

Independent Film & Television Alliance® (IFTA®) submission dated August 20, 2018 in response to Topic 8 with respect to Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201.¹

The creation of film and television programming is the epitome of the innovation that fuels the development of the digital economy. Evidence confirms that both intellectual property protection and competition are important to spur innovation.² Moreover, the *DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property* identify intellectual property licensing as procompetitive.³

Copyright and the ability to control exclusively the use of a copyrighted work is the building block for commercial exploitation of rights. The 1998 Digital Millennium Copyright Act (DMCA)⁴ was enacted right after the Pitofsky reports were issued. At that time the Notice and Takedown provisions⁵ seemed to strike a balance between the rights of the copyright owner to control the use of their property and the ability of ISPs to patrol their network without unreasonable burdens. But time and technology have overtaken our industry. In the current high speed, on demand, mobile world, pirated and other illicit content can be duplicated and shared worldwide instantaneously; at the same time, the tools now exist to identify content and to block illegal and unauthorized versions automatically and accurately. The balance that made sense in 1998 is no longer effective. There is a desperate need to evaluate the responsibility that the major platforms must be required to assume to ensure that the internet is a legitimate and safe place for users.

We have seen the impact of wide broadband growth and availability and the importance of high value content in driving consumer take up of broadband offers. Unfortunately, we have also seen the cost of prioritizing broadband growth over the interests of the legitimate owners of that content. Widespread distribution of illegal content has been accepted and enforcement of existing copyright laws deferred or denied as the networks offered up “free” content to all subscribers. For example, in Spain, the country’s broadband network growth was propelled by government’s failure to intervene as the growing network transported free but illegal entertainment content – and legitimate avenues of distribution (such as DVD) and the ability to finance film production died. Every country, including the U.S., have seen the impact of trying to “compete with free” while enforcement efforts flagged. At the same time, illegal supplied content and black services have directly damaged consumers: invasions of consumer privacy, the spread of malware and spyware, and the threat of consumer identity theft are fellow travelers of illegal content.

Under U.S. law, online platforms and service providers are afforded a “safe harbor” from liability for the third party content they carry providing that they are minimally responsive to

¹ See [83 Fed. Reg. 38307 \(August 6, 2018\)](#).

² See *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, Volume I, Page 4.

³ See *DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property*, Section 2.3, *Procompetitive Benefits of Licensing*, Page 5.

⁴ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

⁵ 17 U.S.C. § 512.

notices that a specific item, in a specific online location, is unauthorized or otherwise illegal.⁶ 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 the networks, then click to report, click to report, click to report *ad infinitum*. Meanwhile, for the owner of the film, 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 citations from popping up 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 platforms have built their financial foundation. The combination of safe harbor and advertising has created perverse incentives for the platforms that now are being recognized by Congress and other public decision-makers around the world.⁷ IFTA has joined with others in the creative community in calling on Congress, and now on the Commission, to address and define new policies of platform responsibility by law and regulation.⁸

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 studios⁹, independents are unable to secure more effective private content protection arrangements beyond those provided to the general public. 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 options of continuing to file 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.

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.

⁶ 17 U.S.C. § 512

⁷ 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/>.

⁸ <http://thehill.com/policy/technology/398394-hollywood-urges-congress-to-bring-google-to-testify>.

⁹ 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.

In recognition of this disparity, the European Commission recently proposed a notice, takedown and staydown obligation under proposed Article 13 of the Copyright Directive¹⁰, which if enacted would force the large platforms to take on the responsibility of monitoring their own sites and providing tools to every copyright owner to effectuate stay down of their work if they chose. As illustrated by its agreement in the United Kingdom to a “Voluntary Code of Practice” that is dedicated to the removal of links to infringing content from the first page of its internet search results, Google is equipped to do much more with respect to platform responsibility but continues to limit its remedial actions unless under pressure from government or its major contract partners.¹¹

IFTA asks the Commission to investigate and propose a new legal and regulatory approach that requires the online platforms and services to accept responsibility for their operations as do “bricks and mortar” businesses. IFTA further urges the Commission to consider specifically the market power of these distributors and to investigate the discriminatory practices pursued by these platforms and services that place independent content providers at an unfair competitive disadvantage.

¹⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>

¹¹ <https://www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement>