

November 12, 2013

Office of Policy and External Affairs
United States Patent and Trademark Office
Mail Stop External Affairs
P.O. Box 1450
Alexandria, VA 22313-1450

Via email to CopyrightComments2013@uspto.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 Digital Economy. Docket No. 130927852-3852-01

The Independent Film & Television Alliance (IFTA) respectfully submits these comments in response to the Notice of Inquiry referenced above.¹

I. About IFTA and its Member Companies

Based in Los Angeles, California, IFTA is the global trade association of the independent film and television industry. Our nonprofit organization represents more than 145 Member Companies in 21 countries consisting of the world's foremost independent production and distribution companies, the majority of which are small to medium-sized U.S.-based businesses.² IFTA regularly provides input to governments around the world on a wide range of copyright, trademark, financing and export issues that impact our industry.

Independent producers and distributors are those companies that finance the production of a film or television program in majority part without reliance on the six U.S. "major studios" and control its distribution in a majority of territories worldwide. For more than 30 years, IFTA Members have produced, distributed and financed many of the world's most prominent films, 20 of which have won the Academy Award® for "Best Picture," including *The Artist* (Wild Bunch and The Weinstein Company), *The King's Speech* (The Weinstein Company), *The Hurt Locker* (Voltage Pictures and Summit Entertainment), *Slumdog Millionaire* (Pathé), *No Country for Old Men* (Paramount Vantage and Miramax), *Crash* (Lions Gate), *Million Dollar Baby* (Lakeshore Entertainment), *Lord of the Rings: The Return of the King* (New Line), *Braveheart* (Icon Entertainment), *Dances with Wolves* (Orion Pictures) and *Gandhi* (Goldcrest Films). Other recent IFTA Member films have included *Rush*, *Silver Linings Playbook*, *Django Unchained*, *The Hunger Games*, *The Twilight Saga* and *Hugo*, to name a few.

¹ Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61341 (Oct. 3, 2013). (<http://www.gpo.gov/fdsys/pkg/FR-2013-10-03/pdf/2013-24309.pdf>)

² A list of IFTA Member Companies is available online at <http://www.ifta-online.org>.

Independent films and television programs are made at every budget level and may be mainstream, commercial or art house. The independent sector produces approximately 75% of all U.S. films annually³ and globally produces more than 400 films and countless hours of television programming each year resulting in more than \$4 billion in annual sales revenues.

II. Creating a Strong Copyright Framework for the Independent Film and Television Industry

The production, financing and distribution models of the independents differ substantially from those of the U.S. major studios that self-finance production and then control their own distribution through worldwide subsidiaries and affiliates. Independents work closely with local distributors on a one-by-one, territory-by-territory basis to secure distribution of each individual film. The distributors assess the value of the film (gross receipts across all distribution media) based upon many factors.⁴ 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 in a particular territory or region in advance of production. Those license agreements are then presented by the producer to financial institutions and used as collateral for loans to fund the production. Such financing deals depend largely on the confidence of local distributors and financiers that they will recoup on their investment from the exploitation of the completed film.

Due to the unique independent financing and distribution models, independent production and distribution companies rely on strong legal frameworks and effective enforcement worldwide. Effective global licensing is premised on an ability to clearly and precisely define the rights being granted – platform by platform, language by language, and territory by territory – and the ability to guarantee the integrity of those grants. Thus, stable and up-to-date copyright regimes are of great importance to our industry. Moreover, the U.S. independent industry depends on the economic health of the local film industries and distributors in each territory around the world. Licensed distributors contribute to the investment in production of both imported and local content and operate businesses based on the exclusive right to offer the content to the public. These authorized distributors need the protection of laws which “follow the money” made by illegal distribution in order to prohibit such activities, deter and penalize violators, require the cooperation of ISPs and search engines with content owners, and ensure laws and procedures (including any voluntary initiatives) are efficiently operated and enforced.

In addition to ensuring that our U.S. laws are effective in today’s digital environment, the U.S. government also can play a significant role in protecting the health of the overall marketplace, especially emerging online distribution opportunities, through trade agreements which set a high bar for copyright protection and provide the necessary legal framework for vibrant creative and distribution industries. In marketplaces with such protections, producers and their distribution partners can safely explore ways to offer films and television programming in a variety of ways to consumers, greatly benefiting both the U.S. economy and local economies around the world.

