



April 1, 2016

**BEFORE THE U.S. COPYRIGHT OFFICE**

Section 512 Study

[Docket No. 2015–7]

**COMMENTS OF THE DIRECTORS GUILD OF AMERICA**

**Introduction**

The Directors Guild of America (DGA) welcomes the opportunity to respond to the U.S. Copyright Office’s Notice of Inquiry seeking input on Section 512. This Guild has a long-standing interest in the issue of Notice and Takedown because its impact on our members, particularly our independent director members, is a real one—and problematic. This NOI gives us the opportunity to reiterate—and update—the points we made in our letter submitted to the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property, and the Internet in advance of their March 13, 2014 hearing on Section 512 of Title 17.

DGA represents 16,500 directors and members of the directing team who create the feature films, television programs, new media, commercials, documentaries, news and other motion pictures that are this country’s greatest cultural export. DGA’s mission is to protect the creative and economic rights of its members.

Digital theft has changed the nature of the motion picture business. The direct effect of stolen content is the reduction in potential motion picture revenues and income to our members. Downstream revenues—which come to our members in the form of residuals—have been eroded; those residual payments are essential income in a freelance world where it is not uncommon to go years between projects. Second, online theft has eroded the ability of financiers and producers to re-coup their investments; their response has been to fund blockbuster films which can recoup their investment before the film is widely available via illegal streaming and to turn away from funding smaller and mid-range films. These are the very films that historically have received critical acclaim and been a major source of employment for employees in the entertainment industry. The end result of these changes in funding is that fewer motion pictures are being produced and there are fewer jobs for DGA members and others in the motion picture industry.

The impact of online theft is perhaps the most pronounced with respect to independent filmmakers. Independent filmmakers, many of whom own their own copyrights, not only direct, but also write, produce, and often raise the financing for their work. They are working to

maintain both their own livelihood and their small business. When confronted with the online theft of their work, the burden falls on them to enforce their rights. They cannot afford to ignore online theft. Financiers reasonably consider online theft a significant threat to their recoupment of monies and independent rights holders must show they are ready and willing to protect their work. To do so they must turn to the Notice and Takedown procedures in Section 512 of Title 17.

Unfortunately independent filmmakers consistently find the “notice and takedown” procedure in Section 512 of Title 17 to be cumbersome, costly, and particularly for rights holders with limited resources such as independent directors, largely unworkable and ineffective.

The safe harbor that Section 512 provides was designed to put limitations on liability, not, as is currently the case, to provide a way for sites that host illegal content to knowingly or recklessly distribute stolen copyrighted materials. DGA submits this filing on behalf of these individuals, our members, whose vision and creativity we seek to enhance and maintain, and whose economic viability must be protected from the social and economic harm of digital theft.

We are also concerned about the impact on the consumers and public in general. When works are stolen and financing is only available for the largest budget films, the small and mid-range films that tell the stories that reflect the full breadth of our society disappear. The result is that the consumer has greatly diminished access to those stories and the diversity of content they represent.

Finally, there is an often ignored cultural impact. Motion pictures are more than just a huge economic driver, contributing millions of jobs and billions of dollars to the U.S. economy; they are also a global cultural and artistic force. They play a critical role as sources of both entertainment and information. They reflect our society and they are also, in large measure, how the rest of the world comes to know us. Our cultural heritage and identity is distorted, if not lost, when digital theft creates a marketplace where only blockbuster films can prevail.

We welcome the U.S. Copyright Office review as an opportunity to make the following recommendations for specific changes that would enable Section 512 to protect the competing interests of internet service providers who may unknowingly host copyrighted materials while providing a meaningful deterrent to online theft. Specifically, we would propose to:

- Improve access for smaller independent directors and other individual creators, including ease to find information on the designated DMCA agent, easy access to information on how to file, and clear identification of the URL with the illegal files.
- Provide individual directors/creators with clearer cut and less onerous means to file a takedown notice, including reducing multiple-step processes required to file, eliminating overly burdensome online service provider (OSP) requirements to file a notice, and providing access to content-filtering technologies and other identification technologies that are critical to finding illegal content in a speedy manner.

