



**BEFORE THE
U.S. PATENT AND TRADEMARK OFFICE**

**Study on Future Strategies in
Anticounterfeiting and Antipiracy
Docket No. 2023 - 10770**

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments to the U.S. Patent and Trademark Office (USPTO) in response to its May 25, 2023 [Notice of Inquiry \(NOI\) on Future Strategies in Anticounterfeiting and Antipiracy](#).

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 2 million individual creators and over 15,000 organization in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

Every Copyright Alliance member has a strong interest in effective antipiracy strategies to protect against the theft of copyrighted works in the digital age, and we welcome the opportunity to share insights into current and future antipiracy efforts. While the U.S. Copyright Office (USCO) is tasked by statute with “[a]dvis[ing] Congress on national and international issues

relating to copyright” and “[p]rovid[ing] information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright,” the USPTO also plays a vital role on copyright piracy-related issues.¹ For many years, the two offices have worked together harmoniously to help ensure the protection of America’s innovators, businesses, and creators. We continue to support and encourage coordination and cooperation between the two offices.

With that in mind, we submit the following comments to provide information on the evolution of piracy in recent years and to set forth ways to identify and develop future antipiracy strategies. While some questions are directed to counterfeiting and other trademark-specific issues, we will answer from the copyright/piracy perspective.

- 1. Please identify current anticounterfeiting and antipiracy strategies and any trends you see in how often these practices are guiding the public's plans for addressing these issues in the future.*

Copyright antipiracy strategies over the last twenty-five years have been largely based on the provisions of the Digital Millennium Copyright Act (DMCA), which amended U.S. copyright law in 1998 to address the relationship between copyright, new digital technologies, and the internet by adding several new sections to the Copyright Act, including sections 512, 1201, and 1202. Section 512 of the Copyright Act establishes a notice and takedown process that is intended to encourage copyright owners and online service providers (OSPs) to work together to fight piracy by enabling infringing material to be taken down expeditiously without the need for a court order. Section 512 also includes a “safe harbor” for OSPs that immunizes them from liability for the infringing acts of their users when an OSP takes down infringing material from its platform expeditiously and meets certain other requirements.² The DMCA also includes two other very important provisions: section 1201, which safeguards technological protection measures (TPMs) used in connection with the dissemination of copyrighted works, and section

¹ See 17 U.S.C. § 701(b)(1)-(2).

² 17 U.S.C. § 512(c).

1202, which guarantees the integrity of copyright management information (CMI) used to help copyright owners identify and protect their works against unauthorized access.³ We discuss these two sections more in response to Question 11.

At the outset, section 512 seemed to have achieved Congress's purpose, but court rulings and other unanticipated changes in the online environment have rendered it less effective, creating an ecosystem where ongoing mass piracy is an unfortunate and regular occurrence. In the quarter century since the DMCA was enacted, online infringement has increased exponentially and grown in sophistication, causing widespread harm to the economic and creative vibrancy of the copyright community. The number of takedown notices sent daily is staggering, and this number is steadily increasing.⁴ The Copyright Office's Section 512 Report recognizes that the massive amounts of notices sent by copyright owners represent a never-ending uphill battle against infringement and makes clear that a takedown does not mean infringing material *stays* down.⁵ It is abundantly clear that the DMCA's notice and takedown process is not working as intended.

In recent years, large-scale commercial piracy websites have come to enable the lion's share of infringement occurring online, and they present one of the most significant challenges to copyright owners enforcing their rights.⁶ These challenges stem from the fact that the notice and takedown system does not effectively address the whack-a-mole nature of online piracy and jurisdictional issues make it virtually impossible to hold foreign website operators accountable (which incentivizes bad actors to operate from overseas). While the Protecting Lawful Streaming Act (PLSA) was enacted in late 2020 to address streaming piracy through the creation of criminal penalties for certain large-scale commercial infringers, the PLSA's provisions have been rarely utilized by the Department of Justice.⁷ It's also unlikely the PLSA will be an effective deterrent

³ 17 U.S.C. § 1201-1202.

⁴ See generally Google Transparency Report, available at: <https://transparencyreport.google.com/copyright/overview?hl=en>.

⁵ See Section 512 Report, U.S. Copyright Office (May, 20202), available at: <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

⁶ Impacts of Digital Video Piracy on the U.S. Economy, GLOBAL INNOVATION POLICY CENTER (June 2019), available at: <https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf>.

⁷ See Kevin Madigan, *Protecting Lawful Streaming Act Signed Into Law: What You Need to Know*, COPYRIGHT

against foreign-based piracy sites, which increasingly comprise a significant portion of the piracy challenges faced by U.S. companies.

To address the harms that large-scale piracy sites inflict, most countries with developed copyright law systems have implemented some form of “site blocking,” through which copyright owners can seek “no-fault” injunctions that require internet service providers (ISPs) to suspend access to illicit websites. Countries around the world—including Australia, Denmark, Germany, India, Ireland, Israel, Italy, the Netherlands, Portugal, Sweden, and the United Kingdom—have implemented some form of site blocking and have recognized the benefits.⁸ While the United States is an outlier in that it has not yet implemented any site-blocking mechanisms, lawmakers have recently expressed interest in adopting provisions similar to those that have proven successful in a growing number of foreign jurisdictions. On July 13, 2023, a bipartisan group of Senators sent a letter to the U.S. Copyright Office asking it to “provide an update on any reports regarding the effectiveness of no-fault injunctive remedies in other countries.” The Copyright Alliance and our members support further exploration into the effectiveness of site-blocking mechanisms, and we stand ready to work with the USPTO, the Copyright Office, and lawmakers to ensure that the United States provides copyright owners the same tools to address large-scale commercial piracy that are available in most countries with developed copyright law regimes.

Compounding the weaknesses of the notice and takedown system and the rise in large-scale piracy is that fact that section 512’s effectiveness is limited by the misinterpretation of or lack of clarity in many provisions that have allowed online service providers to avoid taking meaningful actions to address piracy. One of the most glaring examples is the lack of any recognized standard technical measures (STMs) under section 512(i)(1)(B), which conditions eligibility for safe harbor protection on whether a service provider “accommodates and does not interfere with standard technical measures.”⁹ Those STMs are to be developed based on “a broad consensus of

ALLIANCE (Jan. 12, 2021), <https://copyrightalliance.org/protecting-lawful-streaming-act-signed/>.

