

April 14, 2009

The Honorable Howard L. Berman

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Sent via electronic mail to Shanna.Winters@mail.house.gov and facsimile to (202) 225-3196

The Honorable Ileana Ros-Lehtinen

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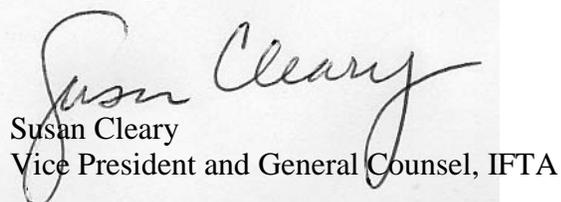
Re: Monday, April 6, 2009 Hearing - "Sinking the Copyright Pirates: Global Protection of Intellectual Property"

Dear Congressman Berman, Congresswoman Ros-Lehtinen and Members of the House Committee on Foreign Affairs:

Thank you very much for holding a hearing on copyright piracy and its impact on the U.S. intellectual property community on April 6, 2009. It was my pleasure to attend the Hearing on behalf of the members of the Independent Film & Television Alliance (IFTA), a business trade association representing over 160 independent production and distribution companies and financial institutions that provide production funding. Many good ideas were exchanged at the hearing, and the witnesses were particularly helpful in laying out the issues and impact of piracy on American businesses and workers. Thank you for the opportunity to submit for the record information on piracy's impact on the independent film and television community.

If there are any questions regarding our submission, IFTA would be happy to provide further information. Thank you very much.

Kindest regards,



Susan Cleary
Vice President and General Counsel, IFTA

cc: Jean Prewitt, President & CEO, IFTA
Barbara Mudge, Director, IFTA and Owner, Worldwide Film Entertainment LLC
Shanna Winters, Office of Congressman Berman
Gene Smith, Office of Congressman Berman

INTRODUCTION

IFTA would like to thank the Members of the House Committee on Foreign Affairs for the opportunity to provide further information on the impact of global intellectual property piracy in conjunction with the Hearing chaired by Congressman Howard Berman in Van Nuys, California on Monday, April 6, 2009, entitled “Sinking the Copyright Pirates: Global Protection of Intellectual Property.”

ABOUT IFTA AND ITS MEMBER COMPANIES

IFTA is a non-profit trade association for the independent film and television industry worldwide. Based in Los Angeles, California, IFTA represents over 160 member companies from 22 countries, including 97 IFTA member companies in the United States. IFTA Members are independent production and distribution companies, as well as sales agents, television companies, studio affiliated companies and financial institutions. As a founding member of the International Intellectual Property Alliance and an NGO member of World Intellectual Property Organization, IFTA actively participates in discussions regarding intellectual property law and regularly provides input to governments worldwide on a wide range of copyright, trademark and financing issues that impact the independent industry.

IFTA Members produce more than 400 independent films and countless hours of television programming annually, and they produce, distribute and finance some of the world’s most successful films. Since 1980, over one half of the Academy Awards for Best Picture have been produced by IFTA member companies. Films such as *Crash*, *Million Dollar Baby*, the *Lord of the Rings* trilogy, *My Big Fat Greek Wedding* and *Bend it Like Beckham* have all been independently produced and financed. Recently, two IFTA member company films- *Milk* and *The Reader*- were nominated for Best Picture at the 2008 Academy Awards.

Independent films and programs are made at every budget level and may be mainstream, commercial or art house. IFTA does not define ‘independent films’ as a genre or a budget range. We define independent producers and distributors as those companies and individuals (apart from the major U.S. studios) that assume the majority of the financial risk for the production of a film or television program and control its distribution in the majority of the world.

The production, financing and distribution models of independent producers and distributors differ substantially from those of the major Hollywood studios. Independent producers secure financing and distribution for each film, on a one by one, country-by-country basis. They work closely with local distributors in each country to secure distribution of each film based upon many factors including script, director, writer or key cast. Often distribution must be secured before the film is produced since the local distributors provide a portion of the production financing in the form of minimum guarantees toward the license fee of each film. Once enough minimum guarantees have been secured, the license agreements are then collateralized by a financial institution who loans the production budget for that film and an independent film can then be created.

In contrast, the major studios are vertically integrated, possessing their own network of national distributors around the world, able to place programming directly in theaters, cable, satellite, broadcast television, DVD and (increasingly) the internet. These conglomerates “greenlight” and finance their film and television productions to fill their pipelines and to drive merchandising, theme parks and other non-production related ventures.

PIRACY’S IMPACT ON THE INDEPENDENT FILM AND TELEVISION INDUSTRY

Due to the unique financing and distribution models (some would say challenges) for the independent production and distribution industry, piracy has damaging effects beyond the lost revenues fully outlined during the Hearing. Independent production and distribution companies must also contend with the negative impact piracy has on their businesses in the following ways:

Damage to local distributors lowers license fees and impacts the ability to finance future content
IFTA Members utilize the same local distribution companies worldwide as the indigenous film producers, and the health of those local distributors and film industries is of the utmost importance to U.S. independent producers. In the case of the independents, piracy is not just the stealing of a copy of the film. Piracy damages the value of independently produced films by lowering the license fees that may be obtained from local distributors, thus removing the incentive and in most case the ability to finance and produce the next film.