- Insure that OSPs who have received a legitimate takedown notice do not allow the same content to reappear within a day. In other words, takedown should mean stay down.
- Put in place a policy for repeat infringers.

## I. Impact of Digital Theft on DGA Members and the Entertainment Business

Digital theft has changed the nature of the motion picture business. The direct effect of stolen content is the reduction in potential motion picture revenues and income to our members. It simultaneously erodes two vital components of the entertainment business ecosystem: **income and production**. Our members rely heavily on “downstream” revenue from the exploitation of its product in secondary markets, after initial distribution on television or in a movie theatre. Downstream revenue sources include foreign distribution, DVD sales, and repeated airing on free cable or premium pay television.

### *Income*

Our members often spend years developing a project, during which time they are not bringing in income. For most, employment is intermittent and the job search is continual. During the periods between jobs our members must sustain themselves and their families. This intermittent work pattern (*i.e.* freelance nature) of the motion picture and television business, and the integral contribution of our members who work in motion pictures to that business, have been a way of life in the motion picture business since its inception. As an acknowledgement of these realities, our members (and other film artists and craftspeople) *share directly* in the downstream revenue their work generates, in many cases long after its initial release.

Last year the DGA distributed approximately \$360 million in residuals to our members. These residual payments are essential income in a freelance world where it is not uncommon to go years between projects. Additionally, residuals play a significant role in funding the DGA pension plan that benefits all our members. The pension plan provides a critical guaranteed safety net for our members and ensures they and their families are protected in a freelance multi-employer business.

As secondary markets, such as DVD and legal online distribution are supplanted by illegal distribution, our members are deprived of both the residual compensation that sustains them and funds their pension and health plans. If our members cannot rely on payment for the work they have completed, it becomes that much more difficult to weather the periods between jobs.

### *Production and the Film Marketplace*

While our members are integral and irreplaceable contributors to the creative process, motion pictures also cannot exist without significant financial investments; investments that

carry a large degree of risk because success and recoupment is never guaranteed. Moreover, this financial risk is compounded by the *long-term* nature of the return on investment; this makes the certainty of secondary markets all the more important. Given this importance of downstream revenue to financial success, if there is a decrease in this revenue (a decrease significantly spurred on by online theft), financiers will be more reluctant to invest in new work, and the result will be less work and fewer jobs. This is not a prediction for the future; this is the reality of today.

Over the past decade, the number of films released by the studios and their subsidiaries has declined. Between 2006, at the height of the DVD market, and 2014, when the loss of the DVD market to digital theft was a fiscal reality, the number of studio films dropped by 33%;<sup>1</sup> the result is far less work opportunities for our members. Production of fewer movies has been one reaction to the loss of secondary market revenue. But there is another profound reaction. The studios have shifted their budgets to the funding of films that are less vulnerable to online theft: blockbuster movies. Blockbusters or “tent-pole” movies are on thousands of screens around the world and they have an international audience. It is exactly because they are on so many screens that they can recoup their investments in the opening weekend before the film is widely available on illegal sites.

So what gets cut out? The films the studios and financiers have stopped making/funding are the small and mid-budget films that historically were the lifeblood of the business and where a majority of our motion picture director members worked. These films, often well known to the public because a substantial number of them are high-profile award winners, are highly vulnerable to digital theft. They do not have large theatrical releases and customarily do not generate significant box office revenue, which makes them heavily reliant on secondary markets to recoup the investment. But because of their profile they trigger significant illegal downloads/streaming which decimates their secondary market revenue.

