



The Register of Copyrights of the United States of America  
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

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Via Electronic Submission

Katherine K. Vidal  
Under Secretary of Commerce for Intellectual Property  
and Director of the United States Patent and Trademark Office  
U.S. Patent and Trademark Office  
600 Dulany Street  
Alexandria, VA 22314

Re: Future Strategies in Anticounterfeiting and  
Antipiracy Request for Comment  
(Docket No. PTO-C-2023-0006)

Dear Director Vidal:

The U.S. Copyright Office submits this comment in response to the U.S. Patent and Trademark Office (USPTO) Request for Comment on Future Strategies in Anticounterfeiting and Antipiracy Policy. In its Request, USPTO seeks comments on “current anticounterfeiting and antipiracy strategies that have proven effective, as well as ideas for future strategies,”<sup>1</sup> to inform its work with the U.S. government and the private sector on these issues.

The Copyright Office is tasked by statute with administering the U.S. copyright registration system, as well as advising Congress, other agencies, and the federal judiciary on copyright and related matters.<sup>2</sup> USPTO’s Request includes a question about online enforcement activities in the copyright arena, specifically whether “online

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<sup>1</sup> U.S. Patent and Trademark Office, *Future Strategies in Anticounterfeiting and Antipiracy*, 88 Fed. Reg. 33,872, 33,872 (May 25, 2023) (“USPTO Request”), <https://www.govinfo.gov/content/pkg/FR-2023-05-25/pdf/2023-10770.pdf>.

<sup>2</sup> See 17 U.S.C. § 408 (copyright registration requires delivering deposit, application, and fee to Copyright Office), § 701(a) (all administrative functions and duties set out in Title 17 are the responsibility of the Register of Copyrights), § 701(b)(2) (the Register’s duties include providing “information and assistance” to federal agencies and courts on copyright and related matters).

enforcement strategies use existing copyright laws to combat online piracy.”<sup>3</sup> Accordingly, we write to describe our findings from past Copyright Office studies relating to internet piracy and enforcement, as well as to direct your attention to our triennial section 1201 rulemaking and the Copyright Claims Board.

### **A. Section 512 Report (2020)**

Question 11 of USPTO’s Request for Comment asks for a description of “how online enforcement activities intersect with ... copyright laws or procedures” and whether “online enforcement strategies use existing copyright laws to combat online piracy.”<sup>4</sup> In addition to the sections within Chapter 5 of Title 17 relating generally to copyright infringement and remedies, section 512 establishes a mechanism for copyright owners and online service providers (OSPs) to efficiently address online infringement.

In 2020, the Copyright Office published the report, *Section 512 of Title 17* (“Section 512 Report”), concluding a multi-year study on the safe harbor system established by the 1998 Digital Millennium Copyright Act (DMCA).<sup>5</sup> In enacting section 512, Congress sought to balance two goals. The first goal was providing legal certainty for OSPs against the threat of liability for copyright infringement as a result of their users’ activity. The other was protecting the legitimate interests of authors and other rightsholders against rampant, low-barrier online infringement. Congress balanced these goals through a system that protects OSPs against potential monetary liability if they meet certain conditions, while giving rightsholders an expeditious and out-of-court method for curbing infringement. For certain OSP activities, the conditions include taking down infringing content expeditiously upon adequate notification by a rightsholder.<sup>6</sup>

Through a review of a robust public record and a thorough analysis of case law and legislative history, the Copyright Office concluded that Congress’s original intended balance had been tilted askew, resulting in challenges for both OSPs and rightsholders in addressing internet piracy. While the Office made several legislative

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<sup>3</sup> USPTO Request at 33,874 (Question 11).

<sup>4</sup> *Id.*

<sup>5</sup> U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17, at 8 (2020) (“Section 512 Report”), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

<sup>6</sup> *See* 17 U.S.C. §§ 512(b), (c), (d).

recommendations in the Section 512 Report that could help to correct this imbalance,<sup>7</sup> it also identified some non-statutory approaches.

