

November 13, 2018

Vishal J. Amin
U.S. Intellectual Property Enforcement Coordinator
Executive Office of the President
Eisenhower Executive Office Building 472
1650 Pennsylvania Ave. NW
Washington, D.C. 20502

Electronically submitted via www.regulations.gov

Re: Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement¹

Dear Mr. Amin:

The Independent Film & Television Alliance® (IFTA®) respectfully submits these comments in response to the above-referenced matter to assist in the “Development of the Joint Strategic Plan on Intellectual Property Enforcement.” IFTA previously submitted comments in connection with the first, second, and third Joint Strategic Plans on Intellectual Property Enforcement² and welcomes this opportunity to contribute to the continued development of the enforcement strategy, as expressed in the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008.³ IFTA has also joined in the comments filed by the International Intellectual Property Alliance.⁴

About IFTA and its Member Companies

Based in Los Angeles, IFTA is the trade association for the independent motion picture and television industry worldwide, representing more than 145 companies in 22 countries, the majority of which are small to medium-sized U.S.-based businesses⁵ which have financed, produced and distributed many of the world’s most prominent films, including 80% of the Academy Award® winners for “Best Picture” since 1980.

¹ See [83 Fed. Reg. 46522 \(September 13, 2018\)](http://www.fedreg.gov).

² See Comments of the Independent Film & Television Alliance, [March 24, 2010](http://www.ifta-online.org), [August 10, 2012](http://www.ifta-online.org), and [October 16, 2015](http://www.ifta-online.org).

³ 15 U.S.C. § 8113.

⁴ The International Intellectual Property Alliance (IIPA) is a private sector coalition of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA are the Association of American Publishers, Entertainment Software Association, Independent Film & Television Alliance, Motion Picture Association of America, and Recording Industry Association of America. See <http://www.iipa.org>.

⁵ A complete list of IFTA Members is available online at: <http://www.ifta-online.org>.

Independent films and television programs are made in every genre and budget level by those companies that take on the majority of the financial risk for the production and control the licensing of its distribution to third-parties around the world. Our sector accounts for over 70% of all films produced in the U.S. each year.⁶

Collectively, IFTA members generated worldwide revenue over \$4.8 billion in 2017, including \$2.8 billion from U.S. business activity. With over half of IFTA member companies' revenue earned in the U.S. each year, IFTA has a strong interest in fostering the growth of a healthy and competitive marketplace to which to deliver independent content to consumers, in all the manners in which they wish to receive it. However, to ensure distribution opportunities are available to independent producers, piracy needs to be immediately addressed and effective, with proactive tools mandatory and available to be deployed by all rights holders.

The IPEC has a critical role in making sure that all copyright owners have the tools (voluntary or legally mandated) and a framework of laws and enforcement necessary to protect their investment and exclusive rights. This includes the ability to trigger both enforcement action and cooperation from other stakeholders in the current on demand, digital online infrastructure to immediately address and prevent the illegal upload and commercialization of infringing copies, especially when those copies are the result of criminal acts, such as cyberattacks, especially in the case of pre-release theft.

Unique Perspective on Copyright Infringement

The financing, production, and distribution models of independents differ substantially from the six major MPAA studios⁷ that characteristically self-finance and distribute their content through their wholly-owned subsidiaries and affiliates around the world.

In stark contrast, independent producers secure both financing and distribution in substantial part by entering into license agreements with unaffiliated third-party distributors in key geographic territories in exchange for advance financial commitments to secure the exclusive right to exploit the finished product in the licensed territory. These agreements are concluded well before any camera begins to roll and are collateralized by banks to secure loans to support the physical production (or are informally used to support private investment). Once revenue is generated from exploitation, the production loan is repaid and the parties endeavor to recoup their investment.

Since the independents' ability to raise production financing depends on the health of the legitimate distribution network to which they license, copyright infringement damages the independents well beyond "lost revenues". Online theft, which is often suffered on a massive commercial scale, threatens the balance of this creative and business framework, impacting the basic ability to secure financing for future projects by reducing (and in some cases eliminating) the ability of these critical early investors to recoup their investment in the production.

