



**COMMENTS OF THE
DIRECTORS GUILD OF AMERICA**

**SUBMISSION TO THE REPUBLIC OF IRELAND
COPYRIGHT REVIEW COMMITTEE**

JULY 14, 2011

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The Directors Guild of America (DGA) appreciates the opportunity to submit these comments to the Republic of Ireland's Copyright Review Committee. The DGA has an interest in this proceeding for a number of reasons. First, the DGA is a global union, representing directors who reside and work both inside and outside the United States. Of the DGA's 14,500 members, the Guild is proud to have more than 500 members who reside and work in the Republic of Ireland and the United Kingdom, including some of the most acclaimed Irish film directors. These DGA members represent the largest concentration of members after Los Angeles and New York. Second, the issues surrounding the protection of intellectual property do not recognize geographic borders – both content and technology travel everywhere – nor do digital thieves. Third, this review asks specific questions regarding the U.S. system of fair use. The DGA's submission responds to this request by providing a creators' perspective of some of the same issues raised in the Motion Picture Association's submission. Fourth, the DGA has worked closely with its colleagues in the Republic of Ireland, specifically the Screen Directors Guild of Ireland, for many years. This submission underscores the DGA's support for their concerns and interests. Fifth, we welcome the chance to present U.S. creators' views since we are not able to meet directly with any of the distinguished members of the Review Committee.

The environment in which the film and television industry operates in the United States is unique. It is structured to account for specific realities, including: there is no direct government funding for the creation, production and distribution of these works; production of these works creates great financial risk and unpredictability for the producers, investors, and creative talent employed in the industry; production of these works requires a multiplicity of complex financing arrangements; and freelance employment is the norm throughout the entire production line. Underpinning this entire business model are the U.S. copyright laws, originally laid out in the Constitution in 1787, which protect intellectual property and those who create it. These laws have enabled our industry to grow into a multi-billion dollar global economic force, and have allowed other similarly innovative industries to blossom.

This submission addresses issues raised by the Review Committee regarding the relationship between the U.S. copyright regime and technological innovation. But first it lays out, from the creators' perspective, the reality of the U.S. film and television industry, and the importance of effective copyright laws to its success and continued vitality. We do so to underscore why, in the digital age, it is critical for governments to achieve the proper balance between the rights of content creators and the interests of others who wish to utilize those creations for their own purposes. We do not believe any government would want to

institute policies that encourage investments in technologies and services at the expense of markets for creative works or the incentive to make them.

COPYRIGHT AND CREATION

What Copyright Protects and Why It Is Important to Directors

A motion picture or television program generates revenue in every media and market in which it is exploited. The parties who finance and create content rely on “downstream” revenue from the exploitation of these works in secondary markets. Secondary markets encompass all exploitation after an initial theatrical release or telecast, including domestic and foreign distribution, DVD sales, broadcast, free cable and premium pay television, and, more recently “new media” distribution via the Internet, including “download to own”, “download to rent”, and paid streaming. Reliance on downstream revenue has never been more significant than it is today: 75% of a motion picture’s total revenue and more than 50% of a scripted television program’s total revenue come from secondary markets. While most people outside the entertainment industry assume widely reported weekend box office figures represent the lion’s share of a film’s revenue, in reality, the success of the industry is not determined at the box office, but in consumers’ homes.

These secondary markets – which represent the bulk of the industry’s earnings – are the very markets that are most vulnerable to digital theft, despite the changing nature of the release and exploitation windows. Although Internet theft can damage the box office receipts for a theatrical film, it devastates secondary market revenues that make a film or television series successful and profitable over time. As a result, decreased revenues from secondary markets make financiers reluctant to invest in new content, resulting in a decline in the quantity, quality, and creativity of new productions. More importantly to DGA’s members, secondary market revenues also directly fund their “residual” compensation and pension and health care plans. This is true for DGA members residing in both the U.S. and the Republic of Ireland.

