. has released DVDs in the Chinese market in a specialized format (CBHD) supported by the Chinese government.

Despite these efforts, China has become a major source of pirate DVDs of Warner Bros. titles both online and in hard goods. For example, pirate discs, which are high-quality counterfeits, are often manufactured in or around Guangdong province, wholesaled in nearby Shenzhen, and shipped from Shanghai into markets around the world, including the U.S. (through the ports of Oakland and Los Angeles), as well as Canada, the U.K., and Australia. In the U.S., many are resold online via popular auction websites; in other cases, Chinese wholesalers are using auction and classified advertising sites to sell this product directly to U.S.

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<sup>3</sup> See Pro-IP Act, section 303(a)(7)(C).

consumers. In short, the pirate product is ubiquitous, despite the proactive best efforts of Warner Bros.

Clearly, a multi-pronged federal enforcement strategy is needed to address this problem:

- U.S. government representatives (including from the State, Commerce, Justice and other departments) need to engage with the Chinese government, both on the ground in China and in other bilateral fora, to encourage more vigorous enforcement against pirate DVD manufacturers, wholesalers and distributors, and to follow through on cases to ensure that criminal prosecutions are pursued and that deterrent penalties are imposed.
- Enforcement efforts, like those suggested above, need to address not only the hard goods manufactured by Chinese pirates, but also the use of Chinese and other Internet auction sites and classified advertising sites used to sell pirated goods.
- To the extent jurisdiction can be established, U.S. law enforcement officials should evaluate for possible prosecution the operators of sites that systematically traffic in pirate DVD product, and should help their overseas counterparts bringing similar cases.
- U.S. officials should work with relevant service providers and e-commerce sites to encourage cooperative efforts with Time Warner and other right holders to prevent pirate DVD sales online, to respond rapidly and effectively when such sales are detected, to bar recidivist pirate sellers from these sites, and to pursue civil and (where appropriate) criminal remedies against them.
- U.S. Customs officials should step up efforts to interdict pirate DVD product when it enters the U.S. from China.
- U.S. government representatives in third countries to which the pirate Chinese DVDs are exported should work with those governments to encourage more effective border controls and downstream enforcement against this pirate trade.
- Finally, an effective flow of intelligence, enforcement and other information among all the U.S. government agencies involved is crucial to success.

This relatively simple example, which involves only one of the ways in which pirate DVDs are produced in and exported from China, illustrates why the Joint Strategic Plan called for by the PRO-IP Act is so important, in order to coordinate the activities of numerous federal agencies toward a common anti-piracy goal. It also underscores the need for adequate funding, resourcing, and political support for the anti-piracy activities of all the agencies involved. Finally, this case study shows that the dividing lines between domestic and international piracy, and between online and offline infringement, are often fluid. Federal enforcement efforts must respect this reality.

We also urge the IPEC to coordinate a short-term review of the enforcement statutes under which the agencies participating in the international intellectual property advisory committee operate. The goal of this review should be to identify any gaps, weaknesses or

overlaps that stand as impediments to an effective federal enforcement effort against online copyright piracy. The results of this review should be fed into the Joint Strategic Plan, and should inform the recommendations to be contained in the IPEC's annual report at the end of this year.<sup>4</sup>

Time Warner appreciates the chance to offer its perspectives on the development of the Joint Strategic Plan. Please do not hesitate to contact the undersigned if we can provide further information that would be of assistance.

Respectfully submitted,

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<sup>4</sup> See PRO-IP Act, section 304.