The Oscar-winning 2009 film *The Hurt Locker* is a perfect case in point. It cost \$15 million to make (excluding marketing and advertising costs). It was first leaked onto the Internet over five months before its U.S. release. Once it won 6 Oscars, the downloading intensified. It was downloaded on BitTorrent around 10 million times.<sup>2</sup> At the same time, despite the awards and accolades, it generated only about \$16 million in U.S. box office.<sup>3</sup> An analysis of the box office available at the time makes it possible to determine that approximately 1.7 million people in the U.S. and 3.9 million outside the U.S., saw *The Hurt Locker* in a theatre. That means that illegal BitTorrent downloads were *nearly double* the theatrical views. Clearly it was impossible for *The Hurt Locker* to recoup its investment. In an effort to seek redress, Voltages Pictures, the

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<sup>1</sup> MPAA, *Theatrical Market Statistics 2014 Report*. 204 MPAA member films released in 2006 vs. 136 MPAA member films released in 2014,

<http://www.mpa.org/wp-content/uploads/2015/03/MPAA-Theatrical-Market-Statistics-2014.pdf>.

<sup>2</sup> Ernesto, *Oscar win boosts Hurt Locker's Piracy Numbers*, TorrentFreak (March 12, 2010), <https://torrentfreak.com/oscar-win-boosts-hurt-lockers-piracy-numbers-100312/>.

<sup>3</sup> Eriq Gardner, *Hurt Locker lawsuit targets pirates*, The Hollywood Reporter (May 11, 2010), <http://www.hollywoodreporter.com/news/hurt-locker-lawsuit-target-pirates-23474>.

company who produced the film, went to court and sought damages from 5,000 people it said used BitTorrent.<sup>4</sup> But the damage was already done.

## **II. The DMCA Notice & Takedown System is Inadequate for Small Rights holders**

The Digital Millennium Copyright Act (DMCA) was enacted 18 years ago. Section 512 of Title 17, as created by the Act, provides service providers as defined in the statute, with a limited safe harbor from liability for copyright infringement if their activities satisfy specific conditions, including adherence to a codified notice and takedown procedure. These rules apply to various types of service providers. At its outset, the statute clearly protected Internet Service Providers (ISPs) such as large telecommunications companies that provide the “on-ramps” to the Internet or transmit and cache Internet data. It also protected search engines and some service providers engaged in data storage for their users. Over time, the type of service providers protected by the safe harbor has expanded. Courts have now interpreted Section 512 to encompass companies that are solely in the business of aggregating, distributing, and performing copyrighted works on and through their systems. The authors of the DMCA could not have foreseen the magnitude of today’s search engines and the sophisticated means that copyright infringers have at their disposal to distribute and profit from copyrighted materials.

### ***Independent Directors’ Difficulty Complying with Notice and Takedown Procedures***

When directors who are copyright owners are confronted with the online theft of their work, the burden falls on them to enforce their rights. These creators cannot afford to ignore online theft. Financiers reasonably consider online theft a significant threat to that recoupment, and independent rights holders must show they are ready and willing to protect their work. That is far easier said than done under the current interpretations—and application—of Section 512 by Online Service Providers (OSPs).

The breadth of Internet businesses now protected by the Section 512 safe harbor combined with the onerous requirements and impractical realities of the “notice and takedown” process, make it extremely difficult, if not impossible, for directors who are copyright holders to protect their creative works online. The safe harbor now covers so many online entities that tracing where a motion picture is being illegally streamed or offered is a herculean task. Even discovering the theft or illegal distribution of a work requires enormous resources in terms of staff, technological know-how, and finances. While large copyright holders often employ large anti-piracy staffs, purchase anti-piracy equipment, and contract with vendors to monitor online infringement, most independent rights holders do not have the time, knowledge, and resources to match those efforts. The end result is that small and independent copyright holders, like the independent directors we represent, generally do not discover the theft of their work until long after it has been widely distributed throughout the Internet. By that time, the harm is already done.

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<sup>4</sup> Ethan Smith, *Thousands are Targeted Over ‘Hurt Locker’ Downloads*, The Wall Street Journal (May 31, 2010), <http://www.wsj.com/articles/SB10001424052748703957604575272843955251262>.

The challenges for independent directors and rights holders become even more daunting after the discovery of an online infringement/theft. The rights holder has to find the correct URL to report the stolen file; determine the designated DMCA agent; send formal (and legally correct) takedown notices with all the information, sometimes extensive, required; and then go through the entire takedown process. While some large studios and producers have made at least limited progress in utilizing the “notice and takedown” mechanism, small rights holders simply lack the resources and financial ability to navigate the complex system required to identify, notify, and pursue service providers that are exploiting their copyrighted works.