⁶ Independent films are shot all over the country and in many instances have fueled the rise of new industry hubs. Currently, the top 10 states for independent film production are: 1.) **California**; 2.) **New York**; 3.) **Georgia**; 4.) **Louisiana**; 5.) **Ohio**; 6.) **Florida**; 7.) (tie) **Kentucky**; **Massachusetts**; **New Mexico**; and **Oregon**.

⁷ Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

Content theft damages the ability to employ American workers and pay taxes

The creative industries are seriously jeopardized by the theft of their protected works. In particular, by calling into question their sustained business operations and ability to employ American workers. As a result, the corresponding taxes that are paid to support federal and local government are compromised as well.

In 2017, U.S. independent production companies shot 551 feature films. This resulted in over 36,363 full time jobs directly related to this production activity and another 109,611 full time jobs for the various vendors that service the film industry. Combined, both classes of employees earned over \$15.03 billion. Total business revenue that resulted from this production activity totaled over \$23.04 billion in economic output. Independent production generated over \$3.12 billion in income and sales tax for both the federal government and individual state governments. Federal government share of income tax received was over \$1.97 billion.

When online theft occurs, and without tools for all rights holders, there is no way for an independent producer to stop the upload and rapid proliferation of infringing copies across the internet and there is no effective mechanism for efficient notice and takedown that prevents the spread of piracy. It is in this context that IFTA offers the following comments in line with the Administration's four-part strategic approach to promote and protect intellectual property: (i) engagement with U.S. trading partners, (ii) effective use of all U.S. legal authorities, including U.S. trade tools, (iii) expanded law enforcement action and cooperation, and (iv) engagement and partnership with the private sector and other stakeholders.

(i) Engagement with U.S. trading partners

Enforcement of existing free trade agreements is a necessary first step, along with the negotiation of new international agreements with trading partners (both bilateral and multilateral) to reflect the global digital environment, including for example within the potential agreements under negotiation with the United Kingdom, European Union and Japan.

The IPEC should work closely with the U.S. Trade Representative and other agencies in support of open markets and agreements with trading partners that contain strong provisions ensuring meaningful copyright protections. The U.S.-Korea Free Trade Agreement provides the highest level of protections for intellectual property rights holders achieved to date and should be used as the standard going forward with regard to other free trade negotiations.

At the same time, the U.S. Trade Representative's Special 301 Action Plans must be utilized to build on the annual Special 301 review of intellectual property protection and market access practices in foreign countries and to provide clear benchmarks for gauging progress – or lack thereof – over the ensuing year with U.S. trading partners.

(ii) Effective use of all U.S. legal authorities, including U.S. trade tools

The evolving marketplace requires new and enhanced tools for protection and enforcement as consumers increasingly demand delivery of content in digital formats. While the internet creates important opportunities for expanded distribution, new audiences, and new revenue streams for independents, online theft presents the biggest threat to our industry.

There are simply no mandatory tools in the U.S. that independent producers can use to keep illegal copies off the internet. The steady stream of illegal content flowing online results in a distorted marketplace where rights holders are forced to compete with pirated content made available for free.

Stronger criminal deterrents are sorely needed in today's "click and stream" digital environment where even one illegal upload of a copy of a film or television program online can be commercially and creatively devastating. Individual rights holders acting on their own behalf cannot combat content theft without an effective legal framework and ongoing Government action.

To ensure that U.S. Copyright Law keeps pace with technological advances, the IPEC should endorse legislation to more effectively deter infringement and to incentivize all stakeholders to take transparent, effective and, rapid action to mitigate piracy, especially pre-release theft.

Classify large-scale unauthorized streaming as a felony.

Studies show that online video piracy is not only shifting from illegal download to streaming⁸, but it is also growing.⁹ The recent widespread emergence of illegal streaming enabled by devices and "add on" applications is particularly damaging, since they "normalize" piracy by bringing illegal content into the living room through traditional set-top boxes and internet-connected devices.

Under current federal law, a legal distinction exists between the criminal penalties for illegal streaming and downloading – two methods of distributing the same stolen digital content. To ensure that federal law keeps pace with infringers, and that Department of Justice and U.S. law enforcement agencies are able to effectively combat infringement involving new technology, IFTA recommends that Congress clarify that large-scale copyright infringement by streaming or other technology with similar impacts is a felony in appropriate circumstances, to effectively deter online infringement and provide an important enforcement tool to pursue those who do the most damage to independents and their authorized distributors.

