



March 26, 2010

Secretary to the Commission
International Trade Commission
500 E Street, SW
Washington, DC 20436
Phone: 202-205-2000

**Re: IFTA Comment on USITC Investigation into Small and Medium-Sized Enterprises:
U.S. and E.U. Export Activities, Inv. No. 332-509**

The Independent Film & Television Alliance (IFTA) respectfully submits these comments in the above-referenced investigation to inform the Commission about the export activities and commercial constraints faced by IFTA member companies (IFTA Members). IFTA Members consist of over 150 companies from around the world, the majority of which are U.S.-based exporters.¹ With rare exception, IFTA Members fall within the Commission's criteria for Small and Medium-Sized Enterprises as they are firms that employ fewer than 500 employees.

Independent Film & Television Alliance

Based in Los Angeles, California, IFTA is a non-profit trade association for the independent film and television industry worldwide. IFTA Members are independent production and distribution companies, as well as sales agents, television companies and financial institutions. Independent films and television programs are made at every budget level and may be mainstream, commercial or art house.

IFTA Members produce, distribute and finance some of the world's most successful films. Over the last seven years, independent production companies have produced nearly 80% of all U.S. feature films. Since 1982, IFTA Members have been involved with the financing,

development, production and distribution of 64% of the Academy Award Winning Best Pictures® including *The Hurt Locker*, *Slumdog Millionaire*, *No Country for Old Men*, *The Departed*, *Crash*, *Million Dollar Baby*, *Braveheart*, *Lord of the Rings*, *Dances with Wolves* and *Gandhi*. In the past year, IFTA Member films have included *The Twilight Saga: New Moon*, *The Last Station*, *Inglorious Basterds* and *Tyler Perry's Madea Goes to Jail*, to name just a few.

Extent of Global Operations of IFTA Members

IFTA Members produce, distribute and finance about 500 independent films and countless hours of television programming annually. IFTA Members' collective worldwide sales for 2008 totaled over \$2.8 billion, of which \$2.3 billion came from foreign (non-U.S.) revenue and \$500 million from domestic revenue. Of the amount for export revenue, \$1.7 billion was generated from Europe, \$129 million from Latin America, and \$222 million from Asian territories.²

IFTA produces the American Film Market (AFM) every year in Santa Monica, California, where more than 8,000 industry leaders and participants from over 70 countries come together to carry out worldwide film and television production and distribution deal-making. The AFM is a premiere marketplace where more than 400 companies come to exhibit their products. Over \$800 million in production and licensing deals are closed each year at AFM. This year, AFM was selected by the U.S. Department of Commerce to participate in the International Buyer Program which promotes U.S. trade shows around the world to qualified foreign buyers, sales representatives and business partners.

¹ For a complete list of IFTA Members, visit IFTA's website.

² See IFTA Membership Sales Surveys 1984-2008 (*available upon request*).

Characteristics of IFTA Members' Exporting Activities

Independent producers and distributors are 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. Independent producers routinely secure financing and distribution for each project on a one-by-one, country-by-country basis by means of licenses to commercial users (e.g., to film and video distributors, broadcasters, online platforms, etc.).

Often distribution commitments must be secured before an independent 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. Such financing deals are based on the confidence of local distributors and financiers that they will receive a return on their investment. Once enough minimum guarantees are secured from local distributors, the license agreements are then collateralized by a financial institution which loans the production budget for that film, and an independent film can then be created. The production, financing and distribution models of independent producers and distributors differ substantially from those of the major Hollywood studios, which may self-finance and then distribute through worldwide subsidiaries and affiliates.

Export Constraints for IFTA Members

a. Piracy Worldwide

A significant export constraint faced by IFTA Members comes from copyright piracy. In the past three years, exporting revenues of IFTA Members have dropped 30%.³ Along with the

³ See IFTA Membership Sales Surveys 1984-2008 (*available upon request*).

overall economic downturn, much of this decrease in exports can be attributed to the impact of piracy.