⁸ Nigel Cory, *A Decade After SOPA/PIPA, It’s Time to Revisit Website Blocking*, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION (Jan. 26, 2022), <https://itif.org/publications/2022/01/26/decade-after-sopa-pipa-time-to-revisit-website-blocking/>.

⁹ 17 U.S.C. § 512(i)(1)(B).

copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.”¹⁰ The lack of implementation of STMs—which is a direct result of OSPs unwillingness to work with copyright owners to recognize or implement them—has effectively rendered section 512(i)(1)(B) useless. So, while section 512 remains a potentially workable legal framework to combat piracy, it has been ineffective, and it is evident that the statute is under strain and that additional stakeholder collaboration is needed for the statute to live up to its potential as imagined by Congress. Suggested reforms to section 512 are detailed in our response to Question 11.

Another significant challenge is that, although section 512(c) requires OSPs to remove content “expeditiously” upon receiving a takedown request, the statute does not set a floor for what constitutes “expeditious” and many OSPs will take hours or even days to remove an infringing piece of content on their platforms.¹¹ This is particularly problematic in the case of live, newly released, or otherwise time-sensitive content, where a pirated version of that live or time-sensitive content can often remain up on a platform for a long enough time period following the takedown notice that the pirated content is available during the period when the legitimate content’s value is highest (e.g., before the results of a live sporting match are known or a leaked movie or book is “spoiled”). Further, pirates use a range of technology to illegally livestream or share recordings of content, and as technology has improved, so has the ability to immediately provide pirated versions of time-sensitive content.

Finally, we support current legal trends in the United States and abroad that can reduce piracy by imposing transparency and “know your customer” (KYC) requirements on OSPs, and we recommend that these obligations be extended to any online intermediaries that facilitate the distribution and/or consumption of third-party digital goods. In June of 2023, the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers (INFORM Consumers) Act went into effect in the United States, requiring that online marketplaces collect, verify, and

¹⁰ 17 U.S.C. § 512(i)(2)(A).

¹¹ 17 U.S.C. § 512(c)(1)(A)(iii).

disclose information about their customers and suppliers.¹² The law was enacted to protect consumers against fraudulent activity in online marketplaces, and it creates a regulatory framework that requires ID verification, process transparency, active reporting and enforcement.¹³ In addition to platforms and online marketplaces, the obligations included in the INFORM Consumers Act should extend to information concerning domain name registrants (sometimes called WHOIS data). Such information should be verified by domain name registrars and resellers, and that information should be made readily available to consumers and rights holders.

Similar requirements of online intermediaries have been enacted in the European Union (EU) as part of the Digital Services Act (DSA), which in 2022 established a powerful transparency and accountability framework for online platforms.¹⁴ The DSA includes measures to counter illegal content online by allowing users to flag illegal content online and for platforms to cooperate with “trusted flaggers” to identify and remove illegal content.¹⁵ In addition to the DSA, the EU recently adopted the second Network and Information Security (NIS2) Directive, which aims to modernize and harmonize cybersecurity measures across Member States by expanding rules and regulations to new sectors and entities, including search engines and cloud computing services.¹⁶ NIS2 significantly expanded the types of organizations that fall within the scope of the law, and it imposes new security and incident reporting rules and establishes a stricter enforcement regime.¹⁷ Together, the DSA and NIS2 represent the EU’s proactive approach to confronting

¹² Serena Dibra & Dan Stark, *Fraud prevention through the INFORM Consumer Act: Continuous evolution of regulatory change*, THOMSON REUTERS (June 14, 2023), <https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/inform-act/>.

¹³ *Id.*

¹⁴ European Commission, *Questions and Answers: Digital Services Act* (April 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348.

¹⁵ *Id.*

¹⁶ European Commission, *Directive on measures for a high common level of cybersecurity across the Union (NIS2 Directive)* (Jan. 16, 2023), <https://digital-strategy.ec.europa.eu/en/policies/nis2-directive>.

¹⁷ Mark Young, Bart M.J. Szewczyk, Anna Oberschelp de Meneses and Aleksander Aleksiev, *New EU Cyber Law “NIS2” Enters Into Force*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=31ed168e-11ab-4056-864e-e86f830cba01>.

harmful fraudulent and infringing online activity, and we recommend that similar measures be explored for potential implementation in the U.S.

2. *Please identify the types of harms you have observed from sales of counterfeited and pirated goods.*

The widespread theft of copyrighted works online is a persistent and evolving problem affecting virtually all types of works and all types of copyright owners in the digital age, and it undermines the rights of creators, the value of copyright, and our creative economy. A report on the economic impact of copyright by the International Intellectual Property Alliance found that, in 2021, the core copyright industries contributed more than \$1.8 trillion to the U.S. gross domestic product (GDP) (accounting for 7.76% of the U.S. economy) and employed 9.6 million workers (or 4.88% of the workforce).¹⁸ In addition to growing at a rate more than three times that of the rest of the economy, the report notes that the core copyright industries: (1) make up an increasingly large percentage of value added to GDP; (2) create more and better paying jobs than other sectors of the U.S. economy; (3) grow faster than the rest of the U.S. economy; (4) contribute substantially to U.S. foreign sales and exports, outpacing many industry sectors; and (5) make significantly large contributions to what the [U.S. Bureau of Economic Analysis] defines as the digital economy, which does not even encompass the full scope of the copyright industries' digital activities.¹⁹

Copyright industries are an invaluable asset to the U.S. economy because the exclusive rights afforded by copyright incentivize investment in the creation and dissemination of new expressive works and allow copyright owners to recoup that investment. While the growth of the internet over the last twenty-five years has revolutionized the way that creative works are legally made available and reach their intended audience, it has also facilitated massive amounts of copyright

¹⁸ Robert Stoner & Jéssica Dutra, Copyright Industries in the U.S. Economy: The 2022 Report, INT'L INTELL. PROP. ALL. 8 (Dec. 2022), https://www.iipa.org/files/uploads/2022/12/IIPA-Report-2022_Interactive_12-12-2022-1.pdf.

¹⁹ *Id.* at 7.

infringement that harms creators, copyright owners, and consumers. Global online piracy of copyright protected works results in billions of dollars of economic losses each year, hundreds of thousands of lost jobs, and immeasurable harm to the safety of consumers through the spread of malware, phishing scams, and identity theft.²⁰ A recent study found that digital video piracy alone deprives the U.S. economy of a minimum of \$29.2 billion in reduced revenue each year.²¹ This type of piracy not only causes lost revenues to the U.S. creative sectors, it also results in losses to the U.S. economy of between 230,000 and 560,000 jobs and between \$47.5 billion and \$115.3 billion in reduced gross domestic product (GDP) each year.²² Piracy also poses a threat to investments in creativities by unjustly enriching bad actors who make no investment and take no risk, at the expense of the creators.

In a recent article outlining the effects of online piracy, Professor Michael Smith explains that digital piracy harms creators by reducing their ability to commercialize their creative efforts.²³ He points to a broad consensus in peer-reviewed academic literature that confirms “that online piracy does exactly what one would expect: it makes it harder for creators and rights owners to make a fair market return on their investments in content creation and dissemination.”²⁴ In addition to the harms caused to copyright owners, the article summarizes the harms caused to society by reducing creators’ economic incentives to invest in creative output. It explains that economic theory reinforces the Constitutional principle²⁵ that the public interest is promoted by ensuring creators can pursue their own private interests, and that reduced incentives “cause significant problems for both creators and the broader society that benefits from their talents.”²⁶ Finally, the article cites to significant empirical evidence in the academic literature that the losses

²⁰ See Impacts of Digital Video Piracy on the U.S. Economy, *supra* note 6.

²¹ *Id.*

²² *Id.* at 14.

²³ Michael D. Smith, *What the Online Piracy Data Tells Us About Copyright Policymaking*, HUDSON INSTITUTE (April 12, 2023), <https://www.hudson.org/intellectual-property/what-online-piracy-data-tells-us-about-copyright-policymaking>.

²⁴ *Id.*

²⁵ U.S. Const. art. I, § 8, cl. 8.

²⁶ Smith, *supra* note 23.

in revenues that result from online piracy has harmed consumers by reducing both the quantity and quality of creative output that would have occurred absent piracy.²⁷

- 3. Please indicate how consumers are educated about the harms and dangers that may result from the use and sale of counterfeited or pirated products.*

Piracy subsists in part because many consumers simply don't understand the "dos and don'ts" of accessing copyrighted works online. We firmly believe that online infringement and its related harms could be greatly reduced if consumers were better educated on the law, the harms caused when individuals flout the law, and the typical indicia of a suspect service that may be unlawfully disseminating copyrighted works. With respect to a site disseminating copyrighted works, consumers must be better informed about (i) who is providing the service disseminating copyrighted works, (ii) the provenance of those works, and (iii) whether they have the right to disseminate such works. Educating the public on the risks and harms associated with copyright infringement and the distribution of pirated works, as well as on who is "behind the screen" distributing those works, is critical to maintaining a vibrant creative ecosystem in which the rights and interests of all stakeholders are protected. Because not all intermediaries have adopted effective transparency and KYC polices, it can be difficult for the public to know who is "behind the screen." However, the problem could be significantly mitigated if the scope of the INFORM Consumers Act was expanded to cover more platforms, goods, and services, and by obligating domain name registrars and resellers to engage in KYC with respect to registrants and to publish or make information about registrants readily available.

Unfortunately, online copyright infringement is still considered by some to be a "victimless" crime. While nothing could be further from the truth, the harmful repercussions of intellectual property theft are often difficult for consumers to comprehend because of a lack of awareness of how creative industries operate and how they rely on copyright protection to recoup investments and fund future endeavors. When most people think of copyright, they conjure up images of Hollywood celebrities and large movie studios or record labels, but copyright protection is

²⁷ *Id.*

crucial to so many more organizations ranging from book, magazine, and newspaper publishers to software and video game companies, and the millions of individual authors, artists, creators, photographers, developers and other contributors throughout the United States who rely on adequate and effective protection of the creativities that are the result of their expertise and labor to pay their bills and put food on the table. Then there are the host of organizations we represent on copyright issues whose reliance on copyright law may not be as apparent—whether it’s a sports league that energizes fans across the country, or an innovative software development company that makes life easier for society.

In the film and television industries, the works that consumers stream at home or watch in the theater often incorporate a number of different copyrighted works and require the creative inputs of hundreds of different creative professionals. For example, a TV program is a copyrighted work in its own right, often owned by a TV production company, but that program also may be derived from a copyrighted script, book, or article that is owned by an independent writer. Songwriters, music publishers, and composers receive performance royalties for the music synched with a movie or TV program. These creators along with recording artists and record labels also receive performance royalties generated by music channels. And, of course, we cannot forget the hundreds of creative professionals working on the movie or TV program—directors, writers, actors, and composers often receive direct payments called residuals and/or participations, and below-the-line film crews composed of set designers, grips, costumers, and cameramen—who may receive contributions toward their pension and health care plans. By eroding legitimate markets for copyrighted works, piracy erodes opportunities for *all* creative professionals, regardless of whether they are copyright owners. Understanding how copyright supports livelihoods and creative endeavors, from the largest movie studio down to the individual artist, is imperative for consumers to truly appreciate the harms of piracy.

In addition to threats to the greater copyright community, consumers often fail to appreciate the risks to their own personal safety and privacy that come with consuming pirated content over the internet until it is too late. The Copyright Alliance, along with its members, engages in continual efforts to educate the public on the risks and harms associated with copyright infringement and consumption of pirated material. Available on the Copyright Alliance website are numerous

reports, articles, videos, blogs, studies and other resources intended to educate stakeholders and the public on copyright law, the operation of the copyright industries, and the harms associated with piracy.²⁸

Organizations like the Digital Citizens Alliance (DCA), which is a consumer-focused group dedicated to raising awareness about internet safety issues, regularly publish investigative reports and educational materials.²⁹ The DCA has conducted extensive studies on the security threats to consumers that accompany use of piratical apps and devices. According to a recent DCA report, of the millions of Americans who now conduct sensitive or confidential work from home, those who have piratical devices and apps in the home are three times more likely to report an issue with malware than those who didn't have such apps or devices in the home.³⁰ The report explains that the pandemic presented hackers with a "golden opportunity" to mine personal computers and devices for sensitive information and that most Americans are unaware that accessing pirated material or using illicit devices greatly increases their exposure to serious security risks.³¹

More work must be done by internet platforms and service providers who earn massive profits through online commerce and content delivery and whose networks are exploited by those who traffic in pirated works. While there are ongoing efforts to update the DMCA, educational campaigns intended for users of online services and platforms would help increase awareness of copyright law and the harms associated with piracy. The DMCA already includes a threshold requirement that OSPs inform and educate their users about repeat infringer policies, but it's unclear whether or to what extent OSPs actually inform their users about piracy and its consequences.³² We urge the USPTO to engage directly with OSPs to establish awareness campaigns directed to users of their services, but it is essential that educational materials be

²⁸ See generally, www.copyrightalliance.org.