Due to the damage that piracy does to the local distribution network, it is no surprise that piracy lowers the license fees that legitimate distributors can pay for independent films. Legitimate distributors cannot compete against the pirates when such product is free or nearly free. Increasingly, IFTA Members realize this impact of piracy in individual business negotiations. Local distributors will often cite piracy, even for films not yet released in that market, as a reason to pay reduced license fees or to decline to distribute the film at all. Ultimately, the damage to local markets worldwide, which impedes the ability of the independents to finance subsequent productions, threatens to rapidly silence diverse voices.

Damage to existing business models due to government inaction

Government complacency about internet piracy damages existing business models, *especially in countries such as Spain and China*, where the governments’ ability to control the large ISPs is clear but yet they chose to turn a blind eye to the damage piracy is causing to their own marketplaces. As was pointed out at the hearing, this “blind eye” allows ISPs to build market share and finance network expansion on the basis of consumer demand for programming supplied by pirates and their illegal operations. Governments can prevent piracy (e.g., no counterfeit Olympic merchandise or pirated broadcasts were allowed in China during the 2008 Olympics), but they chose not to enact or enforce copyright laws.

In countries where piracy is rampant to a point of systemic abuse of copyright laws, individual rights holders cannot combat piracy without an effective legal framework and government action. For example, worldwide same day release (referred to as day and date release) may prove an effective method to curb or delay piracy for the major studios, but for independents, whose

national distributors release on their own schedule, this prevention technique is impossible. Private rights of action are expensive, and judgments (if any) are impossible to enforce effectively. Therefore, in instances where the piracy problem is so intractable, it needs to be addressed at the government level.

Piracy damages the ability to employ American workers and pay taxes to local governments

IFTA agrees with the statement made during the Hearing by IATSE– International Vice President, Michael F. Miller- that piracy jeopardizes the valuable and much needed economic benefits to American businesses and the American workers they employ, as well as the taxes to support federal and local government.

In 2007, independent production companies shot 477 films in the U.S. Based on production models of the Los Angeles Economic Development Corporation, this independent production activity resulted in the creation of 39,879 direct full time jobs and another 120,000 full time jobs for various vendors that service the independent film industry. Both classes of employees earned nearly \$19 billion combined. This independent production activity resulted in business revenue totaling over \$27 billion in economic output. It also generated nearly \$2.9 billion in federal income tax and nearly \$1 billion in individual state income and sales tax.^[1]

If piracy is allowed to further infiltrate and damage the independent film industry, not only are the creative results of the independent producers work lost but also the economic benefits that flow to the economy and government will disappear too. It is urgent that piracy is addressed at many levels with strong intellectual property laws worldwide, effective criminal and civil enforcement and sufficient governmental resources.

INDUSTRY SOLUTIONS MUST INCLUDE ALL STAKEHOLDERS

As Mr. Soderbergh on behalf of the Directors Guild of America mentioned, the industry can be deputized along with the ISPs to implement solutions to internet piracy. It is imperative, however, that any future solutions are implemented in a non-discriminatory manner and do not impede consumers' access to legal content and services.

IFTA strongly believes that government oversight will help ensure that all stakeholders are actively included and involved in “industry at large” discussions and solutions, including those that would impose *inter alia* filtering technology. At the hearing, Mr. Horowitz of Universal Music Group said that talks with large ISP/cable providers such as Comcast, Cox, and Time Warner to employ automatic warnings are in progress. IFTA agrees that industry consensus for the use of technical solutions to piracy appears to be an attractive tool in the fight against piracy, but only if such technological solutions take into account the interests of independents. IFTA has already encountered an uphill climb in ensuring that its Members are included in the discussions or in the deployment of technological solutions.

^[1] In 2008, IFTA's Research and Strategic Analysis Department issued a report on the economic impact of independent production in the United States during 2007.

Enforcement is expensive, especially for independents that often rely on exclusive distributors in each country to enforce the licensed IP rights. Using technology to prevent frontline infringement is a desirable solution provided that all stakeholders participate in the development and implementation to ensure that technological tools such as filtering systems employed by ISPs are available to ALL rights holders, do not attack legal content and services, and are reasonable and transparent to all users.

CONCLUSION

IFTA would like to express its sincere interest in being part of industry and governmental discussions to identify and implement solutions to piracy. We encourage all Committee Members to call on us for information regarding worldwide marketplace conditions and the impact of piracy on independent film and television production and distribution companies. Additionally, it would be IFTA's pleasure to present a knowledgeable witness to testify at a subsequent hearing on piracy and its impact on the intellectual property industry. Once again, thank you for your time and support of the intellectual property industry.