MILLENNIUM MEDIA

31 March 2020

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Thom Tillis
Chairman, Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Chris Coons
Ranking Member, Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Graham, Chairman Tillis, and Ranking Member Coons:

I want to thank you for your March 17 letter containing additional questions for the record related to the March 10 Subcommittee on Intellectual Property hearing entitled *Copyright Law in Foreign Jurisdictions: How are other countries handling digital piracy?*

I have done my best to answer your questions, recognizing that some of them assume a deeper knowledge of the intricacies of copyright law than I might offer as a film producer. However, I do know the effect of our current laws on the health of my business and those who make their living in it, and I can certainly speak to that.

Following are my answers to questions from both Senator Coons and Senator Tillis. I look forward to remaining engaged with this Committee as the hearings examining the Digital Millennium Copyright Act continue.

In the meantime, I wish you all the best of health, and I thank you for helping to steer our country through this incredibly difficult time.

Best,

Jonathan Yunger
Co-President

6423 Wilshire Blvd. Los Angeles, California 90048
Tel: (310) 388 - 6900 Fax: (310) 388 - 6901

QUESTION FROM SENATOR TILLIS

1. *Many countries have systems different from a U.S.-style notice-and-takedown regime – with different burdens and liabilities for service providers. Which tools used by foreign jurisdictions do you think could improve our system for curbing online piracy?*

When the DMCA was written in 1998, Google was in beta; Facebook, Instagram, and YouTube did not exist. I applaud those Members who wrote that law; they were truly looking into a crystal ball.

There was a credible concern at that time that that *any* form of restriction or regulation would risk constraining this fledgling industry. So, through Section 512 of the DMCA, internet platforms received broad protections against liability from copyright infringement stemming from their users' actions. But in the intervening years, the growth of these platforms and technology advances have left them far better equipped to deal with the abuses of their platforms.

Yet, at the same time, courts have watered down the protections for creatives that were built in to the DMCA, leaving the platforms with even less incentive to use their economic and technological resources to deal effectively with piracy on their platforms. As a result, the DMCA leaves creatives with little more than a notice-and-takedown system that is neither effective nor what Congress intended.

The notion that platforms would be required to remove infringing content only when notified by the copyright owner with a "takedown notice" is a web 1.0 notion, crafted when infringement was infinitesimally small compared to the scale we see today. Infringement is now so commonplace and so massive in scale that consumers around the globe have virtually instantaneous access to any film or television series ever made, for free, without the copyright holder's permission. And no takedown notice is permanent or comprehensive; as soon as one upload or link is taken down, another pops up – all in a maddening version of "Whack-a-Mole."

The DMCA was designed to promote growth, while also encouraging platforms to act responsibly in addressing abusive conduct. But instead, companies built entire businesses on the back of infringement using these safe harbors – most notably YouTube, now owned by Google's parent company, Alphabet.

This legal structure has allowed these companies to grow into the largest corporations in the world as the creative industries suffer. To give you a sense of the scale of infringement, our industry sends over 900 million takedown notices each year to Google and YouTube *alone*.

A study released in June by the U.S. Chamber's Global Innovation Policy Center estimated that more than 80% of piracy is attributable to streaming. Using macroeconomic modeling of digital piracy, they estimated that the global piracy ecosystem costs the U.S. economy at least $29.2 billion in lost revenue each year.

This notice and takedown system is not working. While there are no silver bullets to curbing online piracy, I know from selling my films internationally that there are countries with tools that work much better than notice and takedown.

Today, 34 countries around the world, including 17 countries in the European Union, implement site blocking. This tool, which allows for no-fault injunctive relief aimed at blocking access to known, adjudicated pirate sites, is working effectively in Australia, Canada, and the UK, among other nations.

When site blocking was last proposed in the U.S. Congress in 2011, Silicon Valley said that it would break the internet and stifle free speech. No one knew that those huge internet companies would go on to use that excuse to fend off every proposal that would require them to take some responsibility.

But, now we know. So my first response is that our system for curbing online piracy would be significantly improved if it were to allow the kind of no-fault injunctive relief available in other countries. We have seen that when markets around the world implement no-fault injunctive relief, legitimate commerce is improved and piracy is reduced. In those countries with site blocking, I have seen first-hand that my partners are more willing to pay better license fees because they know that the risk of digital piracy has been reduced. In the United Kingdom, revenues have definitively gone up since site-blocking went into effect. I would like to see America equally committed to creating a healthier legitimate film and television marketplace.

The second thing that we could easily do in the United States is close the legal loophole that currently allows streaming – which accounts for the vast majority of piracy today – to be treated as a misdemeanor rather than a felony. This loophole was completely accidental. When the law was written, streaming did not exist. If we could make this adjustment to the law, it would effectively shut down a cottage criminal industry of websites, app developers, and set top box sellers in America who are profiting enormously from illegal streams of movies, television shows, and live events.

These streaming services are an existential threat to our industry. Both the Department of Justice and the Copyright Office have recognized this threat to creativity and the American economy and have supported this change to the law.

I look forward to working with the Committee toward a solution.

QUESTIONS FROM SENATOR COONS

1. *Several foreign jurisdictions rely on no-fault injunctive relief to compel online providers to block access to websites hosting infringing content, subject to valid process. Could the United States implement a similar framework while providing adequate due process protections and without impinging on free speech rights? Why or why not?*

I am not an attorney, but I feel strongly that the United States, the beacon of freedom and opportunity for the entire world, can find a site blocking solution similar to one that we see being used effectively in over 34 countries, and do so consistent with free speech and due process. Many of these countries are in the European Union. Most are democracies. Several are among our closest allies, including Australia, Canada, and the UK.