This topic was raised in May at the IPEC's White House Roundtable on Illicit Streaming Devices, and there was a general consensus among the stakeholders and participating Government agencies that such a clarification would better equip U.S. law enforcement.¹⁰

Update the 1998 Digital Millennium Copyright Act (DMCA) to provide for "Notice, Takedown and Staydown".

Today's now-common technology allows for clear and accurate identification of specific film and TV program digital files by comparison with a copyright-owner supplied "digitally fingerprinted" or "watermarked" files, enabling platforms and service providers to rapidly block all unauthorized copies as they appear online (after an initial rights holder notification).

⁸ <https://www.muso.com/magazine/musos-global-film-tv-piracy-report-2016-released>

⁹ <https://www.muso.com/magazine/global-piracy-increases-throughout-2017-muso-reveals>

¹⁰ <https://twitter.com/JacobWood45/status/996168446789419009>

Under current federal law, online platforms and service providers are afforded a “safe harbor” from liability for the third-party content they carry provided that they are minimally responsive to notices that a specific item, in a specific online location, is unauthorized or otherwise illegal.¹¹ The requirement that each and every copy be identified over and over has spawned, among other things, an industry of companies that for a price will scan online networks, then click to report *ad infinitum*. Meanwhile, for the owner of the film or program, any prospect of significant revenue generation from legitimate channels is rapidly destroyed. But the platforms and services have no requirement to deploy technology to proactively delete these copies or to prevent the illegal sites and copies from popping up prominently for any consumer who searches for the titles and -given the safe harbor protections – substantially little reason to do so.

At the same time, the audience built up through the content offer (both legal and illegal) has fed the advertising-based revenue stream on which the online platforms have built their financial foundation. The combination of safe harbor and advertising has created perverse incentives for the platforms to do only the minimum legally required, which is now being recognized by Congress and other public decision-makers.¹² IFTA has joined with others in the creative community in calling on Congress to address and define new policies of platform responsibility by law and regulation.¹³

The antiquated notice and takedown provisions of the DMCA requiring individual identification and notification of each and every illegal copy -- provides no workable mechanism to fight the widespread proliferation that comes from the first individual act of theft and illegal upload or sharing. Once notified of illegal files on their systems, ISPs have no obligation to keep other identical illegal copies down. They are also not obligated to provide any fingerprinting and identification tools offered to major studios to independent producers.

Recent figures show that content owners notified Google of about 882 million URLs in 2017 alone.¹⁴ Updating this enforcement mechanism means requiring ISPs, after having received clear notification and identification from a rights holder, to then take effective and rapid action using existing technology to prevent any hosting of the infringing file in order to preserve their legal “safe harbor”, especially in the most egregious cases of pre-release theft where there can be no legitimate copies available online.

Such technology is currently in use on a voluntary basis by some hosting online services and increasingly made available for license.¹⁵ YouTube’s Content ID Program introduced by Google in 2007 provides some copyright owners with a dashboard to assist in fingerprinting their content and tracking unauthorized uses of the content.¹⁶ Similarly, Facebook’s Rights Manager system is able to match and monitor videos uploaded to its platform as a key component of its advertising revenue model.¹⁷ None of these systems are offered generally for copyright

¹¹ 17 U.S.C. § 512

¹² See House Judiciary Committee Hearing on July 17, 2018, “Facebook, Google and Twitter: Examining the Content Filtering Practices of Social Media Giants” available at <https://judiciary.house.gov/hearing/facebook-google-and-twitter-examining-the-content-filtering-practices-of-social-media-giants/>.

¹³ <http://thehill.com/policy/technology/398394-hollywood-urges-congress-to-bring-google-to-testify>.

¹⁴ *How Google Fights Piracy*, 2018; available at https://blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf.