Piracy lowers the license fees that distributors can or will pay for independent films because legitimate distributors, including online distributors, cannot compete against pirated product that is free or nearly free. Local distributors will often cite piracy, even for films not yet released in that market, as a reason to pay reduced license fees, change the terms of an executed license agreement, or decline to distribute a film at all. Moreover, piracy decreases the value of the film's license in neighboring regions where pirated copies may be distributed. The risk of the film being pirated throughout the region, thus lowering the value of the license and exposing the producer (or seller) to possible contract renegotiation demands by local distributors in neighboring countries, can outweigh the financial benefit of distributing in certain territories.

The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. 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, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible. Moreover, private remedies in the form of individual lawsuits are expensive, scarcely affordable by most independents, and judgments (if any) are very difficult to enforce effectively.

While private industry agreements may provide some copyright protection mechanisms in the digital marketplace, private industry solutions to combat piracy are not the only solutions. IFTA Members are small and medium sized businesses, and many effective anti-piracy enforcement measures they can utilize or benefit from may only be realized by means of specific

government regulations. Accordingly, there must be concerted advocacy led by the U.S. Government to enforce intellectual property protections on a government to government level.

b. Piracy in the U.S.

While it is imperative that the U.S. Government advocate to other governments for more effective intellectual property protections and enforcement abroad, it must also implement greater protections for copyright infringement domestically. IFTA recently conducted an online piracy survey monitoring Internet service providers worldwide. In a three month period, there were more instances of piracy recorded and detected in the United States on U.S.-owned networks than in any country. Specifically, over 838,000 instances of piracy in the U.S. were detected during that period for the 90 films in the survey.

Independent producers make their films throughout the U.S., but cannot do so without revenue to recoup costs and fund future productions. Simply stated, the impact of piracy reduces financing resources for independent films. Consequently, the number of films that are produced is decreased and the corresponding economic benefit derived from independent film production is reduced.⁴

c. Examples of Export Constraints

Other commercial export constraints faced by IFTA Members come in the form of government regulations or laws which create market access barriers for the U.S. independent film and television industry, such as local dubbing requirements, screen quota requirements, and other measures designed to protect local industries. For example, territories such as Spain and France require film dubbing to be done locally. This means that distributors must use local laboratories

⁴ In 2007, independent production companies shot 477 films in the U.S., employing 198,000 jobs per year and generating nearly \$2.9 billion in federal income tax.

and local talent to dub their films. This increases exporting expenses and cuts down on economies of scale because the distributor otherwise could do all of the dubbing for different territories at the same time or place.

Another export constraint in Korea, Spain and China is screen quotas, which require that theaters exhibit locally-produced films for specific periods of time (or proportions of screen time) throughout the year. Screen quotas reduce export opportunities by lowering the number of slots available for theatrical exhibition of foreign films.

China is an example of multiple market access barriers which are further exacerbated by piracy. In China, foreign motion pictures are imported and distributed theatrically only by two state licensed Chinese entities, leaving few distribution opportunities for theatrical release of foreign films. For those films that are imported and released, the licensing arrangement is on much less favourable commercial terms than could be negotiated in an open market. Another barrier in China is the rigorous and non-transparent censorship requirements. All of these barriers discourage distribution of imported films in the world's largest marketplace.

In India, the U.S. motion picture industry faces numerous market access barriers, including foreign ownership restrictions and considerable piracy rates. Additionally, customs valuation practices that reference projected royalties resulting from the distribution and exhibition of the work, rather than the value of the physical medium on which the work is recorded, inflate the costs and discourage imports. In addition, customs authorities continue to demand proprietary and financial documents for the past five years to determine supposedly delinquent taxes, sometimes refusing to release products into the market in the absence of inflated duty payments.

No Specific U.S. Government Support

U.S. independent film producers and exporters also face the worldwide marketplace without some of the valuable tools provided to their competitors by their respective governments. For example, U.S. companies bear all costs of attending critical international film markets and festivals at which they screen films and meet with and negotiate license agreements with buyers around the world. Other developed countries, especially in the European Community, fund participation costs for certain markets and/or support national “umbrella stands” at the events.

The United States is also one of the few nations that does not participate in bilateral “co-production agreements.” Australia, Canada, China, Great Britain and France, among many others, have entered into multiple such pacts under which films involving local talent, subject matter, crew and expenditures, and/or shooting locations are able to qualify for cross-national benefits, including local subsidies and screen quota qualifications. Equally important, these treaties create relationships between producers and distributors in multiple countries that become the basis for future business. This limits the economic flexibility of U.S. independent producers and distributors to develop their worldwide business.

