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March 25, 2011

Office of the Assistant Attorney General
Antitrust Division
Department of Justice
Main Justice Building
Room 3109
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Producers Guild of America Business Review Letter Request

To the Assistant Attorney General:

We are writing on behalf of our client, the Producers Guild of America, to request a business review letter with respect to the proposed use of the "p.g.a" certification mark owned by the Producers Guild of America ("PGA"). The "p.g.a" certification mark has been approved for registration by the United States Patent and Trademark Office subject only to proof of use in commerce. (A true and correct copy of the USPTO Web site records reflecting the status and ownership of the "p.g.a" certification mark is annexed as Exhibit A.) Because so many persons now receive producer credits for so many reasons, even cinephiles often find it impossible to determine which person(s) performed the functions of a producer with respect to a given motion picture. The use of the PGA's certification mark would make the persons who truly performed a producer's duties with respect to a given movie easily identifiable.

Financiers, actors, lawyers, and others have long demanded a "producer" credit in exchange for their help making motion pictures, both in the United States and abroad. Their contributions, although valuable, do not merit credit for producing those works. For that reason, the PGA proposes to allow any person -- whether member or non-member -- to use the "p.g.a" certification mark with respect to his or her involvement in a given cinematic production if the

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PGA has certified that he or she, in fact, substantially performed such function with respect to such production. Notwithstanding that the PGA (with respect to its annual awards) and the Academy of Motion Picture Arts and Sciences (with respect to its annual awards) have for some time determined which persons receiving producer credits are eligible for their awards as a "producer," certain broadcast entities (specifically Paramount Studios and NBC Universal) have questioned whether the use of the "p.g.a" certification mark as described above would cause anti-trust concerns and, in the case of Paramount, has stated that it will not permit the use of the certification mark absent the PGA's receipt of a business review letter.

The Producers Guild

The Producers Guild of America is a professional trade organization representing producers and members of the producing team in film, television and new media. Founded in 1950 as the Screen Producers Guild, it merged with the Television Producers Guild in 1960 and assumed its current name. In 2001, the Producers Guild of America again merged, this time with the American Association of Producers ("AAP"), with all AAP members becoming members of the Producers Guild. It currently has approximately 4,500 members, including Brian Grazer, Norman Lear, Kathleen Kennedy, Jerry Bruckheimer, Lorne Michaels, George Lucas, Hawk Koch, Judd Apatow, Laura Ziskin, Richard D. Zanuck, Gale Ann Hurd and Scott Rudin, among others. One of the important, historic goals of the PGA has been to establish standards for producers' job definitions and qualifications for producing credits. The PGA is, however, stymied in its efforts to achieve that objective. The PGA is not a union and, therefore, has no collective bargaining power vis-à-vis studios and distributors who assign producing credits. Because studios and distributors control the producing credit, that credit is frequently bartered for outside considerations, such as the involvement of a major star or financing for a film. By way of example, 11 persons received some form of producer credit for *The King's Speech*, which won the Best Picture "Oscar" from the Academy of Motion Picture Arts & Sciences last month. Some had no creative involvement whatever in the film. To be sure, casting and financing are important aspects of a producer's job duties, but a producer's job duties vastly exceed those realms. (A true and correct copy of the PGA's job description for a "Produced By" credit is annexed as Exhibit B.)

Need for Certification Mark

Because so many persons are credited as producers for many reasons, some having little to do with the critical functions of a producer, even well-informed consumers can watch a sequence of producing credits without discerning which persons have actually performed the majority of the work, and which persons received credit based solely on other considerations. The use of the PGA's certification mark would bring much-needed clarity to this area. Its use would be authorized on a picture-by-picture basis. The mark would appear in the credits following a credited producer's name. The mark would signify that as to a particular motion picture, the persons whose names are followed by the mark performed a majority of the producing duties. The use of the mark would be purely voluntary. Its use would have to be requested by the producer and applied to the credits by the studio, distributor or copyright holder.

PGA producer credit determinations are already in limited use in the entertainment industry. Since 2006, the Academy of Motion Picture Arts and Sciences has relied upon the PGA's producer credit determinations to decide which persons credited as a producer of a given motion picture are eligible to receive an "Oscar" in the event that the motion picture wins the Academy Award of Merit as a "Best Picture." Further, the Hollywood Foreign Press Association uses the PGA producer credit determinations in deciding eligibility for the Golden Globe Awards, and the British Academy of Film and Television Awards does the same with respect to the BAFTAs.

Determination of Producer Credits

Eligibility for use of the "p.g.a" certification mark is not restricted to PGA members. As explained in the 2011 Rules for Eligibility—Theatrical Motion Pictures (the "Eligibility Rules"), a true and correct copy of which is annexed as Exhibit C, anyone who has, in fact, substantially performed the role of a producer with respect to a given work is potentially eligible to use the certification mark. As reflected in Section A(2) of the Eligibility Rules, every person who has been contractually awarded a "Produced By" or "Producer" credit for a theatrical motion picture may apply to use the certification mark. Membership in the PGA is not a requirement of eligibility. *Id.*

The standards for the determining entitlement to use the certification mark are enumerated in Section B of the Eligibility Rules, which set forth an extensive list of metrics used to measure a person's performance of the duties of a producer.