²⁹ See generally, <https://www.digitalcitizensalliance.org/about/about-the-digital-citizens-alliance/>.

³⁰ COVID-19 Lockdown and Piracy: A Toxic Combination for Cybersecurity, Digital Citizens Alliance Research Finds, DIGITAL CITIZENS ALLIANCE (February 23, 2021); <https://www.digitalcitizensalliance.org/news/press-releases2021/covid-19-lockdown-and-piracy-a-toxic-combination-for-cybersecurity-digital-citizens-alliance-research-finds/>

³¹ *Id.*

³² 17 U.S.C. § 512(i)(1)(A).

developed with the assistance and approval of the copyright community. Educational campaigns will only be effective if they incorporate accurate information. As such, the development of materials and messaging, as well as the establishment of a plan for implementation of the campaign, must be done with the input and approval of all stakeholders.

In recognition of this enduring threat to global creative ecosystems and the public, the Copyright Alliance submitted comments to the USPTO in 2021 in support of the establishment of a national consumer awareness campaign in which stakeholders work together hand-in-hand with federal, state, and local governments to educate consumers on the importance of strong intellectual property protection, the direct and indirect costs and risks of counterfeit and pirated goods, and ways to distinguish between legal and illegal activity online.³³ Importantly, we urged the USPTO to engage with copyright owners and OSPs, especially social media companies, which are often in the best position to engage with their users, to develop agreed-upon, straightforward, and uniform education materials.

4. *Please describe current anticounterfeiting and antipiracy strategies that may be available, identifying which elements have proven successful and those that have not. Your answer should identify the targets of anticounterfeiting and antipiracy efforts, such as ecommerce platforms, physical markets, and social media.*

As discussed in our response to Question 1, the antipiracy strategies that copyright owners employ through the provisions of section 512 of the Copyright Act have had limited success in addressing the ever-evolving piracy landscape in the digital age. Alternative strategies, such as the aforementioned site-blocking mechanisms that are widely available to copyright owners in foreign jurisdictions, have proven more effective. In his article on the effects of digital piracy, Professor Smith describes a study he conducted on site blocking in the United Kingdom, which found that obstructing more than one dominant channel of piracy increases the effectiveness of

³³ See generally Copyright Alliance Comments on the Development of a National Consumer Awareness Campaign on Combating the Trafficking in Counterfeit and Pirated Products (March 12, 2021), <https://copyrightalliance.org/wp-content/uploads/2021/03/Copyright-Alliance-Comments-2021-02724.pdf>.

such efforts.³⁴ The study found that while blocking access to a single piracy site had little effect—due to the ability of users to simply switch to another readily available site—when a sufficiently larger number of sites were blocked, consumers shifted away from piracy and towards legitimate content channels.

Another report, published in 2022 by the Information Technology & Innovation Foundation (ITIF), details the effectiveness of various site-blocking initiatives by dozens of countries and recommends the adoption of similar measures in the United States.³⁵ The report warns that offshore piratical services continue to provide U.S. consumers with access to infringing content, and that without effective restraints, foreign-based piracy threatens the jobs and economic and cultural contributions of America’s vital creative sectors. Highlighting efforts in Australia and the UK, the report explains that courts in many countries have demonstrated that “website blocking is a fair, effective, and proportionate tool to target major piracy sites and that it does not undermine human rights, free speech, or net neutrality.”³⁶ The ability to implement targeted site blocking measures without violating free speech or human rights is a critical element of any site blocking system. The ITIF report debunks arguments that site blocking violates free speech and would ultimately “break the internet.” It explains that many countries have implemented site blocking in a way that safeguards against over-blocking and ensures that the internet remains free and open. Ultimately, the report urges the United States to “follow the rest of the world by creating an effective legal pathway for rightsholders to get ISPs to block access to websites involved in the mass (not incidental) dissemination of copyright-infringing content.”³⁷

While the deficiencies of the DMCA and jurisdictional roadblocks often make it difficult to combat piracy, some copyright owners have been successful in bringing lawsuits that hold direct infringers (or those that facilitate infringement) accountable. However, litigation as an antipiracy strategy is simply not practical, particularly for most individual creators and small businesses

³⁴ Smith, *supra* note 23.

³⁵ Cory, *supra* note 8.

³⁶ *Id.*

³⁷ *Id.*

that cannot afford to defend their rights in federal court. While these individual creators and small businesses have traditionally had little recourse in addressing piracy through legal action, the creation of the Copyright Claims Board (CCB) in 2020 established a new venue for these groups to enforce their rights.³⁸ The CCB is discussed in more detail in response to Question 11.

As described in our response to Question 1, the INFORM Consumer Act establishes verification and transparency requirements for OSPs and internet intermediaries that facilitate the distribution of physical goods and/or services. We recommend that these obligations be extended to third-party digital goods sellers and intermediaries that facilitate their distribution and/or consumption, including domain registrars. The effectiveness of efforts in the EU to implement accountability and transparency measures should also be explored and those that appear effective should be considered for implementation in the United States.

5. *Please identify the challenges you anticipate in the ongoing fight to prevent counterfeited and pirated goods from entering the stream of commerce and reaching the hands of consumers. Please add information on how those challenges might be addressed.*

As discussed in response to Question 6 below, the piracy challenges that came with the increased shift to online markets during the COVID-19 pandemic are likely to endure. Illicit piratical websites remain a significant concern among copyright owners, as jurisdictional roadblocks that make it difficult to address pirate sites outside the United States, combined with section 512's shortcomings, continue to frustrate efforts to hold pirate site operators accountable. In addition to these more established forms of piracy, copyright owners are beginning to experience online infringement issues related to the unauthorized use of copyrighted works for the development of generative artificial intelligence (AI) systems. The indiscriminate mass scraping of the internet by AI developers and those creating datasets for the ingestion or "training" of AI systems inevitably involves scraping copyrighted content from piratical websites and services, or violating section 1201 to illegally download copyrighted content that was only intended for

³⁸ See generally, <https://copyrightalliance.org/education/copyright-claims-board-explained/>.

authorized consumer streaming.³⁹

These problems have been highlighted by a series of recent lawsuits⁴⁰ brought by authors against various generative AI companies for the unauthorized ingestion of literary works to train their AI models (as well as the various articles noting the surge in unauthorized AI vocal models of sound recording artist voices and unauthorized AI vocal “covers” of copyrighted sound recordings).⁴¹ The lawsuits allege that OpenAI, ChatGPT, and Meta all use datasets to train their AI models that contain hundreds of thousands of literary works, and that the only “internet-based books corpora” that have ever offered that much material are notorious “shadow library” piracy websites like Library Genesis (aka LibGen), Z-Library (aka Bok), Sci-Hub, and Bibliotik.⁴² According to the complaints, these flagrantly illegal sites have long been of interest to the generative-AI-training community. While these cases are in their early stages, they highlight the challenges copyright owners are facing, and will continue to face, as pirated works are used without authorization by generative AI developers for commercial purposes.