To utilize the DMCA notice and takedown mechanism, a rights holder must first prepare notices in exact accordance with the complicated legal requirements of Section 512. Sending these notices to a designated agent of the service provider requires a level of legal expertise that larger rights holders may possess but which smaller creators do not have at their disposal.

The experience of DGA director member Rick Pamplin is instructive. Rick is the sole creator and copyright owner of the feature film *Mike Winslow Live*. In 2013 he discovered, along with his distributor Nemours Marketing, Inc., that his film was being offered for free on YouTube. At the same time, the film was legally for sale on DVD and via several Video On-Demand platforms. Sales through both of these legal outlets generated revenue for the Pamplin Film Company.

Rick soon learned that there had been over an estimated \$300,000 in lost revenue, and thus he and his distributor commenced the DMCA notice and takedown process. However, with each different notice sent, they received replies seeking more information. Perhaps at the time if they had the legal resources, their request would have followed the DMCA requirements to the letter, but like most small businesses, they did not. This was in 2013-2014.

Fast-forward to 2016 and the impact on Rick as a director and as an entrepreneur is even more devastating. His film *Mike Winslow Live* has been stolen so extensively on YouTube that he knows that if “we had received half of the revenue due to us from the unauthorized views, the film would have doubled its budget, provided investors with payback and profit, and provided our company with over six-figures of profit.” Rick’s residual earnings, pension, health insurance, annual income, and future employment have all been negatively affected. Investors frequently ask, “If you can’t collect revenue from your earlier films why should I invest in new films that will face similar piracy?”

Rick’s films, which also include *Hoover*, starring Academy award-winning actor Ernest Borgnine, have won critical praise and awards, been featured on premium pay cable, and distributed in theaters and on DVDs, Netflix, and other streaming services such as Amazon and iTunes. But, as Rick notes, while he receives small revenue streams for his films, they are “irrevocably damaged” by the ongoing illegal streaming of his full-length films and the failure of sites such as YouTube to “honor our copyright or legal standing as the creator and owners of these films”. The future for an independent director like Rick is increasingly uncertain as his production company is no longer a small business job creator, and investors are hesitant to fund future films as Rick recently learned when he proposed four new projects to market. Again, in

Rick’s words... “As a small independent filmmaker, the pirating, i.e. theft of our copyright-protected work, has been devastating and the collateral damage cannot be overestimated.”

Rick is not alone. We have had other prominent and well-respected directors tell us that unique films of theirs that, while not mainstream, were important stories that needed to be told (so they personally helped raise the financing) could never get made again because digital theft completely destroyed the audience for the film—both at home and abroad.

### ***The Final Straw: Takedown Does Not Mean Staydown***

Unfortunately, Rick’s situation is not unique, and even a successful “notice and takedown” is too often a very short-lived victory. That is because *Section 512 imposes no obligation on the service provider to prevent further infringements of the same copyrighted work, even on the same site, after it has been taken down.* That was the experience of DGA director member Penelope Spheeris, who owns the copyright to her three-part independent documentary, *The Decline of Western Civilization*.

Penelope’s classic project, *The Decline of Western Civilization*, was shot in the early 1980s and late 1990s, and, over the years her documentaries have gained a cult status. Beginning in 2010, she began to find her work all over the Internet, streaming on sites like YouTube and with pirated copies on sites like eBay. In 2011, witnessing the proliferation of illegal copies of her work, Penelope decided to create a very small, self-funded, in-house operation to monitor their use. She began identifying so many infringing copies of her work that her assistant would often send out multiple cease and desist notices in a single day. Some sites would respond and immediately remove infringing content. But other sites, often larger, well-established sites, were slow to comply and respond. Some sites even used threats to keep her from pursuing them. *And often, even after multiple notices, the downloading on the same site reappeared again that very day.*

By 2014, Penelope’s conclusion was that, although she planned to maintain her in-house effort, for an independent rights holder like herself, trying to employ the notice and takedown procedure to stop infringement was like “putting out a forest fire with your bare feet.” And as she also noted at the time, even though they have been notified of the fire raging on their services, the Internet businesses profiting from that fire have no obligation to put it out.

