



October 16, 2015

Daniel H. Marti  
United States Intellectual Property Enforcement Coordinator  
Office of Management and Budget  
Executive Office of The President  
The White House  
Washington, D.C. 20500

Re: Development of a Joint Strategic Plan on Intellectual Property Enforcement

Dear Mr. Marti:

We are writing on behalf of the Directors Guild of America, Inc. (“DGA”) and the International Alliance of Theatrical Stage Employees (“IATSE”). Together, we represent over 138,000 directors, craftspeople, and technicians whose creativity lies at the heart of the American entertainment industry. Our members create and support the films and television programs which have made our country the world leader of creative works, and our members work in both traditional and new media. We submit these comments in response to the Intellectual Property Enforcement Coordinator’s (“IPEC”) notice published in the Federal Register<sup>1</sup> (“Notice”) on September 1, 2015, which requests comments regarding IPEC’s development of a third Joint Strategic Plan on Intellectual Property Enforcement (“Strategic Plan”). We welcome this opportunity to contribute to the government’s public policy and enforcement efforts.

We have supported IPEC’s enforcement efforts since it last invited stakeholder comments, in particular IPEC’s involvement in the creation of voluntary best practices agreements negotiated between private parties participating in the online ecosystem. We think those efforts should continue. Additionally, we believe that IPEC should continue to support and advocate for some of the legislative initiatives it has already recommended.

Unfortunately, the threats we addressed in previous comments are as relevant today as they were then. Despite the efforts of IPEC and others, IP theft remains a significant impediment to the Internet’s ability to act as an important, lawful channel for distribution of the high-quality, IP-intensive works that are created and sometimes owned by our innovative and entrepreneurial members. Moreover, as new technologies have developed, the protections provided by the “notice and takedown” provisions of the *Digital Millennium Copyright Act* (“DMCA”) have proven insufficient to deter or prevent digital theft, particularly for those who do not have the resources to pursue illegal use of their works.

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<sup>1</sup> 80 Fed. Reg. 52800 (September 1, 2015).

The comments below describe the rights and interests our members have in their work and how those rights are impacted by digital theft. We also review and comment on the various strategies IPEC has at its disposal to protect intellectual property. We look forward to a continued relationship of collaboration.

## **I. Digital Theft Harms U.S. Creators and Craftspeople**

No one has a greater stake in the debate over the future of the Internet than our members. Highly skilled, they embody the creativity that makes the American entertainment industry the global economic and cultural powerhouse it has become. Without their talent and craftsmanship, audiovisual works such as motion pictures and television programs would simply not exist.

Similarly, our members are clearly greatly harmed by copyright infringement and digital theft. Digital theft erodes their ability to earn a living and feed their families, and it depletes the vitality of their pension and health plans. In the case of directors, digital theft also undermines the non-economic rights they hold in their creations.

It should be clear to IPEC from previous comments submitted by the entertainment unions and guilds that the viability of a film or television production hinges on the producers' ability to recoup their substantial investments. It should be equally clear that digital theft undermines that ability, resulting in fewer major motion pictures being made and thus fewer jobs for our members who work as freelance employees. We are also sure that IPEC is aware of the other ways in which the loss of downstream revenue to digital theft directly harms the individual men and women employed in the industry, because the impact is so important.

DGA's and IATSE's collective bargaining agreements establish certain minimum economic benefits that apply to all members working on motion pictures, and individual directors and skilled craftspeople often negotiate additional financial terms specific to each project. These economic terms provide both short- and long-term financial security to our members because they also fund their multi-employer pension and health plans, which are essential to our members who work in a freelance industry where earnings and the earnings structure take on a new meaning.

Many of the economic benefits and returns in our business depend on downstream revenue. For example, directors receive residuals payments based on all non-theatrical revenue generated from a motion picture in perpetuity. These residuals payments, derived from license fees, can extend for many years after a motion picture is released and for as long as it generates revenues. In addition, individual directors and certain craftspeople often negotiate supplemental economic benefits called participations, which are also based on future revenues earned from a motion picture, also generally in perpetuity. Although craftspeople do not receive direct residual payments, their retirement and health plans are supported by the income derived from downstream revenues and are thus similarly subject to the corrosive effects of piracy.

When digital theft reduces a motion picture's downstream revenue, our members are directly harmed in the form of reduced residuals and reduced contributions to their retirement and health plans. Downstream revenues are essential to our members' livelihoods; they ensure that our members can live between paychecks in a freelance industry. Digital piracy threatens our members' financial stability and subverts their ability to profit from their artistic and creative ingenuity.

## II. Digital Theft Harms Society

There are different ways to measure the "creative economy." Aside from their economic value, the motion picture and other creative industries have societal and cultural value. The works our members create and the stories they tell are known throughout the world. When our members' creativity mingles with American industry and commerce, it has produced works of a quality and on a scale unmatched by any other country. Ours is an industry that is woven into the fabric of our culture and history, and it permeates the lives of most Americans to a much larger extent than some of the ongoing digital policy debates would suggest.

Because the "business" of entertainment must begin with creativity, the risk that digital theft poses to the creative economy cannot be understood purely in numbers. Digital theft degrades an intangible part of American culture that is worth more than dollars and cents; without our member's creativity, the content that America and indeed the world have enjoyed for the past century simply could not exist.

It is clear that any assessment of IP enforcement should consider the intangible value of IP and the risk posed to our national culture should we tolerate a willful disregard for the value of that work. Our government's willingness to embrace and protect its artists and creators, knowing full well their value to society, is a hallmark of democracy and is grounded in American tradition and history as embodied in our nation's constitution.<sup>2</sup> But, the threats we now face raise fundamental questions about whether the government will continue to value and protect the culture and creativity that has helped make our nation a bastion of creativity and commerce.

