

April 6, 2018

Ms. Lisa R. Barton
Secretary to the Commission
United States International Trade Commission
500 E Street, SW
Washington, D.C. 20436

Re: Global Digital Trade 2: The Business-to-Business Market, Key Foreign Trade Restrictions, and U.S. Competitiveness [Investigation No. 332-562]¹

Dear Secretary Barton:

The Independent Film & Television Alliance® (IFTA®) respectfully submits these written comments in response to the above-referenced matter to communicate its concerns regarding measures in key foreign markets that affect the ability of IFTA members to supply business-to-business digital products and services abroad.

IFTA welcomes this opportunity to provide input as the International Trade Commission (ITC) conducts its investigation and issues its Report on Global Digital Trade 2: The Business-to-Business Market, Key Foreign Trade Restrictions, and U.S. Competitiveness. We are particularly concerned with trade barriers that interrupt the marketplace and disrupt the distribution opportunities that finance investment in production that is exploited on digital platforms throughout the world. Particularly concerning are China's nontransparent and restrictive marketplace and the European Commission's "Digital Single Market" initiative,² which specifically aims to "end unjustified geo-blocking" and "break down barriers to cross-border online activity" with respect to goods and services across Europe. These trade barriers to territorially exclusive licensing could result in irreversible damage to U.S. independent producers and the production financing for independent film and television programming as well as for the optimal distribution of IFTA's members' film and television programs with resulting reduced revenue streams.

About IFTA and its Member Companies

Based in Los Angeles, IFTA is the trade association for the independent motion picture and television industry worldwide and is dedicated to protecting and strengthening its members' ability to finance, produce, market and distribute independent films and television programs in an ever-changing and challenging global marketplace. IFTA represents more than 130 companies in 19 countries, the majority of which are small to medium-sized U.S.-based

¹ See [83 Fed. Reg. 3185 \(January 23, 2018\)](#).

² http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf.

businesses³ 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.

Independent films and television programs are made at every budget level and IFTA defines 'independents' as those companies (apart from the six major Hollywood studios) that assume the majority of the financial risk for the production and control the licensing of its distribution to third parties locally throughout the world. While operating in a global arena, these independent companies rely heavily on the U.S. as a major marketplace to conduct business and engage in licensing of their copyrighted works.

The economic impact of the independent film and television industry is substantial. Our sector accounts for **over 70% of all films produced in the U.S.** and the jobs generated by that economic activity. For calendar year 2016, U.S. independent production companies shot 521 feature films. This resulted in over 40,460 full time jobs directly related to this production activity and another 122,093 full time jobs for the various vendors that service the film industry. Combined, both classes of employees earned over \$16.59 billion. Total business revenue that resulted from this production activity totaled over \$25.72 billion in economic output. Independent production generated over \$3.46 billion in income and sales tax for both the federal government and individual state governments. Federal government share of income tax received was over \$2.17 billion. A thriving foreign marketplace directly impacts the independent sector's revenue streams and thus its ability to sustain business operations and to employ American workers.

Collectively, IFTA members generated revenue over \$4.3 billion in 2016, of which approximately \$2.1 billion came from foreign (non-U.S.) markets and \$2.2 billion from domestic activity. With nearly half of IFTA member companies' revenue earned outside of the U.S. each year, IFTA has a strong interest in preserving the health and fostering growth of the international marketplace.

Copyright is the Foundation for Production

Copyright is our industry's backbone as it enables our industry to secure distribution, finance, license, and protect our films and television programs. The ability to grant meaningful territorial exclusivity to distributors across the entire audio-visual value chain and to protect those licensed rights is critically important to the financial health of the industry. The independent sector raises production investment in substantial part by entering into license agreements with unaffiliated third-party distributors in key geographic territories (often on a national and territorially exclusive basis) on a project-by-project basis in exchange for advance financial commitments to secure the exclusive rights to exploit the finished film in the particular 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. Equally as important, the local distributors rely on copyright to protect their exclusivity by territory/language version and distribution channel, all of which enables these early investors to recoup their financial contribution.

Digital rights are an increasingly important element of production financing as the online marketplace continues to develop and consumer demand evolves. For example in the U.S.,

³ A complete list of IFTA Members is available online at: <http://www.ifta-online.org>.

independent producers exclusively license certain digital distribution rights to various types of digital exploitation platforms, including satellite (DirecTV), cable (Comcast, Spectrum, etc.), internet downloading and streaming services (iTunes, Netflix, Amazon, Hulu) and direct to broadband providers such as AT&T and Verizon, in exchange for a guaranteed minimum license fee. The producer then delivers the film or program to each distributor with the production funding secured in part by using these exclusive licenses.

China

Notwithstanding China's highly restricted market for imported films, the country is now the second largest film marketplace in the world and surpassed the U.S. theatrical marketplace during the first quarter, 2018. While China already leads the world with over 50,776 movie screens, the commercial potential of the market especially the distribution of online content has yet to be fully realized by U.S. content producers because China maintains policies that deny fair and equitable market access for imported films and television programming.

With respect to online video distribution in China, the (former) State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) has capped the online distribution of foreign films and TV dramas at 30% of the programming on each platform, and requires online distributors to pre-register scheduled content, obtain permits, and submit content for censorship review. The accompanying regulations allow only one opportunity to submit content for registration and censorship per year, which, because of the nature of television production, does not allow for submission of a full season of a television series until all production has concluded. Consequently, these regulations raise serious concerns, since they impose an unwelcome new content quota that will stifle our industry; delay Chinese consumers' access to legitimate, high-demand content, thus increasing piracy; and impose a new formality – a registration requirement – which will be difficult and costly to meet.