¹⁵ <https://www.audiblemagic.com>

¹⁶ <https://support.google.com/youtube/answer/2797370?vid=1-635803642254244490-3403564610>

¹⁷ <https://www.facebook.com/help/publisher/1548693938521733>

protection – rather, they are made available on a limited basis to enable the placement of advertising – but the technology is available and can be deployed for anti-piracy as well.

YouTube does offer some rights holders a portal which allows for “easier” DMCA notice sending to YouTube.¹⁸ This portal makes it more convenient *for YouTube* to communicate with rights holders that submit large amounts of notices, but this is not a solution for all rights holders and YouTube routinely rejects rights holder applications to participate in this program for not being “large enough”, leaving independents disadvantaged and emphasizing that voluntary, discretionary programs alone are not a substitute for transparent and effective Governmental and legislative action.

As previously noted, independents are particularly at a disadvantage in trying to obtain “voluntary” assistance from the platforms and online services. Unlike the major MPAA studios, independents are unable to secure more effective private content protection arrangements beyond the minimum for “safe harbor” protection under current law. Platforms offer companies with which they license content increased content protection mechanisms, which are normally unavailable to independents because they do not have the negotiating leverage to achieve exclusive content distribution deals. These types of preferred private copyright protections should be available to all content providers, regardless of their size and commercial leverage.

In the case of Google/YouTube, smaller companies are offered only the option of continuing to file tens of thousands of individual “notices and takedowns” or of monetizing the illegal copies – allowing YouTube to place advertising on the illegal copies and sharing a fraction of the ad revenue derived from the illegal use, rather than preventing the further upload and illegal distribution of the infringing material. In its most recent report, Google noted that, “[m]ore than 90% of all Content ID claims result in monetization.”¹⁹

This has the effect of pushing small content providers to accept piracy and an even more unfair “partnership” with YouTube, rather than receiving the revenue that could be generated from exploiting the content in a legitimate marketplace where stolen copies are not available for “free”. It also may force small providers to cease distributing directly on the internet and instead place their content with aggregators (third-party intermediaries) who package content for a fee and who may receive enhanced protections offered to larger suppliers.

Include special provisions for major security breaches that result from cyberattacks.

ISPs, including search engines and other third-party intermediaries, must be encouraged to show responsibility and commit to a transparent and mandatory protocol to assist all right holders to control and mitigate the damage in extenuating circumstances following notification of a specific criminal act, such as when a pre-release film or television program has been stolen and leaked on the internet.

Upon notification, the notified parties should not only remove the infringing material from their systems and employ technology to identify individual digital files to prevent the

¹⁸ YouTube’s Content Verification Program, designed specifically for large copyright-holding companies to issue multiple takedown requests, allows users to search for infringing material and provide YouTube with sufficient information to locate and remove it.

¹⁹ *How Google Fights Piracy*, 2018; available at https://blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf.

further upload of the particular leaked content, search engines should de-list results offering such material and others in the chain of distribution should also act with similar dispatch. In the absence of such special provisions, rights holders who have been victimized by cyberattacks and other forms of theft must rely on existing inadequate DMCA provisions, which are incapable of stopping the worldwide spread of the stolen film or program. The Justice Department has recognized the importance to responding to data breaches by creating a new office to help companies prevent cyberattacks and respond when they occur.²⁰ The IPEC should work to ensure that adequate funding is supplied to this initiative and assist with promoting its efforts.

Enact effectively tailored laws or procedures to address online infringement from foreign sources.

Many websites engaged in illegal activities are foreign-owned and operated or reside at domain names that are not registered through a U.S.-based registry or registrar. These illegal websites harm the U.S. economy, our workforce and the very ability of American creators to continue to invest in the production of motion pictures, television programs and other creative content. The U.S. Government and rights holders are currently limited in their legal options to go after these foreign websites and reliant on the laws and cooperation of officials worldwide, even when the website is directed at U.S. consumers and steals U.S.-owned intellectual property.

The profitability of these foreign-owned websites and the minimal legal risk their operators face has contributed to unprecedented growth in online infringement. Preventing proprietors of rogue websites from relying on legitimate financial service providers to enable transactions is an important step in combating online infringement.