## III. Legislative Recommendations

### 1) Streaming as a Felony

In March 2011, the Obama Administration issued a *White Paper on Intellectual Property Enforcement Legislative Recommendations*.<sup>3</sup> While some of these recommendations have since become law, several have not. One of the important legislative reforms the White Paper recommended was that Congress "[c]larify that, in appropriate circumstances, infringement by

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<sup>2</sup> U.S. Const. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

<sup>3</sup> White Paper on Intellectual Property Enforcement Legislative Recommendations, available at [https://www.whitehouse.gov/sites/default/files/ip\\_white\\_paper.pdf](https://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf)

streaming, or by means of other similar new technology, is a felony”<sup>4</sup>; we are in full agreement with that position and were early supporters of *The Commercial Felony Streaming Act*.

While illegal downloading of our members’ creative works remains the best known method of Internet theft, illegal Internet streaming has actually become the preferred viewing and listening experience. Unfortunately, the law has not kept pace with these new consumer habits. While illegal downloading and distribution is a felony, the illegal, willful, and commercial streaming of films, TV programs, and music remains only a misdemeanor. We believe that the law should reflect the reality of the digital world. Quite simply, *The Commercial Felony Streaming Act* would not have criminalized any behavior that was not already considered criminal. Instead, it would have equalized the penalty so that digital thieves would not be free to steal content via streaming when they would be prosecuted as a felony were they to do so via a download. We support the Administration’s determination that the law should be amended to address this issue and would work with the Administration to revitalize this legislation and bring it back to the forefront of the IP enforcement conversation.

## 2) Notice and Takedown

Secondly, we are also greatly concerned about the practicability of the Notice and Takedown mechanisms present in the DMCA.<sup>5</sup> When the DMCA was enacted in 1998, today’s digital world of downloading and streaming full-length audiovisual content over the Internet was envisioned by very few. Understandably, the notice and takedown procedures and statutory protections put in place at that time are neither reflective of the high-speed digital environment of today nor responsive to the needs and interests of today’s rights holders.

Many of our members, particularly our independent directors, are content owners, and, contrary to corporate rights holders, they lack the resources necessary to police the Internet and seek out thousands of instances of infringement, which often reappear in the same or a similar location as soon as the next day.<sup>6</sup> The takedown procedures and statutory protections put in place at the time of the DMCA’s drafting are outdated and incapable of addressing the current reality of digital theft. There are strong economic and cultural policy reasons why small and independent IP rights holders should be more fully protected.

Furthermore, recent judicial opinions interpreting the “safe harbor” provisions of the DMCA,<sup>7</sup> combined with the implications of decisions dramatically limiting the rights of

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<sup>4</sup> Executive Office of the President of the United States, *Administration’s White Paper on Intellectual Property Enforcement Legislative Recommendations 2* (2011).

<sup>5</sup> 17 U.S.C. § 512 (1998).

<sup>6</sup> See *DMCA Routine*, PopUpPirates, [http://popuppirates.com/?page\\_id=410](http://popuppirates.com/?page_id=410) (last visited Aug. 1, 2012) (describing the DMCA Notice and Takedown mechanism as “like being handed an umbrella” to use while under Niagara Falls); *The DMCA is Broken...*, The Trichordist (July 18, 2012), <http://thetrichordist.wordpress.com/2012/07/18/the-dmca-is-broken/>.

<sup>7</sup> See e.g., *Viacom Int’l, Inc. v. Youtube, Inc.*, 676 F. 3d 19 (2<sup>nd</sup> Cir. 2012); *UMG Recordings Inc. v. Shelter Capital Partners LLC*, 667 F. 3d 1022 (9<sup>th</sup> Cir. 2011).

copyright holders online,<sup>8</sup> have encouraged unscrupulous, mostly Internet-based entities to establish businesses that reproduce and stream copyrighted works without providing any compensation to the creators of those works. The breadth of the Internet businesses now protected by the DMCA safe harbor provisions, combined with the onerous requirements and impractical realities of the “notice and takedown” process, make it extremely difficult, if not impossible, for individual directors who are copyright holders to protect their creative works online. Due to the harsh reality our members face in upholding their exclusive rights in the online environment, we encourage IPEC to review the DMCA’s private enforcement mechanisms and provide recommendations, whether legislative or administrative, to best address the issue moving forward.

#### **IV. Conclusion**

We appreciate the opportunity to bring to the IPEC discussion the voices of the directors and craftspeople who create the American films, TV programs, and productions that are seen and heard daily by billions of people around the world. Their role in the public debate over IP enforcement in the digital age is unique. They are working men and women, usually independent entrepreneurs, who embrace the possibilities of new technologies, new means of distribution, and new creative opportunities. But, they are also the very real victims of digital theft, both creatively and economically. We look to IPEC to protect the interests of all stakeholders, large and small; to protect the internationally recognized rights of artists; and to preserve their contributions to this nation’s cultural and creative heritage.

Sincerely,

Kathy Garmezy, Associate Executive Director, Government & International Affairs,  
Directors Guild of America (DGA)

Scott Harbinson, International Representative,  
International Alliance of Theatrical Stage Employees (IATSE)

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<sup>8</sup> See e.g., *Lenz v. Universal Music Corp.*, 2008 U.S. Dist. LEXIS 44549 (N.D. Cal. Apr. 8, 2008)(holding that a copyright owner must consider fair use before initiating DMCA takedown procedures); *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d. Cir. 2008).