Residual compensation is a unique and critical feature of our industry. It is based on the intermittent and freelance nature of employment in the film and television industry, and on the essential contributions our members make to finished works. In many instances, Directors and others receive a direct share of the revenue their work generates, often long after the initial release of a film or television program. These residuals carry them between jobs and are a critical income source. In 2010, the DGA collected and distributed nearly \$300 million in residual compensation. In 2009, DGA members derived 19% of their total compensation from residual compensation. An important and growing source of residual compensation for our members is from the re-use of content on the Internet, including via streaming, on-line rentals, on-line purchases, clip licensing, and other exploitation. Many innovative companies have emerged to provide lawful access to our members’ creative works and, in the process, those companies help to finance future productions.

Residual compensation also plays a significant role in funding the pension and health care plans that benefit all DGA members. These plans, part of our industry's long-established and collectively-bargained agreements, provide a guaranteed safety net for our members that is independent of and supplementary to any private or government benefits. In 2009, residuals derived from the licensing of feature films and television programs to supplemental markets funded 71% of the DGA's Basic Pension Plan.

The Role of Copyright

U.S. copyright laws exist "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". (United States Constitution, Article 1, Section 8, Clause 8). They accomplish this by establishing legally protected markets for creative works of all kinds. The motion picture and television industry is entirely predicated on the exploitation of creative works, which is the essence of copyright. U.S. copyright law creates financial incentives for investment in original works, and encourages artistic innovation by protecting creators' economic rights.

The debate over the level of protection that copyright law should provide in the modern age is not a theoretical one for the DGA or its members. Effective enforcement of strong copyright laws is the engine that has driven the U.S. entertainment industry's growth over the past 75 years. By contrast, irregular or incomplete enforcement encourages conduct that undermines innovation and growth. Internet theft provides a clear example of this phenomenon. For the past decade, law enforcement authorities have had difficulty enforcing copyrights on the Internet. As a result, recent figures from Envisional, an independent research organization, show that nearly 24% of global Internet traffic is now copyright infringing. This infringement undermines the development of new content and the high-risk innovation for which the U.S. entertainment industry is known.

The professional content created by our members is one of the primary forces sending people to the Internet *en masse*. It is no surprise that many online businesses, dependent on customers' mouse clicks for their own revenue, attempt to benefit by offering that content without paying for it. However, strong copyright laws and effective enforcement are necessary to ensure the film and television industry will continue producing high-quality, innovative programming into the foreseeable future.

FAIR USE

The Review Committee seeks comments on the fair use doctrine, its effect on technological innovation within the U.S., and whether a similar doctrine would be appropriate in the Republic of Ireland. Because our members must often cope with the parameters and implications of fair use, the DGA is in a unique position to comment on this issue. To determine to what extent the fair use doctrine has affected U.S. innovation, it is important first to understand the limited scope of the doctrine under U.S. copyright law.

The fair use doctrine provides only a narrow affirmative defense to copyright infringement, and applies most frequently to small samples of creative work used for commentary, education, or parody. The applicability of the defense is determined by statute and, more importantly, by over 170 years of legal precedent. Whether any particular infringement is protected as a “fair use” is determined by a fact-intensive, case-by-case analysis of the infringement, based on four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Fair use developed as part of a broader copyright framework, and its effectiveness as a legal doctrine cannot be divorced from the entirety of U.S. copyright law. To the extent technological innovation has blossomed under the U.S. copyright regime, all aspects of U.S. copyright law, including substantial statutory damages for copyright infringement, the anti-circumvention provisions of the Digital Millennium Copyright Act, copyright term extension, domain seizures, and recent judicial decisions regarding peer-to-peer file-sharing networks, have contributed to it. One simply cannot examine the alleged link between fair use and technological innovation without viewing that doctrine in the broader context of U.S. copyright law. Moreover, one cannot disregard the other hospitable factors that have influenced technology growth in the U.S., including universities with the willingness and ability to provide start-up money and resources, sophisticated and tech-savvy venture capital, access to highly trained and educated individuals, and a high-risk, high-reward U.S. business environment.