One of the key features of the safe harbor system was the provision of “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”<sup>8</sup> A number of study participants urged that the limitations of the current system should be addressed by the development of new approaches involving a broad-based, multi-stakeholder consensus.<sup>9</sup> While stakeholders have already engaged in a range of voluntary collaborations and adopted technical measures to supplement the enforcement framework, these have been criticized for various shortcomings, from limited participation to ultimate ineffectiveness.<sup>10</sup> The Copyright Office noted in the Section 512 Report that further discussion and collaboration would help ensure a reasonable, effective, and flexible approach for all involved.<sup>11</sup>

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<sup>7</sup> In a June 2020 letter responding to additional questions on our study posed by Senators Thom Tillis and Patrick Leahy, the Copyright Office highlighted the following legislative recommendations made in the Section 512 Report that would be especially beneficial: clarifying the distinction between “actual knowledge” and “red flag knowledge” under the section 512(c) or (d) safe harbors; clarifying the intent regarding the content requirements for a valid takedown notice, specifically the provisions concerning the submission of a representative list of infringed works and adequate identification of the location of infringing material; granting regulatory authority to the Copyright Office regarding standards for designated DMCA agents; reforming section 512(f)’s penalties for knowing misrepresentation in takedown notices and counter-notices; and considering a more flexible approach for the window of time in which content remains down following receipt of a counter-notice. Letter from Maria Strong, Acting Register of Copyrights & Director, U.S. Copyright Office, to Sen. Thom Tillis and Sen. Patrick Leahy (June 29, 2020), [www.copyright.gov/laws/hearings/response-to-may-29-2020-letter.pdf](http://www.copyright.gov/laws/hearings/response-to-may-29-2020-letter.pdf).

<sup>8</sup> H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.).

<sup>9</sup> SECTION 512 REPORT at 66–67. Since the enactment of section 512, stakeholders have engaged in various efforts to address online piracy, especially in response to the growth of the internet. For example, stakeholders have developed a range of voluntary initiatives to address online infringement, from best practices to formal, binding agreements. While these agreements do not have the force of law, they do emphasize the commitment to a shared goal in facilitating the notice-and-takedown-framework. In addition to cooperative agreements, some rightsholders and OSPs have launched private initiatives in the form of educational outreach or technological tools to address online piracy. *See id.* at 35–47.

<sup>10</sup> *Id.* at 67–68.

<sup>11</sup> *See id.* at 179–80.

## **B. Consultations on Voluntary Technical Measures and Study on Standard Technical Measures (2022)**

As part of their enforcement efforts, copyright owners often employ a variety of technical measures to address online piracy. The Copyright Office recently explored the range of available technical measures by initiating two separate projects at the request of Senators Thom Tillis and Patrick Leahy: a study on standard technical measures (STMs) as defined in section 512(i), and a series of consultations on voluntary technical measures used to identify or protect copyrighted works online.

The public comments submitted in response to the STM study<sup>12</sup> showed a lack of consensus on the value of STMs and disagreement about proposals for legislative or regulatory action.<sup>13</sup> The Copyright Office recommended in a December 2022 letter to Senators Leahy and Tillis that Congress amend section 512(i) to clarify that the terms “broad consensus” and “multi-industry” in the statute require substantial agreement but not unanimity, and only by those industries directly affected by an STM.<sup>14</sup> The Office also recommended that Congress clarify that a “broad consensus” of copyright owners and service providers can exist even if the technical measures were originally developed by a narrower subset of stakeholders or emerged from proprietary processes.<sup>15</sup>

The consultations on voluntary technical measures hosted by the Copyright Office similarly explored the role of consensus and collaboration as part of enforcement efforts against internet piracy. In 2022, the Office held two public plenary sessions, six moderated consultations, and six office-hour sessions with over 40 different stakeholders and received over 6,000 public comments.<sup>16</sup> In a December 2022 letter to Congress, the Office reported that the diversity of the online marketplace has generated

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<sup>12</sup> Comments submitted in response to the STM study are available at <https://www.regulations.gov/docket/COLC-2022-0002/comments>.