These regulations are already having a damaging effect on Chinese VOD websites and on the licensing and import of U.S. audiovisual content as some website operators are reportedly delaying or decreasing licensing activity, pointing to the uncertainty of the regulations and to conflicting reports on the corresponding requirements. The lack of transparency, together with the quotas on foreign content, diminishes the ability of independents to secure distribution and to use those distribution agreements as collateral for investment in production.

European Union

The European Union consists of 28 key foreign markets for IFTA members and the intrinsic right of copyright owners to enter into exclusive distribution agreements country-by-country provides a critical vehicle for raising and securing basic production financing, ensuring the best local distribution in each national market, and also facilitates anti-piracy protection. Any regulation that strips away the rights to license on an exclusive territorial basis or forces rights holders to allow cross-border distribution without respecting the interests of local distributors cuts to the heart of the system that supports production.

With that in mind, note that the European Commission is pursuing an aggressive campaign to eliminate the borders between EU member countries for purposes of digital trade without concern for the consequences for the damage done to copyright owners and investors in production as well as in marketing and distribution. Under the auspices of its "Digital Single

Market” initiative, the Commission looks to a future in which consumers can purchase digital goods and services from anywhere in the EU and in which businesses can meet requests from consumers in other countries. The view is that such a market will both increase competition but also enhance innovation by giving companies a vastly expanded marketplace in which to sell.

While we support a strong digital economy within Europe, as producers of much of the content that will propel that economy, IFTA and its members are extremely concerned with the unintended consequences of Commission’s aggressive move toward mandatory cross-border online distribution insofar as it may be applied to audiovisual content.

The audiovisual industry continues to explain to the Commission why these “single market” principles should not apply to online distribution of film and television programming, laying out in detail the industry’s reliance on territorial licensing to raise and recoup production finance and local distributors’ role in actually making content attractive and accessible to local audiences through a tried and true sequential system that pays for dubbing, advertising and attention raising. Such territorial exclusivity also allows for full exploitation where consumer demand exists and encourages robust marketing and exploitation market-by-market, ensuring distribution to the widest possible audience.

In its initial offering, the EU Regulation on ensuring the cross-border portability of online content services within the EU/EEA recently entered into force on April 1, 2018 with retroactive effect as to all programming then available on the affected services.⁴ This Portability Regulation is narrowly directed toward enabling subscribers of a legitimate online content service in their home countries to use it in another EU/EEA country while traveling within the EU/EEA, relying on the legal fiction that those travelers are still in the Member State of their residence and no unauthorized (cross-border) distribution has taken place. If properly contained to its purpose, the Portability Regulation provides consumer benefit without disrupting the economic relationships underpinning our industry or interfering with the ability to license exclusively by territory within the EU/EEA.

However, further proposals are outstanding. Among those now moving through the review phase at the Commission, the Council and before the European Parliament is a proposal that would allow broadcasters’ online services to be subject only to the law of the “Country of Origin” of the broadcast and thus rights as a matter of default would be deemed cleared for all other EU countries as part of the initial license.⁵ This proposal would give European broadcasters (who already have massive leverage over independent producers) permission to transmit programming throughout Europe based upon a single license for a single territory and, in doing so, to wipe out the value of that content elsewhere in Europe. Other initiatives seek to expand the Exceptions and Limitations to copyright set out in the Copyright Directive⁶, without reference to the probable damage on the production of content.

These European institutions must not be allowed to interfere with the terms on which copyright owners are able to exclusively license and put into commerce each distribution right of their copyrighted assets. As described above, independent producers and their distributors rely

⁴ [Regulation \(EU\) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.](#)

⁵ <https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-laying-down-rules-exercise-copyright-and-related-rights-applicable-certain>

⁶ [Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM\(2016\)593.](#)

on *upfront payment of license fees from national distributors* in exchange for exclusivity in their specialized territory. These exclusive licenses are collateralized with financial institutions that loan the funds to support the production. Once a film is produced based on those investments from a network of distributors, the producer works with each national distributor to market and plan a release tailored to local culture, language, and consumer demand and tastes. Without these exclusive, local licenses with a variety of distributors (especially across Europe), the financing for the majority of independent content would dry up quickly leaving European consumers with *less choice* not more.

IFTA, along with a coalition of worldwide rights holders in the audiovisual field are actively engaged with the Commission, the European Parliament and with Member States to ensure that the fundamental rights of copyright owners and their ability to conduct business are not compromised by these initiatives. We continue to emphasize the relationship between territorial exclusivity and financing to illustrate that marketplace – rather than legislative – solutions must be encouraged in the rapidly changing digital arena.

Rights holders are also actively engaged at WIPO where they are raising a red flag to broad-based, open exceptions to copyright sought by many developing countries despite the lack of a “public interest” and an assessment on damage to copyright owners. The U.S. delegation should be encouraged to continue to hold firm against such proposals that would establish any mandatory global exceptions that would be applicable cross border.

IFTA appreciates the opportunity to provide the ITC with the perspectives of the U.S. independent film and television industry on the important issues presented in the current investigations. We urge you and your colleagues at the ITC to keep these pressing concerns in mind as the investigation moves forward and we hope the results will lead to targeted and effective dialogue and improvement to support a flourishing global digital marketplace.

If you have any questions regarding IFTA, its Membership, and its concerns in connection with the investigations, we are ready to offer further input and assistance. Thank you.

Best regards



Jean M. Prewitt
President & CEO

cc: Susan Cleary, Vice President & General Counsel, IFTA
Eric Cady, Senior Counsel, IFTA