III. Response to Request for Comments

a. Licensing and Fair Use of User-Generated Content

User-generated content such as “remixes” and “mash-ups” rely heavily on preexisting works as source material and any use of copyrighted content requires the user to determine if the nature of the use requires

³ IFTA analysis of weekly production listings published in *The Hollywood Reporter & Daily Variety* (2002-2008) and in Baseline Studio Systems and IMDb Pro (2009 & 2010).

⁴ Factors include the script, director, writer or key cast; subject matter or genre; estimated production budget; and projected season and year of release.

permission from the rights holder and, if so, to identify the proper rights holder. On a commercial basis, “fair use” analyses for derivative works are often conducted by lawyers or production experts, and rights holders are routinely contacted in order to gain permission to use their copyrighted works. However, in a non-commercial or personal context, there are concerns that users are not able to adequately determine whether a use should be cleared or is protected by a “fair use” defense, or will be unable to easily identify and contact the appropriate rights holder to gain permission to use copyrighted works in their mash-ups.

Various public resources such as IMDb (and the more in-depth IMDb Pro)⁵ as well as the U.S. Copyright Office’s searchable database⁶ can facilitate the identification of a particular rights holder of source material. More complex is the analysis of whether an unauthorized use is “fair.” There are a myriad of publicly available resources to explain the “fair use” doctrine, including the USCO’s concise explanation found at <http://www.copyright.gov/fls/fl102.html>. Rather than revising the law to widen the scope of permissible use, IFTA strongly urges that more efforts be made – at the governmental and voluntary industry levels – to educate the non-commercial user and potentially to develop further guidelines to assist in the relevant analysis in the context of specific types of uses, as has been done in the arena of higher education and documentaries.

Licensing Mechanisms

The dominant business model for independent producers rests on face-to-face negotiations and agreements for exclusive licensed rights. Due to the fact that the amount of license fees for independent films and television programs varies widely based on numerous factors (discussed earlier) and frequently is determined prior to the production of the work, exploitation of a primary license requires flexibility and does not readily lend itself to the rigidity of alternative licensing mechanisms, such as compulsory, collective and micro licensing, which may be based on lower, standard rates and ad revenue. While producers may be dependent on utilizing alternative licensing mechanisms for specific secondary uses that defy face-to-face licensing, such as the compulsory licensing of cable and satellite retransmissions,⁷ they require flexibility and control of all primary and exclusive rights that can be contractually committed to specific third party distributors in order to set adequate license fees and raise production funding.

b. First Sale in the Digital Environment

The first sale doctrine is primarily a limitation on a copyright owner’s exclusive right to distribute a copyrighted work. It permits parties who lawfully obtain a copy of a copyrighted work to distribute that particular copy without violating the copyright owner’s exclusive distribution right.⁸ The doctrine was created with respect to the distribution of *physical* goods, and the typical example of giving away or reselling a single copy of a lawfully purchased book is easy to understand. However, the doctrine is far more problematic when it is applied to *digital* versions of a book, or any digital work, where “sharing” and “copying” may be effectively synonymous.⁹ Unless both the law and technology guarantee the complete destruction or disablement of an original digital version of a work upon its resale or redistribution, application of the first sale doctrine in the digital environment will continue to be an unacceptable infringement on a copyright owner’s exclusive right of reproduction and distribution.

⁵ www.imdb.com and www.imdbpro.com

⁶ <http://www.copyright.gov/records/>

⁷ 17 U.S.C. §§ 111 and 119

⁸ 17 U.S.C. §109

⁹ Also, in light of the Supreme Court’s decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, the first sale doctrine now applies to distribution of physical copies of a copyrighted work lawfully made *abroad*, effectively rendering parallel importation in the context of “first sale” permissible, at least under copyright law. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1341 (2013).