<sup>13</sup> Letter on Standard Technical Measures from Shira Perlmutter, Register of Copyrights & Director, U.S. Copyright Office, to Sen. Patrick Leahy, Chair, and Sen. Thom Tillis, Ranking Member, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary 1 (Dec. 20, 2022), <https://www.copyright.gov/policy/stm/usco-letter-on-standard-technical-measures.pdf>.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.*

<sup>16</sup> Plenary session videos and the public comments are available at <https://www.copyright.gov/policy/technical-measures/>.

a variety of technical measures with corresponding challenges and expectations, precluding a one-size-fits-all approach.<sup>17</sup>

Given this diversity, little consensus emerged during the consultations, although it was clear that resource-intensive technical measures remain a challenge for both rightsholders and service providers. While a variety of open-source, scalable, and free technical measures are widely available, some participants asserted that small service providers, including startups, may lack the capital to invest in more expensive technical measures and should not be held to the same expectations as larger, more established platforms.<sup>18</sup> Other participants countered that size and resources should not excuse a service provider from implementing effective technical measures if it distributes content to the public.<sup>19</sup>

Similarly, the topic of access generated diverging viewpoints, with some participants, particularly individual rightsholders, expressing frustration at not being party to agreements on particular technical measures.<sup>20</sup> Other participants cautioned against calls for increased access, expressing concern that intentional or unintentional misuse may occur if access is open to all.<sup>21</sup> The Office has continued to monitor these issues and plans future projects to facilitate stakeholder engagement.

### C. Section 1201

While many copyright owners use technical measures to protect their works online, their enforcement strategies must often address the circumvention of those measures. Section 1201 of title 17, enacted in 1998 as part of the DMCA, prohibits the circumvention of technological measures employed by or on behalf of copyright owners to protect access to their works (also known as “access controls”), as well as the trafficking in technology or services that facilitate such circumvention.<sup>22</sup> It also prohibits trafficking in technologies or services that facilitate circumvention of

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<sup>17</sup> Letter on Voluntary Technical Measures from Shira Perlmutter, Register of Copyrights & Director, U.S. Copyright Office, to Sen. Patrick Leahy, Chair, and Sen. Thom Tillis, Ranking Member, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary 9–10 (Dec. 20, 2022), <https://www.copyright.gov/policy/technical-measures/usco-letter-on-technical-measures-consultations-to-senate.pdf>.

<sup>18</sup> *Id.* at 6–7.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.* at 7–8.

<sup>21</sup> *Id.* at 8.

<sup>22</sup> 17 U.S.C. § 1201(a)(1), (2).

technological measures that protect the exclusive rights granted to copyright owners under title 17 (also known as “copy controls”).<sup>23</sup>

In addition, section 1201 establishes a triennial rulemaking process through which the Librarian of Congress, following a public proceeding conducted by the Register of Copyrights in consultation with the National Telecommunications and Information Administration of the Department of Commerce (NTIA), may grant limited exceptions to the bar on circumventing access controls.<sup>24</sup> In June 2023, the Copyright Office initiated the ninth such rulemaking proceeding, using a streamlined procedure for the renewal of exemptions that were granted during the eighth rulemaking.<sup>25</sup>

#### **D. Report on Copyright Small Claims and the Creation of the Copyright Claims Board (CCB)**

Enforcement is a challenge for many copyright owners due to the substantial time, money, and effort needed to bring a lawsuit. The prospect of a modest recovery outweighed by the litigation expense often dissuades copyright owners of works of relatively small economic value from pursuing actions in federal court. In a 2013 report prepared at the request of Congress, *Copyright Small Claims*, the Copyright Office studied the current system for resolving copyright disputes involving these kinds of claims and recommended that Congress create a streamlined, voluntary adjudication process to resolve such claims.<sup>26</sup>

Following that recommendation, Congress enacted the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020, which established a Copyright Claims Board (CCB) in the Copyright Office to hear copyright claims with damages that do not exceed at \$30,000.<sup>27</sup> As a voluntary alternative to federal court, CCB proceedings are designed to be accessible to anyone, with or without an attorney. Procedures are streamlined and do not require in-person appearances, thus requiring less money and time than federal lawsuits. The discovery process is much more limited, with limited

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<sup>23</sup> 17 U.S.C. § 1201(b).

<sup>24</sup> *Id.* § 1201(a)(1)(C)-(D).

<sup>25</sup> See U.C. Copyright Office, Ninth Triennial Section 1201 Proceeding, 2024 Cycle, <https://www.copyright.gov/1201/2024/>. Further details on our current and past Section 1201 rulemaking are posted at [www.copyright.gov/1201](http://www.copyright.gov/1201).

