March 10, 2014

Rep. Howard Coble, Chairman
Rep. Jerry Nadler, Ranking Member
United States House of Representatives
Judiciary Subcommittee on Courts, Intellectual Property and the Internet
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Coble and Representative Nadler:

The Directors Guild of America (DGA) respectfully submits this statement in connection with the March 13 Subcommittee hearing on Section 512 of Title 17. DGA represents over 15,000 directors and members of the directing team who create the feature films, television programs, 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.

Congress has long recognized that small businesses are the economic engines of America. Similarly, smaller and independent directors are important economic engines of the motion picture business. These entrepreneurs are involved with all aspects of their film, from the writing to the financing, from the directing to the marketing, and they take great risks to share their creative visions with billions of people around the world on screens both large and small. They serve as the incubators of the motion picture business, opening doors to the motion picture business for new talent and craftspeople of all kinds. In short, they help make our industry the strong economic and creative force it is today. And yet, because these artists are small and economically limited, their voices are often forgotten in public policy debates.

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. To get even a small film made, independent film makers must obtain advance financing that is available only if funders believe they can re-coup their investment. 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.

To enforce their copyrights in the face of online theft, directors who produce their films must utilize the "notice and takedown" procedures in Section 512 of Title 17. Unfortunately, by virtue of their independent status, our members consistently find the "notice and takedown" procedure to be cumbersome, costly, and particularly for rights holders with limited resources, largely unworkable and ineffective.

We believe there is a social and economic benefit to protecting the interests of these talented independent directors by improving the procedures set forth in Section 512. DGA submits this testimony 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 believe their situation in today's public policy debate on Section 512 of Title 17 is a unique one.

I. The DMCA Notice and Takedown System is Inadequate for Small Rights Holders

The Digital Millennium Copyright Act (DMCA) was enacted over 15 years ago. Section 512 of Title 17, as created by that 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. Initially, the statute clearly protected traditional internet services 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 types of service providers protected by the safe harbor have 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.[1]

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

[1] *Viacom International Inc. v. YouTube, Inc*. provides but one example. Despite the fact that YouTube operates primarily as a commercial video streaming service rather than a storage service, the District Court in that case found that YouTube qualifies as a service provider under Section 512(c).

staff, technological know-how, and finances. While large copyright holders often employ large anti-piracy staffs, purchase equipment, and contract with outside 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 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.

The challenges for independent directors and rights holders become even more daunting after discovery of an online theft. 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 those legal outlets generated revenue for the Pamplin Film Company.

Rick soon learned that there had been over earn estimated $300,000 in lost revenue. Rick and his distributor commenced the DMCA notice and takedown process. However, with each different notice sent, they received replies seeking more information. Perhaps 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—what they did have was their determination to stop the unauthorized postings of Rick's film. To quote Rick: "The bottom line is my film is very popular so YouTube is making money, but the filmmakers, investors, and the distributor are not."

Unfortunately, Rick's situation is not unique, and even a successful "notice and takedown" is only a partial victory. This is because Section 512 imposes no obligation on the service provider to prevent further infringements of the same copyrighted work. That was the experience of DGA Director Member Penelope Spheeris, who owns the copyright to her independent documentaries *The Decline of Western Civilization*.

Penelope's classic project was shot in the early 1980s and late 1990s, and over the years her documentaries have gained a cult status. In recent years, she has found her work all over the

Internet, streaming on sites like YouTube and with pirated copies on sites like eBay. 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 and well-established sites with the resources to delay, were slow to comply and respond. Some sites even used threats to keep her from pursuing them. Penelope's conclusion, though she has maintained her in-house effort, is that for an independent rights holder, trying to employ the notice and takedown procedure to stop infringement "is like putting out a forest fire with your bare feet." And 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.

II. 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.

Service providers today also have far greater technological capabilities, including the ability to identify works through techniques such as fingerprinting or watermarking. Those technologies should be utilized not simply to take down copyrighted motion pictures upon receipt of a Section 512 notice, but to ensure that once illegal motion pictures are identified, they are kept down. It is essential that such protection be offered to all rights holders equally, and that service providers be given an incentive to provide effective protections and tools to independent directors who are copyright holders. We hope an updated Section 512 will do just that.

III. Conclusion

The Directors Guild of America thanks the House Judiciary Committee for commencing this and other hearings in its ongoing review of U.S. Copyright Law. We appreciate the opportunity to add the voice and interests of the independent director and rights holder to this review.

We believe strongly that there are economic and cultural policy reasons to protect small and independent rights holders from digital theft. We are well aware that with the digital age comes a sea change of issues that impact the motion picture business. Our members have already shown themselves to be more than up for that challenge. And as the various stakeholders continue working together to engage and solve new challenges, the DGA and its members should

be at the table to share their concerns and experience as the economic engine underlying the motion picture industry. We believe this Committee, as this hearing underscores, has begun that effort and we welcome the role it will play. We look forward to working with you.

Sincerely,

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cc: Members, House Judiciary Subcommittee on
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