The process of determining eligibility to use the certification mark begins with a motion picture's production company. As reflected in Section C of the Eligibility Rules, the production company must choose to notify the PGA of the identities of persons contractually granted the right to a "Produced By" or "Producer" credit. It must then identify the key creative participants and department heads involved with the motion picture. Upon receipt of a Notice of Producing Credits from the production company, the PGA asks the persons potentially eligible to use the certification mark whether they in fact wish to use it in conjunction with their credits on the motion picture. Persons who desire to use the mark submit a "Producers Mark Eligibility Form" to the PGA Administrator. The PGA then sends a written notice of Available Arbiters to all producers who request permission to use the mark.

Importantly, the Arbiters need *not* be members of the PGA and producers seeking PGA certification have the right to strike as many potential arbiters as they like. *See* Eligibility Rules, § C(4). Arbitrations are conducted by two- or three-person panels comprised of persons each having at least two "Produced By" credits.

For purposes of the arbitration, the PGA Administrator contacts creative participants and department heads (*e.g.*, writer, director, casting director, unit production manager, production designer, cinematographer, post-production supervisor, etc.) involved in the motion picture to secure confidential information concerning the involvement of each of the credited producers. To ensure their honesty and candor, the PGA holds confidential all information provided to it. *See* Eligibility Rules, § D(2). Of course, the producers are also asked to evaluate their own contributions and complete a comprehensive self-evaluation of their level of involvement in each

of the functions associated with the duties of a producer. A true and correct copy of a self-evaluation form is annexed as Exhibit D.

The Arbitration Panel reviews both the self-evaluation forms provided by the credited producers and the information gathered by the PGA Administrator from the key creative participants and department heads responsible for making the motion picture. The producers under evaluation are also permitted to submit any additional evidence they want for consideration by the Arbitration Panel. After considering all the evidence in light of the Eligibility Rules, the Arbitration Panel renders a decision concerning the eligibility of each credited producer to use the certification mark next to his or her name in the credits for the motion picture. Persons disappointed by the decision of the Arbitration Panel have a right of appeal to an Appeal Panel as reflected in Eligibility Rules, Section E.

That a person is not recognized as a producer with respect to one film has no bearing on whether that person will be recognized as a producer of another film. For example, Paul Haggis was one of only two persons recognized as a producer of *Crash* (the 2005 Academy Award Best Picture winner), even though six persons were credited as producers. One year earlier, however, Mr. Haggis was the only one of four credited producers determined not to be entitled to recognition as a producer of *Million Dollar Baby*, the 2004 Academy Award Best Picture winner. (The Guild determined that Mr. Haggis served primarily as a screenwriter and not a producer of that film.)

Legal Analysis

The proposed use of the certification mark does not raise any concerns under the antitrust laws. A violation of Section 1 of the Sherman Act requires, inter alia, an unreasonable restraint of trade. See, e.g., *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687-92 (1978); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). A violation of Section 2 of the Sherman Act requires, inter alia, monopoly power (or a dangerous probability of success in achieving monopoly power) acquired, enhanced, or maintained by anticompetitive conduct. See, e.g., *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993). The use of the mark does not constitute an unreasonable restraint of trade or anticompetitive conduct. The PGA is not a competitor of the studios, distributors, and copyright holders, and the PGA does not have any collective bargaining power vis-à-vis the studios and distributors. The use of the mark will be voluntary. No producer will be required to request a mark, and no studio, distributor, or copyright holder will be required to apply the mark to the credits of a picture. The use of the mark will not be exclusionary or exclusive. On a picture-by-picture basis, the producers will be allowed to request the mark, and the studios, distributors, and copyright holders will be allowed to apply the mark. Other organizations will be free to develop different marks, which the producers will be free to request, and the studios, distributors, and copyright holders will be free to apply, as well. The use of the mark is not critical to the commercial success of the producers, studios, distributors, or copyright holders. The use of the mark will not raise price, reduce output, reduce quality, limit choice, create, maintain, or enhance market power, or otherwise unreasonably restrain trade or harm competition. To the contrary, the use of the mark will have

procompetitive benefits. It will provide added information and clarity to movie watchers and other consumers that are much needed but not currently available.

Conclusion

Based on the foregoing, the Producers Guild of America respectfully requests that the Antitrust Division advise it of its present enforcement intention with respect to the voluntary use of the PGA's certification mark as described above. Please contact the undersigned to request any further information or documentation.

Very truly yours,

A handwritten signature in black ink, appearing to read 'D. Quinto', with a stylized flourish at the end.

David W. Quinto

DWQ

cc: Vance Van Petten, Executive Director, Producers Guild of America (with enclosures)
Stephen Koppekin, Esq., Executive Vice President of Industrial Relations, Paramount Studios (with enclosures)

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