Artists rely on fair use, and the free and open exchange of ideas that is fostered by it, to create original works. Directors often speak about films and colleagues who have influenced and inspired their work. But to be inspired by an idea, vision, or technique is fundamentally different from assuming a wholesale right to commercial use of another’s artistic work. U.S. filmmakers know they can rely on well-established a legal framework, including voluminous case law precedents, for guidance regarding the fair use of copyrighted works. These guidelines are part and parcel of the U.S. copyright system, and ensure the fair use doctrine will not be abused or stretched to extremes that are not supported by case law. No similar protection would exist for Irish filmmakers under a fair use regime because a similar legal context is absent.

The fair use doctrine does not explicitly account for technological innovation, and the purpose of the fair use doctrine is not to promote any particular type of technological innovation. For example, the fair use doctrine has been successfully applied in many cases that do not involve any new form of technology, and it has been similarly rejected as a defense in cases that do involve new technology. In either instance, courts are focused solely on the well-established factors that determine fair use and which have governed fair use case law for more than 170 years.

INNOVATION

The Review Committee also seeks comments on areas of existing Irish law that are perceived to create barriers to innovation. While some interested parties have argued that copyright law itself presents a barrier to technological innovation, the DGA rejects this argument.

Some advocates of limited copyright law have presented a false choice to legislators. They suggest that governments must choose between encouraging “innovation” on the one hand, and encouraging “creative works” on the other. This alleged trade-off is not grounded in reality because technological innovation is not the sole purview of any one industry. The film and television industry is among the most technologically innovative in the world; in fact, it represents the very intersection of creativity and technology. As a result, governments need not choose between encouraging “innovation” and encouraging “creative works”. They need only determine how to encourage and balance investments in both.

Technological innovation within the film and television industry is vast and influential. Many modern technologies — including photo, video, editing, audio, special effects, and animation technology — were invented or inspired by filmmakers striving to bring their visions to the screen. Our members are in the business of using technology to enhance their storytelling. For example, James Cameron spent years developing the technologies required to realize his vision for *Avatar*. The efforts of Cameron and his collaborators resulted in a number of groundbreaking, state-of-the-art technologies, such as specialized cameras, 3-D equipment, and advanced performance-capture techniques. Over time, technologies developed by or for our industry become less expensive and more accessible to the general public.

In fact, innovative technology and content developed by the film and television industry is integral to the success of many Internet websites. Popular “mash-ups” depend on professional studio footage, fan-fiction needs film storylines, and news, gossip, and blog sites demand an entertainment industry to follow and discuss. YouTube relies on amateur videographers who shoot their films, edit their footage, write their music and mix their scores using industry technologies and techniques. Across the globe, amateur animators utilize programs and technologies that were developed for and tested by the film and television industry, and amateur musicians record, edit, and mix compositions using software and tools also originally developed for film and television scores. Specialized content delivery technologies were also inspired or developed by the film and television industries. Few industries, if any, have been the source of artistic and technological innovations that have had such wide-reaching impact.

The question of what incentives spark innovation is a legitimate one that deserves consideration and action. In the case of the film and television industry, strong copyright laws have encouraged both entrepreneurial innovation and creative works. But they’re not alone. Businesses that lawfully provide copyrighted content via the Internet, such as Slingshot, Roku, AppleTV and Ultraviolet, rely on copyright laws to ensure their service is not undermined by illegal streaming and file-sharing services. Google, Amazon, Microsoft,

Yahoo, and other technology and Internet companies depend on intellectual property laws to protect their patents and exploit their innovations, and many high-tech software and hardware developers would cease operating absent strong copyright protections. In the United States, robust and effective copyright laws are not an impediment to technological innovation – they are the source of it.

CONCLUSION

The creation of films and television programs would not occur without the personal investment of time, financial risk, and – most importantly – the creativity, talent, and skill of our members. Like all creative endeavors, success is hard to achieve and fragile to maintain.

Copyright enables directors to make motion pictures and television programs they hope the public will value and the marketplace will reward. Thanks to the protections afforded by copyright law and the marketplace it governs, producers and financiers are willing to risk massive investments in the creation and production of motion pictures and television programs, and thereby into our intellectual and cultural enrichment. Those investments have made motion pictures and television programs perhaps the most important — and best known — art form of the last century. The films and television programs that exist thanks to U.S. copyright law, including the carefully circumscribed “fair use” doctrine, are irrefutable proof of both its profound importance and its success in the United States.