Nevertheless, content creators are rising to the challenge of providing content in a variety of ways, including mechanisms that address consumers' desires to "pass along" works to a friend to enjoy in the digital environment. For example, Barnes & Noble's Nook and Amazon's Kindle provide a 14-day lending/borrowing feature that allows for temporary sharing of e-books. Since the USCO's 2001 conclusions, technological capabilities such as Digital Rights Management, Technological Protection Measures and offerings that can be "shared" or "transferred" in a digital environment have emerged. However, as it stands today, even with the emergence of other technologies such as ReDigi¹⁰ that aim to ensure original copies of a work no longer exist after it has been redistributed, such "forward and delete" technology must evolve before any meaningful discussion of first sale in the digital environment may take place.

c. Statutory Damages

Statutory damages for copyright infringement can range from \$750 to more than \$30,000 "as the court considers just."¹¹ Additionally, *willful* copyright infringement "may increase the award of statutory damages to a sum not more than \$150,000."¹² Also, rights holders may utilize so called, "True Name and Address" statutes that impose criminal fines for the rental or sale of recording and audiovisual works that do not bear the true name and address of the actual author, artist, performer, producer, programmer, and so on.¹³ Forty-five states have enacted such legislation and California's statute imposes criminal fines of up to \$500,000 for the rental or sale of at least 100 articles of works, with any other violation under the statute incurring a fine up to \$50,000.¹⁴ These state-imposed statutory fines for inaccurate labeling of the source of goods have provided rights holders with an alternative remedy for the infringement of their works as embodied in *physical* copies; however, effective remedies of this kind may act as a useful deterrent to online infringement if extended to apply to *digital* copies of works.

Compensatory damages for copyright infringement are difficult to calculate due to lack of adequate data available from infringers, who do not typically keep records of their illegal reproductions or sales. There are also instances in which there may be only limited monetary damages – lost revenues and lost profits – but there is clearly a massive "commercial advantage" enjoyed by the infringer, such as in the case of end-user infringement, in which a company or even government agency uses, copies or "distributes" (*e.g.*, internally) copyrighted materials without permission, a license or exceeding the terms of a license. In such cases, it is pertinent to consider that statutory damages especially when applied to digital distribution are necessary and would have to be set at a level to ensure adequate compensation for the injury suffered by the rights holder and to act as a meaningful deterrent to infringement. Rather than hinder the development of legitimate services or platforms to deliver content, statutory damages provide an essential mechanism of protection for legitimate portals that license independent films and television programming.

d. Government Role in Improving the Online Licensing Environment

The government can continue to work to improve the online licensing environment by encouraging and facilitating discussion amongst all stakeholders, implementing meaningful legislation for content protection and

¹⁰ ReDigi is touted as an online marketplace for legally acquired, pre-owned digital content. Currently, ReDigi only accepts iTunes purchased music. Music selected for cloud storage is removed from a user's library and synced devices so that the only copy exists on the user's ReDigi Cloud space. The seller remains the owner of the songs until the songs are sold to a buyer and the music file and corresponding license are transferred from the seller to the buyer. The seller is then no longer able to access the music file. ReDigi claims that no copies are made during the transaction but this practice was rejected in *Capitol Records v. ReDigi*, 934 F.Supp.2d 640 (S.D.N.Y. 2013).

¹¹ 17 U.S.C. § 504(c)(1)

¹² 17 U.S.C. § 504(c)(2)

¹³ See the Motion Picture Association of America website at <http://www.mppaa.org/contentprotection/copyright-laws/state>.

¹⁴ Cal. Penal Code Ann. § 653w(b)(1)-(2) (2011)

enforcement on the Internet, and setting adequate statutory damages as a deterrent to infringement and to protect emerging and legitimate digital distributors who license content. It should be noted that any efforts in the U.S. to improve the online licensing environment may positively impact efforts in other countries.

e. Operation of the DMCA Notice and Takedown System

The Digital Millennium Copyright Act (DMCA) was enacted over 15 years ago and featured, for the first time, a notice and takedown regime that, if followed precisely by an Internet service provider (ISP), provided a “safe harbor” from infringement. At that time, in 1998, the online downloading and streaming of full-length audiovisual content over the Internet was barely imaginable as bandwidth speeds were not developed to support such capacity. The notice and takedown procedures and statutory protections which were forward-thinking at the time now require updating to provide a framework to adequately protect rights holders in today’s high-speed digital environment.