It is my understanding that site-blocking laws require copyright holders to take their case to a court of law and prove that the website is a clearly illegal copyright infringing site before any blocking takes

place. I honestly do not understand how that kind of remedy, based on that kind of due process could ever harm free speech, unless someone is referring to the "speech" of a pirate site operator in Eastern Europe distributing our works for "free." But that is not the kind of speech protected by the First Amendment.

And unfortunately, that kind of activity directly and negatively affects my ability and the ability of every other member of the independent film industry to engage in the expressive activities that *are* protected by the First Amendment. I see no reason why, with hundreds of years of experience in protecting the due process rights of its citizens, the United States cannot protect the rights of creatives through effective remedies like site blocking while ensuring continued due process protections.

2. *Critics contend that the EU Copyright Directive will require filtering algorithms that cannot distinguish between infringing material and content that is lawful based on fair-use. Do you agree with those concerns, and do you think they could be mitigated?*

I have great respect for fair use and the right to use content for parody or criticism. Like many creatives, I depend on reasonable interpretations of fair use. However, in the context of these piracy debates, I have grown tired of arguments that fair use is an excuse for piracy. It is a matter of scope and scale. It is conceivable that some fair use situations *may* be impacted by filtering technology, and if that is so, they should be fixed. But we also know that filtering can be effective against the *billions* of infringements that occur every year.

By Google's own admission, they receive 900 million takedown requests from copyright holders *each year*. By contrast, how many instances of erroneous takedown notices could there possibly be for fair uses? I'm sure they exist, but my understanding is that they are an incredibly small proportion of the total number.

We must remember that fair uses are not possible without the original content, without movies like the ones that I make. And, if we do not protect that original content from the wholesale infringement on platforms like YouTube, fair uses will not exist either. Of course, there is a way with proper guidelines to implement the filtering required by the Copyright Directive without adversely impacting fair use. That should be the focus.

3. *Critics also warn that the EU Copyright Directive will lead to blocking legal content and chilling free speech. What is your perspective? Would you support a less aggressive provision requiring service providers to ensure that once infringing content has been removed pursuant to a notice-and-takedown procedure, the same user cannot repost the same content on any platform controlled by that provider?*

I would challenge these critics to provide specific, real-world examples of how speech is being chilled, and to identify what sort of legal content they believe is being blocked by the responsible use of filtering. Without those facts, these claims feel to me like the usual straw-man arguments that Tech Exceptionalists use to defend business models that rely upon copyright infringement and lax regulations.

Silicon Valley is constantly warning lawmakers that *any* sort of regulation will break the internet or stifle innovation and free speech. But from where I sit, the largest internet platforms have already done a pretty good job of breaking the internet. And, why would I want to stifle free speech? My business relies upon free speech. I simply want a technological solution to the global piracy ecosystem that steals billions of dollars from hardworking Americans every year. The U.S. Chamber reported in 2019 that piracy costs the American economy at least $29.2 billion each year.

My concern with any proposal for a less aggressive provision is that it fails to address the "whack-a-mole" problem of the same content being repeatedly posted to the same site and would allow for sophisticated pirates to find ways around the system built to exclude them. YouTube, for instance, could easily keep a user who has uploaded an infringing piece of content from uploading that same content again from the same account. However, it would be a trivial matter for the same user to create a new account and upload the content anew.

While I agree that a user who uploads infringing content to one platform should not be allowed to upload the same content to other platforms controlled by the provider, it seems to me that an effective solution would be for YouTube and others to not allow uploads of content that have already been flagged as infringing, regardless of who the uploader is. For instance, with my content, I know I am the only copyright holder. If I notify YouTube that my films should not be on their platform, they should be able to make sure that no user can upload my films. And, as you suggest, that should apply across the platforms controlled by Google.

4. *You testified about the pre-release theft of the Expendables 3 film and the apprehension of the pirate by law enforcement in the United Kingdom. What can we do to strengthen copyright law enforcement efforts in the United States?*

From my experience, the United Kingdom has the model of a specialized enforcement organization with strong and consistent government support. Its Police Intellectual Property Crime Unit is dedicated to finding criminals who traffic in IP infringement and arresting them.

The U.S. has dozens of enforcement agencies with officers around the world. If someone were importing pirated DVDs into the port of Long Beach, they would be stopped, arrested, and those DVDs would be destroyed. One method to stop overseas digital piracy from being accessible to the American people is site-blocking, a solution that is working in 34 countries internationally.

There are dozens, if not hundreds, of Americans who have set up and are making money from homemade streaming sites or who are selling homemade piracy devices and apps that rely upon streaming piracy sites to beam movies and live television into homes around the country, sometimes for free and frequently for a subscription cost (with all those subscription revenues going to the criminals).

Yet the Department of Justice is currently unable to effectively pursue and prosecute some of these more egregious domestic cases of criminal copyright infringement. Their hands are tied because these criminal operations rely upon streaming technologies, which are treated as misdemeanors under current law. When the laws were written over 20 years ago, lawmakers could not realistically

have foreseen technology beyond downloading, (which is rightfully a felony) nor could they have imagined the landscape today in which the vast majority of piracy is transmitted through streaming.

We must change existing law to create a more powerful deterrent for Americans to engage in streaming piracy, and to allow the DoJ to prosecute these criminals who are engaged in massive levels of infringement with the same felony penalties that apply to illegal downloading and distribution.