It should also be noted that copyright owners’ rights can be violated when their works are reproduced to create datasets or ingested by generative AI systems, regardless of whether the AI systems generate infringing output or distribute infringing copies to end users. Thus, while AI developers may not be pirating content and offering it to consumers in the more traditional sense, their choice to use pirated works as ingestion material instead of entering into licensing agreements with copyright owners can lead to copyright liability and will have the same negative effect on copyright owners’ ability to commercialize their works, recoup investments, and the incentivization to create new works.

³⁹ Kevin Schaul, Szu Yu Chen, and Nitasha Tiku, *Inside the Secret List of Websites that Make AI like ChatGPT Sound Smart*, WASHINGTON POST (April 19, 2023), <https://www.washingtonpost.com/technology/interactive/2023/ai-chatbot-learning/>.

⁴⁰ Tremblay et al v. OpenAI, Inc. et al. (N.D. Ca.), Silverman v. OpenAI (N.D. Ca.), Silverman v. Meta (N.D. Ca.).

⁴¹ Nick Breen and Josh Love, *Attack of the Clones: AI Soundalike Tools Spin Complex Web of Legal Questions for Music*, BILLBOARD (May 19, 2023), <https://www.billboard.com/pro/ai-music-tools-copy-artists-voices-legal-questions/>.

⁴² Tremblay, *supra* note 40.

6. *What patterns and trends have you observed in counterfeiting and piracy during the COVID–19 pandemic? Do you anticipate that these patterns and trends will continue past the pandemic?*

As people around the world were forced to quarantine at home for extended periods in response to the COVID-19 pandemic, there was an increased demand for easily accessible entertainment through streaming video and music services, eBook and audiobook platforms, video game portals, and many other digital resources, and the copyright industries rose to the challenge. The Copyright Alliance website has a compilation of numerous educational materials and resources copyright owners offered in response to the pandemic, as well as links to countless legal entertainment options for consumers.⁴³ But even with the myriad of legitimate content and services made available, the pandemic resulted in more people turning to illicit services to access pirated content, and sharp increases in pirate site traffic were reported around the world.⁴⁴ When entire creative industries were at a standstill due to COVID-related restrictions, it was absolutely crucial that consumers be made aware of the lasting harms to creators and to themselves caused by online infringement and the importance of copyright law and legitimate content to the resurgence of the U.S. economy and employment.

The economic and societal effects of COVID-19 also gave rise to opportunistic infringers who used the pandemic as a premise for acts of mass piracy, most notably the Internet Archive’s “National Emergency Library” (NEL). The NEL was an extension of the Internet Archive’s “Controlled Digital Lending” (CDL) practice, which involved the unauthorized digitization and distribution of countless physical books (and which a court in the Southern District of New York found constituted copyright infringement and was unequivocally not fair use).⁴⁵ Launched in

⁴³ Resources from Creative Community to Ease Coronavirus Impact, THE COPYRIGHT ALLIANCE, available at: <https://copyrightalliance.org/trending-topics/resources-from-creator-copyright-community-to-ease-coronavirus-impact/>

⁴⁴ Thomas Pholnikorn, *Online movie piracy increases during pandemic*, THE SUFFOLK JOURNAL (Sept. 22, 2020) (citing data from MUSO, a digital piracy data collection company, that showed a 33% rise in online piracy worldwide and a 45% increase in the United States).

⁴⁵ Nate Raymond and Blake Brittain, *Internet Archive's digital book lending violates copyrights, US judge rules*, REUTERS (March 27, 2023), <https://www.reuters.com/legal/us-judge-rules-internet-archives-digital-book-lending->

March 2020, the NEL did away with the “controlled” part of the Internet Archive’s “lending” practice—which supposedly limited users to accessing works one at a time—and replaced it with unrestricted access to infringing copies by any number of users. Attempting to justify such blatant piracy, the Internet Archive claimed that it would “address our unprecedented global and immediate need for access to reading and research materials” during the pandemic.⁴⁶ However, the Internet Archive conveniently ignored copyright industry-wide response to the pandemic that saw unprecedented access to copyrighted works online. Ultimately, the NEL was short-lived—shutting down soon after publishers sued the Internet Archive—but it provides an example of the way that disruptive global events are exploited and used as an excuse to flout copyright law.

While COVID-related restrictions on the creative industries have been lifted, and consumers have begun to return to movie theatres and live music venues, the online markets for consuming content of all kinds over the internet are here to stay. Unfortunately, so too are illicit pirate services that continue to saturate the market, and it is essential that consumers are educated about the dangers of pirate sites and the harm caused to the creative community and are made aware of the piracy landscape so that they can make informed decisions that result in access to safe and legitimate content.

- 7. What patterns and trends have you observed in counterfeiting and piracy due to shifts in the economy? Do you anticipate that these patterns and trends will continue? And if so, what impact will they have on any current and future strategic plans to combat counterfeiting and piracy?*

As detailed in our response to question 13, a recent study found that adverse economic conditions and fast-growing global inflation have resulted in a drastic increase in visits to

[violates-copyrights-2023-03-25/](#).