Congress should pass legislation that strengthens law enforcement's ability to "follow the money" and pursue rogue websites that offer or link to unauthorized content, especially those foreign-based and foreign-controlled websites and web services that target U.S. consumers. Such legislation must cover criminal activity clearly prohibited under existing U.S. laws and be effectively tailored, with strong due process procedures. Such legislation should contemplate cooperation with other law enforcement agencies to achieve comprehensive response when illegal activities bridge jurisdictions

(iii) Expanded law enforcement action and cooperation

For independent producers, who generally operate with limited resources and are primarily focused on their core business of filmmaking, pursuing high-cost online enforcement is impractical, making Government action necessary to combat online infringement.

Civil actions are cost prohibitive and require rights holders to engage legal counsel for months, if not years, after an infringement has occurred. Other non-litigious private responses are equally unrealistic for the independent sector. For example, since independents do not own their worldwide distribution channels, they cannot realistically coordinate same day-and-date worldwide release strategies in an effort to "out run" piracy. Similarly, independents do not have marketplace leverage to negotiate preferential agreements with online service providers or others in the internet ecosystem to obtain heightened content protection obligations beyond what is

²⁰ <http://www.latimes.com/business/technology/la-fi-tn-doj-sony-hack-20151006-story.html>

required under current law. Consequently, both the law and economics mean that private action alone is insufficient.

It is imperative that the Government not only investigate, but also pursue *ex officio* criminal actions to enforce existing laws, ensuring results against the flow of infringing content online and to provide a safe and vibrant online marketplace for all stakeholders to conduct business. Furthermore, as copyright infringement becomes more sophisticated, our enforcement strategies and laws must adapt accordingly.

As Congress reviews the need to update the Copyright Law, it continues to be important for the IPEC to lead in publicly supporting copyright owners' right to exclusively control their works, including coordinating cross-agency Government resources and directing producers to effective enforcement solutions, convening all stakeholders to discuss better methods of protection especially in light of evolving anti-piracy technologies, and ensuring that voluntary measures are crafted effectively. It is also important that the IPEC lead the way in educating the public on the need to honor creators' exclusive rights in order to guarantee ongoing production of content, on the impact of online infringement on creators and on the U.S. economy and on the vastly expanding legal availability of content, so as to develop a more favorable atmosphere to address this issue. Educational initiatives should include plain language explanations of the law and surrounding concerns such as with freedom of expression, privacy and cybersecurity risks.

Adequate funding for enforcement activities.

The U.S. Government must provide sufficient funding and other resources for the effective enforcement of intellectual property protection laws and other measures. Today, nearly 90% of all illegal film content made available during the theatrical release is reported to have been initiated by use of some form of recording device (whether cell phone or camcorder) in a cinema-venue.²¹ It is imperative that the U.S. Government enforce the Federal camcording law²² and Copyright Law violations on an *ex officio* basis where there is *prima facie* evidence that an intellectual property right is being infringed, without waiting for a formal complaint from an injured rights holder. For example, camcording in cinemas continues to plague the marketplace and fuel online infringement activities; laws prohibiting camcording²³ must be vigorously enforced to protect the return on investment of the producers and distributors especially when the film is in its crucial first weeks of release.

Effective coordination and training.

The IPEC should seek to facilitate participation and information exchange among as many Government agencies as possible, in order to avoid duplication or working at cross-purposes, and to ensure that valuable training and assistance resources are targeted as intelligently and expended as efficiently as possible. Internationally, there is a perception that intellectual property enforcement is valuable only for U.S.-based industry and product. In fact, intellectual property protection is a key to building the export capability of the local film industries since it defines the norms for international distribution. IFTA supports using existing resources to enhance training programs in high-priority countries through the Intellectual

²¹ [http://fightfilmtheft.org/docs/BEST-PRACTICES-TO-PREVENT-FILM-THEFT-\[statement-added_111715\].pdf](http://fightfilmtheft.org/docs/BEST-PRACTICES-TO-PREVENT-FILM-THEFT-[statement-added_111715].pdf)

²² 18 U.S.C. § 2319(B) - Unauthorized recording of Motion pictures in a Motion picture exhibition facility

²³ 18 U.S.C. § 2319(A); Cal Penal Code § 653z (and other state statutes)

Property Rights Attaché program operated by the U.S. Patent and Trademark Office in cooperation with the International Trade Administration/Global Markets, the U.S. Trade Representative's Office, and the U.S. Department of State.²⁴ Training programs in developing countries must build upon the needs of the local industry and should be coordinated with international agencies such as World Intellectual Property Organization and local organizations to reach the intended audiences.