<sup>26</sup> U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS (2013), [www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf](http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf) (recommending that Congress create a streamlined, voluntary adjudication process in the Copyright Office to resolve copyright infringement claims that do not exceed \$30,000).

<sup>27</sup> See Copyright Alternative in Small-Claims Enforcement Act of 2020, Pub. L. No. 116-260, Div. Q, Title II, § 212, 134 Stat. 2176.

document production and no depositions. Only three types of claims can be brought before the CCB: claims of infringement of a copyright, claims seeking declarations that specific activities do not infringe copyright, and claims of misrepresentation in notices sent under the DMCA. The CCB has operated successfully for over a year<sup>28</sup> now and has received more than 500 claims.

### **E. Additional Studies on the Scope of Copyright Protection**

The Copyright Office has conducted a number of additional studies over the past decade looking at the scope of rights as well as exceptions and limitations. Some of the issues addressed may be relevant in identifying current and future antipiracy strategies, as asked in Question 11 of the Request for Comment, because they affect the framework on which stakeholders build their enforcement strategies.

To that end, we list below some of our other reports that identify issues regarding the creation, distribution, and use of copyrighted materials:

- *Section 108 of Title 17 (2017)*<sup>29</sup>
- *Section 1201 of Title 17 (2017)*<sup>30</sup>
- *Software-Enabled Consumer Products (2016)*<sup>31</sup>
- *The Making Available Right in the United States (2016)*<sup>32</sup>

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<sup>28</sup> U.S. Copyright Office, Newsnet, U.S. Copyright Office Celebrates First Year of the Copyright Claims Board (June 26, 2023), <https://www.copyright.gov/newsnet/2023/1009.html>. In its first year, the CCB received 485 claims, from forty-three states and twenty-four countries. Further information and resources, as well as the link to the eCCB case management system, are available on the CCB website at <https://www.ccb.gov/>.

<sup>29</sup> U.S. COPYRIGHT OFFICE, SECTION 108 OF TITLE 17 (2017), [www.copyright.gov/policy/section108/discussion-document.pdf](http://www.copyright.gov/policy/section108/discussion-document.pdf) (restating the Copyright Office’s longstanding belief that section 108 needs to be updated so that libraries, archives, and museums have a robust, comprehensible, and balanced set of exceptions in order to fulfill their missions).

<sup>30</sup> U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17 (2017), [www.copyright.gov/policy/1201/section-1201-full-report.pdf](http://www.copyright.gov/policy/1201/section-1201-full-report.pdf) (concluding that section 1201’s overall structure and scope remain sound while recommending certain legislative updates, including expanding existing exemptions for security and encryption research and adding new provisions to allow circumvention for other purposes, such as the use of assistive reading technologies and the repair of devices).

<sup>31</sup> U.S. COPYRIGHT OFFICE, SOFTWARE-ENABLED CONSUMER PRODUCTS (2016), [www.copyright.gov/policy/software/software-full-report.pdf](http://www.copyright.gov/policy/software/software-full-report.pdf) (addressing several different aspects of the embedded-software landscape, including issues regarding licensing, resale, repair and tinkering, security research, and interoperability and competition).

<sup>32</sup> U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES (2016), [www.copyright.gov/docs/making\\_available/making-available-right.pdf](http://www.copyright.gov/docs/making_available/making-available-right.pdf) (assessing the state of U.S. law recognizing and protecting copyright holders’ exclusive right of “making available”).

- *Copyright and the Music Marketplace* (2015)<sup>33</sup> (which led to passage of the Music Modernization Act (MMA) (2018))<sup>34</sup>

## Conclusion

The Copyright Office appreciates the opportunity to provide information about our law and policy work with relevance to antipiracy strategies. We hope it is helpful and would be pleased to assist the USPTO with any copyright issues that may arise as you move forward with this inquiry.

Sincerely,



Shira Perlmutter  
Register of Copyrights and Director,  
United States Copyright Office

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<sup>33</sup> U.S. COPYRIGHT OFFICE, *COPYRIGHT AND THE MUSIC MARKETPLACE* (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (making a number of recommendations that would bring both clarity and relief to songwriters, artists, publishers, record labels, and digital delivery services).

<sup>34</sup> Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115-264, 132 Stat. 3676.