Under the DMCA, ISPs are legally obligated to respond to notices from rights holders only where such notices contain all the elements set forth in Section 512 since only such notices convey actual knowledge to the service provider,¹⁵ thus triggering the ISP’s obligation to remove the infringing material. However, such detailed information for the tidal wave of infringements that may occur on a daily basis is cost and resource prohibitive for many rights holders. To compound the problem, the statutory time period of 48 hours for an ISP to respond to a rights holder’s notice is insufficient given the potential for illegal copies to proliferate on the Internet in a matter of moments. This is especially damaging to pre-theatrical or initial film releases on any format. Further, the increasing popularity of content streaming, as opposed to downloading, and the delivery of so-called “over-the-top” (OTT) content¹⁶ via third party applications, accelerates such proliferation. Once infringing material is uploaded to the Internet, the damage is immediate, widespread and harsh, stifling the ability of rights holders to commence legitimate transactions and generate revenue because they (and their distributors) are unable to compete with infringing material offered for “free.”

The most recent illustration of the insufficiencies of the DMCA in this regard appeared in *Viacom International Inc. v. YouTube, Inc.* 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.¹⁷ Thus, it held that YouTube is in compliance with the DMCA safe harbor when it removes only the specific clips identified in DMCA notices, and not other clips which infringe the same works.¹⁸ The lower court’s decision, based on 1998 law and procedures, effectively excuses ISPs operating in a fully developed technological environment of any responsibility past the “letter of the law.”

Currently ISPs have the technological ability to prospectively block infringing material on request of rights holders before it goes up on systems such as YouTube. However, the ISPs simply have no incentive to go beyond the legal framework and processes which shield them from liability. While a 48-hour notice and takedown period and requiring specific information for each infringement was innovative and necessary in 1998, this legal framework needs to be updated for the 21st Century as fingerprinting, filtering and metadata are

¹⁵ 17 U.S.C. § 512 c(3)(B)(i)

¹⁶ Although the definition has evolved over time, over-the-top content (OTT) generally refers to *any* content not delivered as a part of a specifically programmed channel from the cable, multi-system operator or satellite provider and is streamed over the “open Internet” *outside the control* of the ISP network it is delivered on. Examples of third party applications that deliver OTT to end user devices include Netflix, Hulu, NowTV, WhereverTV and myTV.

¹⁷ *Viacom International Inc. v. YouTube, Inc.*, 718 F.Supp.2d 514 (S.D.N.Y. 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.” *See also Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d. Cir. 2012).

¹⁸ *Id.* at 16 (citing 17 U.S.C. § 512(c)(3)(A)(iii))

all routinely used in the digital environment allowing for extremely accurate digital identification of copyrighted works. ISPs are currently able to provide such services to rights holders in order to monetize such infringing use and may also offer these additional protections to select rights holders with which they may have a contractual relationship and who want to prohibit uploading of copyrighted content all together. However, ISPs are not offering such options for protection to *all* rights holders and they should be required to do so under the law.

Voluntary Initiatives

IFTA supports the use of private voluntary agreements as one tool to reduce copyright infringement and make consumers aware of the availability of legitimate content. The voluntary agreements aimed at positively impacting the digital environment and recently adopted in the U.S. include the payment system operators' "Best Practices to Address Copyright Infringement and the Sale of Counterfeit Products on the Internet"¹⁹ and the "Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting."²⁰ Both are intended to reduce online infringement by making counterfeiting and infringement a less profitable business by cutting off revenue to sites that are "principally dedicated to selling counterfeit goods or engaging in copyright piracy and have no substantial non-infringing uses"²¹ and eliminating the indicia of credibility that attaches to rogue sites from legitimate advertisements, credit card logos and payment processing. Broad-based, voluntary initiatives by other service providers within this ecosystem – including the search engines – must continue to be encouraged. That being said, there are instances where voluntary agreements may not be sufficient, particularly in cases where service providers will not act unless obligated to by government mandate.