Expand the National Intellectual Property Rights Coordination Center (IPR Center) and its “Operation in Our Sites” program.

“Operation in Our Sites” is designed as a strategic offensive targeting entities that distribute counterfeit products, pirated movies and television content through internet websites.²⁵ IFTA supports enhanced funding for the program, to increase the number of actions that can be taken to protect our industry. Also, with the rise of foreign rogue websites marketing to U.S. consumers, the IPR Center should continue to collaborate and partner with international agencies to maximize resources available to combat worldwide online counterfeiting and piracy.

U.S. Customs and Border Protection (CBP) should have ex officio authority.

CBP officials should have *ex officio* authority to share information with affected right holders pre-seizure. This will help determine whether suspected goods are infringing or if devices illegally allow the circumventing technological measures that control access to and copying of copyrighted works. Obtaining input from right holders pre-seizure will greatly assist CBP with infringement determinations. Destruction of infringing goods seized by CBP officials remains crucial to preventing such seized items from being returned to the country of origin or re-shipped to the U.S. through another port.

Promote use of U.S. Immigration and Customs Enforcement (ICE).

As the principal investigative arm of the Department of Homeland Security, ICE's enforcement efforts have been limited to addressing substantial piracy at websites having web addresses for which U.S. based registries act as the official registry operator. Many independent producers are unaware of ICE's authority and of how to trigger support from this agency in cases of commercial scale infringement. The IPEC should support full development of ICE's capabilities to act in this arena and assist in promoting these resources to rights holders. For example, a joint investigation between ICE and the City of London's Police Intellectual Property Crime Unit led to the arrest of a man in the U.K. suspected of leaking top hit movies on the internet, including the independent production, *The Expendables 3*. This particular investigation stemmed from a tip regarding possible movie piracy from film industry representatives in Los Angeles and the arrest likely prevented the leak of other motion pictures.

(iv) Engagement and partnership with the private sector and other stakeholders.

Private sector voluntary agreements, which may be confidential and only benefit “large” stakeholders, do not negate the need for Government intervention to facilitate stakeholder cooperation or replace the need for strong legislation in the area of copyright enforcement. IFTA

²⁴ <http://www.uspto.gov/learning-and-resources/ip-policy/ip-attach-program>

²⁵ <https://www.iprcenter.gov/ip-theft/ongoing-operations>

is acutely aware such industry agreements can disenfranchise or disadvantage those who are not involved in the relevant discussions or cannot afford the cost-sharing obligations to participate.

The abandonment of the U.S. Copyright Alert System (which only addressed peer-to-peer activity) is further justification that a legislative solution to address online infringement, most often by streaming, is needed now more than ever.²⁶ Notwithstanding the limited scope of the program, the parties still were not able to reach agreement to extend the U.S. Copyright Alert System in a manner that would offer tangible results with respect to recidivist (and commercial-scale) infringers.

Accordingly, IFTA urges the IPEC to act as convener of any such private sector discussions to exercise oversight and ensure: (1) that all stakeholders are actively included and involved in “industry at large” discussions and solutions; (2) that the policy and solutions that emerge are transparent and address actual content theft; (3) implementation is financially and practically reasonable for all rights holders; and (4) that the public’s right to enjoy legal access to new services, applications, and content without interference is preserved.

Conclusion

IFTA continues to support the efforts of the IPEC to shape the intellectual property enforcement strategy for the U.S. and remains available to provide further information with respect to the experience and perspective of the independent film and television industry as the fourth Joint Strategic Plan is developed. Thank you.

Respectfully submitted by,

Jean M. Prewitt, President & Chief Executive Officer
Susan Cleary, Vice President & General Counsel
Eric D. Cady, Senior Counsel

On behalf of the Independent Film & Television Alliance

²⁶ <https://variety.com/2017/digital/news/copyright-alerts-piracy-mpaa-comcast-att-1201971756/>