⁴⁶ Chris Freeland, *Announcing a National Emergency Library to Provide Digitized Books to Students and the Public*, INTERNET ARCHIVE BLOGS (March 24, 2020), <https://blog.archive.org/2020/03/24/announcing-a-national-emergency-library-to-provide-digitized-books-to-students-and-the-public>.

piratical websites.⁴⁷ The report found a nearly 30% increase in visits to illegal sites in the first quarter of 2022 compared to the first quarter of 2021.⁴⁸ That year was marked by global economic uncertainty and skyrocketing inflation, and it's likely that many consumers who may otherwise have spent money on legitimate content or services turned to piracy. While the trend in increased piracy is an unfortunate situation that the report expects to continue in times of a global economic downturn, there are strategic antipiracy efforts that can combat the harmful impacts on creative ecosystems that piracy inflicts. As discussed in other responses, updates to the DMCA, the adoption of site-blocking mechanisms, and educational campaigns are a few of the efforts that be taken to limit the damage that online infringement causes to consumers, copyright owners, and the creative industries.

8. *Please indicate whether any strategic plans to combat counterfeiting and piracy might include collaboration with private or public parties, and if a strategic plan is not collaborative, please explain why not. If a strategic plan does include collaboration, please describe the anticounterfeiting and antipiracy strategies employed in the collaboration.*

In addition to stakeholders (ideally) working collaboratively within the parameters of the DMCA, supplemental approaches exist in the form of private voluntary agreements. While these types of negotiations and agreements should not be viewed as alternative approaches that supplant the need for additional regulatory and legislative reform, they should be encouraged to continue alongside any formal statutory or regulatory processes. Effective technical measures to combat piracy have been identified and implemented through voluntary agreements among industry stakeholders, and they have proven successful in identifying and protecting copyrighted content in specific circumstances. However, their success has been dependent on the existence of some type of incentive for service providers to participate. Further, individual creators and small copyright owners have largely been left out of voluntary agreement discussions. With no incentive to adopt and implement piracy fighting tools, many of the technical measures offered

⁴⁷ MUSO Discover Q1 2022 Digital Piracy Data Insights, <https://www.muso.com/magazine/muso-discover-q1-2022-digital-piracy-data-insights>.

⁴⁸ *Id.*

by service providers are the result of voluntary agreements with specific industries and are only available to select partners.

Examples of effective voluntary agreements include the Trustworthy Accountability Group (TAG), the Principles for User Generated Content Services, trusted notifier programs, and payment processor agreements.⁴⁹ Stakeholders were incentivized to participate in those voluntary initiatives for a variety of reasons, including (i) ambiguity in the law was on a particular issue because of conflicting court decisions in different jurisdictions, (ii) pending litigation that presented risks to both sides, (iii) the possibility of legislation being enacted that would change the playing field, (iv) customer relations, or (v) some combination of all of these.

Voluntary solutions are often the result of private discussions and agreements among stakeholders, which make it difficult to say what processes are ongoing or what technical measures are currently the subject of voluntary agreement discussions. What's clear is that the success of any voluntary processes depends on a number of factors, including (i) stakeholder incentives and a willingness to participate, (ii) multilateral stakeholder involvement, (iii) a willingness to listen to and address concerns raised by the participants, (iv) setting practical goals based on agreed upon guidelines or principles, and (v) ensuring agreements are revisited so that they remain effective over time.

9. Are you considering new collaborative efforts to combat counterfeiting and piracy? What factors will affect your decision? How might those future collaborations be comprised?

The copyright community has been, and continues to be, open to collaborative efforts among copyright owners, creators, OSPs, ISPs, and other stakeholders to combat online piracy. Collaborative efforts, specifically in the form of voluntary agreements, can play an important role in the fight against infringement, but they are only partial solutions and not a substitute for effective laws. While some voluntary agreements between online service providers and copyright owners have addressed specific problems for specific industries, most service providers know

⁴⁹ See generally, <https://www.tagtoday.net/>.

that, due to courts' misinterpretations of the DMCA, they have a limited risk of liability and need only do the bare minimum required to avoid liability. In particular, websites outside the United States view themselves as immune from United States copyright laws. That means that while online service providers and their representatives sometimes publicly express a willingness to work with the copyright community, their words are rarely followed by actions.⁵⁰ As such, reforms and updates to the DMCA are needed, and site blocking must be explored.

10. Please identify effective technologies for use in the fight to prevent counterfeited and pirated goods from entering the stream of commerce and reaching the hands of consumers, such as counterfeited product identification devices or advanced algorithms to secure supply chains and identify counterfeited goods online. Please explain how any anticipated strategies will improve an overall anticounterfeiting and antipiracy strategy.

There are many existing technologies capable of identifying and/or protecting unauthorized copyrighted material and online piracy. Some of these are “off-the-shelf” technologies that are easy to implement and affordable for OSPs of all types and sizes. Some OSPs have already implemented technologies that identify and/or protect copyrighted works from infringement on and through their services, sites, and platforms. However, the problem is that these technologies do not meet the statutory interpretation of a “standard technical measure” under the DMCA because they are usually not voluntarily made available to all types of relevant copyright owners and many OSPs have refused to come to the table with other stakeholders to have these technological measures formally adopted as widely recognized standards under section 512(i).⁵¹ This has led to a lack of uniformity among and access to existing technical measures that makes it difficult for those copyright owners who do not have access to these measures to combat infringement. On the other hand, OSPs may prefer the status quo because it allows them to avoid adopting and implementing standard technologies under section 512(i).

⁵⁰ See The Role of Private Agreements and Existing Technology in Curbing Online Piracy: Hearing before the Senate Subcommittee on Intellectual Property, 116th Cong. 3 (2020) (written statement of Keith Kupferschmid).

⁵¹ *Id.*

Copyright owners currently utilize a range of technical measures, either developed themselves, by OSPs, or by third parties that enable them to identify, and in some cases protect against, piracy. Technical measures used by copyright owners to identify infringement include such technologies as Google Image’s Usage Right feature⁵² and Picture Licensing Universal System’s (PLUS) image recognition tools.⁵³ Some copyright owners employ third-party web crawler technologies to scan the internet for infringement, however, many OSPs block these tools from their services.⁵⁴ Other technologies can be used to both identify and protect works from infringement. Some examples of technical measures that have been developed by copyright owners or third parties who license use of their technologies to copyright owners and can be used to both identify infringement and protect works include Audible Magic, AdRev detection services, PEX Attribution Engine, and measures developed by the Coalition for Content Provenance and Authenticity (C2PA) as part of the Content Authenticity Initiative (CAI).⁵⁵

OSPs like YouTube, Facebook, Scribd, and Dropbox have implemented technologies capable of identifying and removing unauthorized copyrighted material posted by their users. Additionally, as the Copyright Office’s 512 Report notes, fingerprinting and filtering systems are used by various OSPs, including Facebook, SoundCloud, Twitch, Vimeo, and Verizon Wireless.⁵⁶ Examples of technical measures offered by OSPs and used by those copyright owners who are

⁵² The International Press Telecommunications Council (IPTC), Quick guide to IPTC Photo Metadata and Google Images, IPTC.org (In 2018, Google Images introduced new features that allow for the display of an “image’s creator, credit line and a copyright notice” alongside the image instantly upon display. The technology works by reading the corresponding embedded IPTC International Press Telecommunications Council (IPTC) photo metadata fields from the image file.) <https://iptc.org/standards/photo-metadata/quick-guide-to-iptc-photo-metadataand-google-images/> (last visited February 2, 2022).

