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Office of Policy and External Affairs
United States Patent and Trademark Office
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Submitted via email to: CopyrightComments2013@uspto.gov

RE: Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy. Docket No 130927852-3852-01

On behalf of the Directors Guild of America, Inc. (DGA), I am pleased to submit these comments in response to the Department of Commerce Internet Policy Task Force's ("Task Force") recent Green Paper. DGA represents over 15,000 directors and members of the directing team who create the feature films, television programs, commercials, documentaries, news and other motion pictures that are this country's greatest cultural export. DGA's mission is to protect the creative and economic rights of those members.

Directors occupy a unique position in the copyright debate because they understand content as both users and rightholders. Many directors are encouraged by the potential of the Internet; others are inspired by digital technology's ability to transform how they create content; and nearly all directors appreciate how it enables them to better engage viewers. However, directors are also sensitive to technological or legal changes that may threaten the rights they have in their works as either copyright holders or authors.

Directors' rights in their creations have been well documented in DGA's various filings with the United States government during the past decade, including with the Copyright Office, the Federal Communications Commission, and the Intellectual Property Enforcement Coordinator. These rights include long-recognized economic and creative rights established by collective bargaining agreements and personal services contracts, as well as moral and human rights based on international treaties to which the United States is signatory. Although these rights are distinct from those of copyright holders, they are equally worthy of protection.

For example, with respect to economic rights, DGA's collective bargaining agreements establish minimum economic benefits that apply to all DGA directors working on motion pictures. Those benefits often include residuals in perpetuity. Directors may also negotiate terms that give them an additional ongoing financial interest in a motion picture in the form of participations. These economic rights are more than just a performance bonus. They are a recognition of the essential role directors play in the creative process, and they are foundational to the economic model on which the motion picture industry has been based for more than 75 years. Indeed, directors and other authors, who are generally employed on a freelance basis, rely on residuals to provide financial support between projects, and 70% of the DGA-Producer Pension Plan is funded by residuals.

The DGA Basic Agreement also establishes a range of creative rights that attach to individual directors, many of which extend beyond the completion of principal photography and even the theatrical release of a film. These creative rights are complimented by moral rights directors receive as "authors" under EU and international law, and as delineated by the Berne Convention's provision on moral rights to which the United States is a party. Among other protections, the Berne Convention protects an author's right of attribution (to receive or decline credit for their work) and right of integrity (to prohibit distortion or mutilation of the work that would undermine their reputation). The human rights upon which these moral rights are founded are established by various international agreements, including the 1996 International Covenant on Economic, Social and Cultural Rights,¹ the Universal Declaration of Human Rights,² 1948 American Declaration of the Rights and Duties of Man,³ 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,⁴ and the 1952 Convention for the Protection of Human Rights and Fundamental Freedoms.⁵

As the Task Force considers the issues addressed in its Green Paper, DGA asks that it also consider the important economic, creative, moral and human rights of directors. Failure to recognize and respect these rights undermines a director's ability to create and share their work with the world. Too often in these discussions in the digital age, the rights of consumers and copyright holders are highlighted while the fundamental rights of authors are disregarded. We hope the DGA's unique perspective on the matters addressed below will be helpful to the Department of Commerce as it grapples with issues of copyright in the digital age.

¹ G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1996) (All people have a human right that includes "the protection of the moral and material interests derived from any scientific, literary, or artistic production of which he is the author.")

² G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948). "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author;" *Id.* at Art. 27, ¶ 2.

³ O.A.S. Res. XXX, International Conference of American States, 9th Conf., O.A.S. Doc. OEA/Ser. L/V/I.4 Rev. XX (May 2, 1948). "Every person has the right . . . to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.;" *Id.* at Art. 13, ¶ 2.

⁴ Nov. 16, 1988, O.A.S.T.S. No. 69, 28 I.L.M 156 (Protocol of San Salvador). "The States Parties to this Protocol recognize the right of everyone . . . [t]o benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.;" *Id.* at art. 14, ¶ 1.

⁵ 213 U.N.T.S 262. "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of [their] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

First Sale Doctrine in the Digital Environment

The current first sale doctrine, as embodied in Section 109 of the Copyright Act, is technology neutral, thus providing consumers identical rights in the online and offline marketplaces. Although the first sale doctrine does not permit the owner of a copy of a copyrighted work to make copies, technologies are being developed that may facilitate the ability of consumers to transfer digital files without copying, allowing them to transfer ownership of goods purchased both online and offline.

Because the first sale doctrine already applies equally in the online and offline worlds, so-called “digital first sale” proposals are not actually creating parity for owners of online and offline goods. Rather, such proposals grant online distributors vast new rights at the expense of rightholders, who would see their rights curtailed in the online marketplace. These proposals would impose an unprecedented limitation on digital reproduction rights.

By limiting digital reproduction rights, proposals to amend the first sale doctrine negatively impact the rights of authors, like directors, who have an economic interest in their work that is independent of the copyright holders. For example, under DGA collective bargaining agreements, our members receive residuals payments based on revenue generated from the reuse of a motion picture in perpetuity. This includes revenue generated from nearly all acts of reproduction. In addition to being an essential source of income for members working in a freelance industry, residuals provide essential support to the DGA-Producer Pension Plan.

Amending the first sale doctrine for digital goods harms directors, not just copyright holders, because it reduces residuals for directors and undermines the value of the content they create. At the same time, such an amendment is entirely unnecessary. Online consumers already have unprecedented flexibility and choice regarding when and how they consume copyrighted works. And if consumer demand creates a sustainable market for the distribution and sale of copyrighted works online, rather than the current licensing model, existing law already provides the flexibility required to meet that demand through emerging technologies.

Improving DMCA Notice and Takedown Procedures

Some DGA directors in the independent world are the copyright owners of their films. Although DGA will not make specific proposals in these comments, it wishes to express to the Task Force the enormous burden that existing notice and takedown procedures place on these independent directors who are also copyright holders. These individuals lack the resources to monitor and provide notice to the many websites infringing their content, and when notice is given, they encounter bureaucratic and legal hurdles that make it difficult to have their content removed. Adding insult to injury, their requests are often met with derision or attempted public shaming, such as referral to the EFF-funded website ChillingEffects.org. DGA receives calls from both members and non-members regarding the inadequacy of existing notice and takedown procedures, and it appreciates the Task Force’s work to address this difficult issue.

Conclusion

DGA recognizes the challenge the Task Force faces in balancing the interests of the many groups affected by copyright law in the digital age. As it considers those many interests, we hope, as noted above, it will give appropriate weight to the important rights of directors, whose economic, creative, moral and human rights are separate and distinct from those of copyright holders. We welcome any additional questions or issues the Task Force might want to raise. Thank you again for the opportunity to participate in this review and comment on issues of such importance to our members.

Respectfully submitted,

/s/

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