The U.S. Copyright Alert System

Another voluntary agreement resulted in the U.S. Copyright Alert System (CAS) which addresses infringement occurring only on peer-to-peer (P2P) networks. In an effort to address P2P infringement of independent content and begin to positively influence the marketplace through consumer education and ISP participation, IFTA has provided its Members with the opportunity to participate in the CAS.²² Launched in February 2013, the CAS is the result of a four-year voluntary agreement between the major studios, the independent film industry, major and independent music companies and the five largest ISPs in the U.S.²³ The ISPs have agreed to send "Copyright Alerts" to ISP subscribers when a P2P infringer is detected on the ISP's system. The Center for Copyright Information (CCI)²⁴ manages the CAS and is operated by an Executive Director and a three member Advisory Board, which includes consumer advocates. The technology used to identify Internet Protocol (IP) addresses that share content illegally was subjected to extensive testing to avoid false positives. Once content is confirmed to have been shared illegally, the ISP to which the particular IP address is assigned sends a Copyright Alert to the subscriber associated with that IP address.

Copyright Alerts are designed to educate subscribers about copyright, inform them of the consequences of copyright infringement and deter them from allowing such infringement to occur on their Internet service accounts. A maximum of six Alerts will be given to a subscriber, with the initial Alerts aimed to educate the

¹⁹ See 2012 U.S. Intellectual Property Enforcement Coordinator Joint Strategic Plan at

http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_two_year_anniversary_report.pdf.

²⁰ See "Coming Together to Combat Online Piracy" posted by Victoria Espinel, U.S. Intellectual Property Enforcement Coordinator, at <http://www.whitehouse.gov/blog/2013/07/15/coming-together-combat-online-piracy-and-counterfeiting>.

²¹ Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting (developed by 24/7 Media, Adtegrity, AOL, Condé Nast, Google, Microsoft, SpotXchange, and Yahoo!)

²² IFTA currently has 61 film titles representing 33 Member Companies in the CAS. As of September 2013, over 900,000 copyright alerts have been forwarded by the ISPs, on behalf of the IFTA Members, to ISP subscribers suspected of P2P infringing activity. Information based on U.S. Copyright Alert System Dashboard Report - IFTA (Program to Date as of 9/30/2013).

²³ AT&T, Cablevision, Time Warner, Verizon and Comcast.

²⁴ www.copyrightinformation.org.

subscriber and subsequent Alerts to reinforce the seriousness of content theft and the consequences of continued content theft on the subscriber's account. Failure to respond to the Alerts will result in Mitigation Measures which can include temporary reductions of internet speeds or redirection to a landing page until the subscriber contacts the ISP to discuss the matter or reviews and responds to educational information about copyright. Before a Mitigation Measure is imposed, the subscriber receives notice that an independent review of the process is available. Upon a subscriber's request, and payment of a nominal fee (which is refunded if the subscriber prevails), an Independent Review will be administered by the American Arbitration Association. The CCI is in the process of compiling data on the efficacy of the program, as well as cooperating in the launch of more extensive consumer educational efforts.

Ensuring Participation by All Relevant Stakeholders

Industry solutions, voluntary agreements and any legal framework consultations must include all stakeholders and be effective for independent rights holders. Independent producers view distributors as partners, not adversaries. ISPs and sites like Amazon and YouTube should, likewise, find the establishment of best practices appealing because they are now becoming content producers and copyright owners themselves. However, to date, comprehensive and inclusive collaborative private industry discussions regarding infringement via streaming sites and the role of search engines in pointing consumers to infringing content have yet to occur.

Given the technological complexities of online infringement, as well as the social and financial implications, it is imperative to have the direct involvement of all stakeholders, including the content owners, technology companies, ISPs and consumer groups, in crafting effective means to recognize and prevent online infringement. The 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 emerge must be practical for all copyright holders and narrowly tailored to meet actual illegality only; and (3) that the public's right to enjoy legal access to new services, applications and content without interference is preserved.

IV. Conclusion

IFTA thanks the Department of Commerce, the U.S. Patent and Trademark Office, and the National Telecommunications and Information Administration 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 infringement comprehensively and encouraging private and transparent voluntary mechanisms which encompass the interests and the needs of all stakeholders and the public.

Respectfully Submitted,

Independent Film & Television Alliance

/s/

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