⁵³ The Picture Licensing Universal System is a cooperative, multi-industry initiative that “provides a system that clearly defines and categorizes image usage around the world, from granting and acquiring licenses to tracking and managing them well into the future.”

⁵⁴ U.S. Copyright Office, Section 512 of Title 17: A Report of the Register of Copyrights (May 2020), footnote 948, at 177

⁵⁵ The Content Authenticity Initiative (CAI) is a cross-industry network of “hundreds of creators, technologists, journalists, activists, and leaders who seek to address misinformation and content authenticity at scale.” Launched in 2021, the Coalition for Content Provenance and Authenticity (C2PA) includes Adobe, Arm, BBC, Intel, Microsoft, and Truepic, and aims to “to accelerate the pursuit of pragmatic, adoptable standards for digital provenance.” See <https://contentauthenticity.org/our-members>.

⁵⁶ Copyright Office 512 Report, *supra* note 4, at 177.

given access to the measures by the OSP to identify infringement and protect their work include Facebook Rights Manager, Spotify's digital rights management and encryption tools, and a suite of YouTube services including Content ID, Copyright Match, and the Content Verification Program. The problem with many of the tools that have been developed by OSPs is that they function within parameters set by their operators,⁵⁷ they're not implemented with any consistency within an OSP's platform or among OSPs, and they are not available to all types or sizes of copyright owners.⁵⁸

Some OSPs have implemented measures to address repeat infringers, including mobile verification, limiting new accounts from streaming live content within 24 hours of account creation, and limiting mobile streaming or heightened viewership to accounts with a certain number of subscribers.⁵⁹ While these measures are not "standard technical measures" under the DMCA, and more rigorous repeat infringer policies should be implemented, they are representative of actions OSPs can take unilaterally to combat piracy. We encourage all OSPs to implement similar verification and enforcement measures to ensure that repeat infringers are held accountable.

11. Please describe how online enforcement activities intersect with trademark and copyright laws or procedures. Do online enforcement strategies include employing existing trademark laws to combat online counterfeiting? Do online enforcement strategies use existing copyright laws to combat online piracy? If so, please describe in detail those activities, and provide any suggestions for maximizing these practices.

As noted in our response to Question 1, online copyright enforcement strategies are rooted in

⁵⁷ For example, Meta's Rights Manager hides critical information from a rightsholder (and in some cases only displays blurred images to a rightsholder of matches of potentially infringing works), making it impossible for the rightsholder to send a takedown notice without opening themselves up to liability if the use of the work qualifies as fair use or was legitimately licensed.

⁵⁸ Keith Kupferschmid, *YouTube Infringement Tools Are All Foam and No Beer for Small Creators (Part 1)*, COPYRIGHT ALLIANCE BLOG (August 24, 2021), <https://copyrightalliance.org/youtube-infringement-tools-part-one/>.

⁵⁹ See generally, <https://support.google.com/youtube/answer/9228390?sjid=5938716527623409862-NA>

sections 512, 1201, and 1202 of the Copyright Act. To encourage copyright owners and OSPs to work together to address online piracy, section 512 includes a notice and takedown process to enable infringing material to be taken down expeditiously without the need for a court order and a “safe harbor” for OSPs that immunizes them for liability from the infringing acts of their users when the OSP takes down infringing material from its platform and meets certain other requirements. Importantly, these safe harbors only apply when *a user* of an OSP engages in an infringement and not when the service provider itself is engaging in the infringing activities.

As has been well-documented elsewhere, one major problem with section 512 is that the notice and takedown system is ill equipped to address a piracy environment where infringing material reappears almost immediately after it is taken down.⁶⁰ While this presents a somewhat insurmountable challenge for all copyright owners, the ineffectiveness of the notice and takedown system is felt most acutely by individual creators who lack the resources of larger copyright owners to make a meaningful impact. The time that these creators use to send takedown notices is time that they aren’t using to create new copyrighted works, which pushes many to give up enforcement efforts all together and some to give up on creative endeavors. These creators are effectively defenseless against the volume and reach of online infringement, especially given the speed at which infringing works are reposted.

Individual creators face numerous other significant barriers to the effective use of the notice and takedown process, including the lack of uniformity and consistency from one OSP’s web form to the next, and the practice by some OSPs of imposing requirements beyond those prescribed under the law. In addition, these individual creators and small businesses also have difficulty locating web forms due to inconspicuous placement. It’s critical that, in addition to clarifying that OSPs cannot impose notice requirements beyond those prescribed under the law, that Congress, the USPTO, and/or the Copyright Office explore ways to ensure that infringing material *stays down* after an initial takedown, such as adopting site-blocking mechanisms as many other countries have done.

In addition to reworking section 512’s notice and takedown provisions to ensure infringing

⁶⁰ See 512 Report, *supra* note 5.

material stays down, below are areas of the Copyright Act that are most in need of reform to ensure OSPs effectively address piracy occurring on their platforms.

- **Red Flag Knowledge:** The “red flag” knowledge standard in 512(c)(1)(A) should be interpreted as Congress intended and should not be equated with actual knowledge. Under current judicial interpretations of the DMCA, platforms are not held accountable for circumstances where they essentially ignore clear indicia of piracy, so long as they do not have knowledge of specific instances of infringing content.
- **Expeditious Takedowns:** The term “expeditiously” should explicitly require immediate or “near instantaneous” takedowns for live, unpublished, pre-release and newly released content.
- **Improving Notices and Webforms:** The representative list provision of 512(c)(3) should clarify that a notice need not include precise locations (including specific URLs) of infringing material. Section 512(c)(2) should also be revised to ensure that webforms provided by OSPs are easy to find on the OSP’s website and cannot require any more information than what is required by statute. Revisions to these sections should also specifically explain a service provider’s obligations upon receipt of a representative list of infringements of the works identified in the notice.
- **Duty to Investigate:** It should be made clear that the reference to monitoring in Section 512(m) does not prevent service providers from *investigating* infringements that they become aware of.
- **Standard Technical Measures:** Section 512(i)(1)(B) should be revised to make clear that to “accommodate” a technical measure means to *implement* the measure. Additionally, 512(i)(1)(B) should be revised to make clear that an STM need only be developed pursuant to a “broad consensus” of *relevant* copyright owners and service providers.