Strategies Adopted By IFTA Members to Facilitate Exports and Overcome Constraints

Production of feature length films and television programming is expensive and time-consuming and success – if measured in “blockbuster” terms – cannot be taken for granted. As small and medium-sized enterprises, IFTA Member companies must raise finances to undertake production and contract with local distributors country by country to generate revenue. To facilitate exports, IFTA Members routinely enter into distribution agreements in advance of actual production – creating both a basis for raising production funding and establishing a

network of distributors who are committed to the success of the film in advance. These distributors take on responsibility for local censorship and customs clearance, marketing, and sub-distribution to cinemas, DVD and television and become the local representative of the film.

Similarly, IFTA Members seek to shift or control the costs of production itself through informal or private co-production agreements. These agreements link the U.S. producer with one chosen in many cases for his/her nationality, access to financial or artistic production resources, or ability to shape a project to meet the audience needs in key territories. Co-productions are especially important in markets with significant limitations in favor of national productions.

As small and medium-sized companies, IFTA Members also look to their trade association to provide certain services that larger companies might supply internally. This includes advocacy at state and federal level in the United States and before foreign governments and international organizations. Intellectual property protection and marketplace barriers are priority issues for the association.

On behalf of the independent sector overall, IFTA has published standard form film license agreements that may be and are used worldwide, and revisits the terms on a regular basis as technology and the marketplace evolve. IFTA also manages an industry specific Arbitration Tribunal through which disputes arising from film financing and distribution agreements may be heard by expert attorneys and resolved quickly and at low cost.

For the benefit of its Members, IFTA manages the collection of non-contractual royalties, such as cable retransmission fees, private copy levies and similar royalties around the world. These royalties are particularly difficult for small companies to manage individually as they are payable in accordance with local law and practice, in multiple currencies and frequently in small

amounts. However, the collective overall value of these royalties is significant -- IFTA has collected more than \$80 million for its participants since the service was created in 1995.

IFTA administers rights certification and verification programs that help reduce false ownership registrations in certain territories and thus protect against piracy. For instance, IFTA helped establish copyright protection verification systems in both China and South Korea. In China, IFTA has an agreement with the Copyright Division of the National Copyright Administration of the People's Republic of China (NCAC), whereby the NCAC will recognize official Certifications issued by IFTA on behalf of its Members identifying the legitimate importers/distributors of Member product imported into China. In South Korea, the Korean Ratings Media Bureau recognizes official IFTA Certificates identifying the authorized licensors/distributors, license term and other important verification information.

IFTA has also been granted an Export Trade Certificate of Review (ETCR),⁵ which provides certain exemptions in U.S. anti-trust laws with respect to various export activities in connection with the distribution of their products internationally.⁶ Pursuant to the Certificate, IFTA Members share information regarding foreign market conditions and develop and utilize model licensing and sales agency agreements to facilitate common trade practices and terms and conditions.

⁵ The Certificate of Review protects IFTA, its Members, and their directors, officers, and employees acting on their behalf from private treble damage actions and governmental criminal and civil suits under U.S. federal and state antitrust laws for export activities, which are specified in their certificate.

⁶ In order to receive an ETCR, an applicant must show that the proposed export conduct will not: (1) result in a substantial lessening of competition or restraint of trade in the U.S.; (2) unreasonably enhance, stabilize, or depress prices in the U.S. of the class of goods/services covered by the application; (3) constitute unfair methods of competition against competitors engaged in export of class of goods/serves

Conclusion

IFTA Members, like all small and medium-sized enterprises, have unique challenges as they bring their films and programs to the international marketplace. IFTA and its Members continue to advocate for export opportunities and address export obstacles in connection with the independent film industry. IFTA would like to thank the Commission for the opportunity to identify some of these export challenges of the independent film and television industry and looks forward to any future opportunity to work with the Commission to address them.

Respectfully Submitted,

/s/

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exported by the applicant; and, (4) include any act that may reasonably be expected to result in sale for consumption or resale in U.S. of such goods/services. 15 U.S.C. § 4013(a) (1988).