Downtrodden and appalled with the Section 512 status quo, she devised a specific strategy, which she implemented at great personal expense to herself, as a means to self-distribute DVDs of her films. She decided to take her films “on the road,” believing her music-driven films lent themselves to that kind of approach. She made three moves to put her new strategy in place: first, she found a distributor—Shout Factory—who would produce the DVDs and “police” the Internet for illegal copies. Second, she sought out and worked with Arthouse Convergence, an organization representing a coalition of art house theaters across the country. Third, every weekend she and her daughter flew to a different U.S. city to present her cult films as unique events.

By 2016, Penelope found an audience of collectors who would buy the *Decline* DVDs which she was making available at screenings around the country. But, even with having those sales, Penelope is quick to note that balancing the financial resources and time she has put into this effort, she is not close to getting the kind of money and financial security that would be generated if it were possible to fully sell her films in a healthy and protected secondary market. As she said, “Filmmakers should not have to devise strategies—and spend their own money—to get around the inadequacy of the notice and takedown process for those of us individual creators who own our copyrights.”

It is important to underscore her words. To overcome the unworkability and ineffectiveness of Section 512, Penelope had to expend her own resources to find a way to protect her work. But the fact that she has done that begs a much larger question: why should independent directors, who already operate with limited budgets and resources, be forced to dig deeper into their own pockets because a law that is purported to protect them does not?

### **III. The DMCA Notice and Takedown System in today’s High-Speed Digital Environment**

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.

Similarly, current law and its application do not take advantage of the ever-expanding content-filtering technologies. While tools like the Google ID Match Program, Audible Magic’s automatic content recognition technology, Dropbox technologies, and NexGuard watermarking now exist and are available, individual creators usually do not have any access to, or in many cases awareness of, them. That too needs to be rectified.

Service Providers today also have far greater technological capabilities, including the ability to identify works. Those technologies should be utilized not simply to take down copyrighted motion pictures upon receipt of a Section 512 notice, but also to ensure that once illegal motion pictures, TV programs, or other content are identified, **they are kept down**. This is **one of the largest problems** confronting individual directors and creators—how to ensure that once they manage to get illegal copies of their work taken down, they don’t see it reappear the next day on the same site or other sites. It is essential that such protection be offered to all rights holders equally, and that service providers are given an incentive to provide effective protections and tools to independent directors who are copyright holders.

### **IV. Conclusion**

The Directors Guild of America appreciates this opportunity to add the voice and interests of the independent director and rights holder to the U.S. Copyright Office review of Section 512.



As we have stated with this filing, the current Section 512 as it has been applied and implemented is largely unworkable and ineffective for independent directors. Changes must be made that reflect this reality and that also take advantage of the changes in technology that so differentiate 1998, when DMCA was enacted, from the world we live in today. Specifically, we would ask that as you undertake this Section 512 review you consider how to best:

- Improve access for smaller independent directors and other individual creators, including ease to find information on the designated DMCA agent, easy access to information on how to file, and clear identification of the URL with the illegal files.
- Provide individual directors/creators with clearer cut and less onerous means to file a takedown notice, including reducing multiple-step and extensive information processes required to file, eliminating overly burdensome OSP requirements to file a notice, and providing access to content-filtering technologies and other identification technologies that are critical to finding illegal content in a speedy manner.
- Insure that OSPs who have received a legitimate takedown notice do not allow the same content to reappear within a day. In other words, takedown has to mean stay down.
- Put in place a policy for repeat infringers.

We firmly believe that there are strong economic and cultural policy reasons to protect small and independent rights holders from digital theft. The online environment of today is not a hospitable market for their work. We are well aware that with the digital age have come a sea change of issues that impact the motion picture business. This Guild and its members have shown themselves more than ready to face that challenge. We welcome this review and look forward to working with you to ensure that our members' concerns and experiences help shape your recommended solutions.

Respectfully submitted,

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