- **Repeat Infringement Policies:** Service providers’ repeat infringer policies must be transparent and effective, and it should be made clear that nothing in a repeat infringer policy should prevent the provider from terminating the account of someone who has infringed only once, especially in egregious circumstances that are blatant and injurious. In addition, OSPs must take steps to prevent users who have already been terminated for repeat infringement from once again creating new accounts, including by requiring more stringent account verification and by limiting the capabilities of recently created accounts (e.g., prohibiting recently created accounts from livestreaming).
- **Limiting Safe Harbor Eligibility:** It should be clarified that OSP activities eligible for a safe harbor are limited to those expressly enumerated in the statute.
- **Reworking the Penalty Provisions Related to Takedown Notices:** It should be made clear that section 512(f) penalties only apply when a person sends a notice intentionally, and in bad faith, knowing that the use is non-infringing, and that a copyright owner is not subject to penalties simply for sending a notice in response to material for which a fair use defense may be applicable.

In contrast to the outdated provisions of section 512, the anticircumvention provisions of section 1201 have proven successful in safeguarding against piracy by making it unlawful to circumvent technological measures—or traffic in circumvention tools or services—used to prevent unauthorized access to copyrighted works.⁶¹ Section 1201 helps prevent piracy and unauthorized access to copyrighted works by preserving the incentives for content creators and distributors like the Copyright Alliance’s wide array of members to embrace digital opportunities while continuing to create and disseminate expressive works. The triennial rulemaking proceeding established by section 1201 provides a safety valve for users by directing the Librarian of Congress, upon the recommendation of the Register of Copyrights, to determine whether the prohibition on circumvention is having, or is likely to have an adverse effect on users’ ability to make non-infringing uses of particular classes of copyrighted works. The rulemaking process is a

⁶¹ 17 U.S.C. § 1201.

time-tested, balanced, and flexible system that has contributed to consumers today having a wealth of ways to safely access and enjoy all sorts of copyrighted works and creators having many new platforms to reach their audiences.

While the effectiveness of section 1201 is widely recognized, including in a Copyright Office report to Congress in 2017,⁶² there have been recent efforts to amend copyright law to allow for broad exemptions to section 1201. However, copyright owners' rights must not be compromised by laws that result in the widespread availability of tools that would enable mass piracy. To the extent exemptions to section 1201 are warranted, stakeholders who seek those exemptions should use the existing triennial rulemaking process to pursue them.

Section 1202 of the Copyright Act, enacted as part of the DMCA, makes it unlawful to provide or distribute false copyright management information (CMI) with the intent to induce or conceal infringement.⁶³ The term CMI means any information, including the title, name of the author and copyright owner, and terms for use of the work, conveyed in connection with copies, phonorecords, performances, or displays of a work.⁶⁴ The legislative history of the DMCA explains that CMI is an important element in establishing an efficient internet marketplace in that it assists copyright owners in tracking and monitoring uses of copyrighted works, as well as licensing of rights and indicating attribution, creation and ownership.⁶⁵

The provisions of section 1202 have played an integral role in enabling copyright owners to identify and combat infringement, but technologies employed by some OSPs and AI developers threaten its effectiveness. Metadata and CMI are often stripped from uploaded works by OSPs to reduce file sizes and decrease transmission and storage costs during the caching process, which violates section 1202(b) and makes it extremely difficult for a copyright owner to track

⁶² U.S. Copyright Office, Library of Cong., Section 1201 of Title 17: A Report of the Register of Copyrights (June 2017).

⁶³ 17 U.S.C. § 1202.

⁶⁴ 17 U.S.C. § 1202(c).

⁶⁵ S. Rept. 105-190 - The Digital Millennium Copyright Act of 1998, 105th Congress (1997-1998), <https://www.congress.gov/congressional-report/105th-congress/senate-report/190/1>.

subsequent use of a work. The unauthorized ingestion of copyrighted material by AI developers also implicates copyright owners' rights under 1202, as recent lawsuits allege the removal or alteration of CMI from massive amounts of works used to "train" AI tools. In a recently filed lawsuit against Stability AI, Getty Images claims that the AI developer intentionally removed or altered Getty Images' watermarks and metadata associated with the images that Stability AI impermissibly copied from Getty Images' websites.⁶⁶ Similar 1202 violations are alleged in lawsuits brought by authors and visual artists against OpenAI, Meta, and Google.⁶⁷ As the development of AI technologies advances, it is critical that the integrity of CMI is maintained and that copyright owners' rights under section 1202 are upheld.

Another existing area of copyright law aimed at combatting online piracy of copyrighted works is the Protecting Lawful Streaming Act (PLSA), which was enacted in 2020 to address the growing threat of streaming piracy.⁶⁸ By harmonizing criminal penalties for violations of the public performance rights associated with digital streaming with those that have long existed for violations of reproduction and distribution rights, the PLSA closed an unintended gap in copyright law that allowed large-scale commercial enterprises to avoid serious consequences for their illegal streaming of copyrighted works.⁶⁹ While the Copyright Alliance fully supported the PLSA and encourages its utilization as a deterrent against large-scale commercial piracy, to our knowledge, unfortunately it has only been used twice in the nearly three years since enactment. Further, as noted above, the PLSA's reach extends only to domestic defendants, which makes it virtually meaningless for foreign-based pirate site operators. Site blocking legislation is necessary to address that concern.

The Copyright Alternative in Small-Claims Enforcement Act (CASE Act) was also signed into

⁶⁶ Getty Images (US), Inc. v. Stability AI, Inc., 1:23-cv-00135, (D. Del.).

⁶⁷ Andersen v. Stability AI Ltd. (3:23-cv-00201) (N.D. Ca.), Tremblay et al v. OpenAI, Inc. et al. (3:23-cv-03223) (N.D. Ca.), Silverman v. OpenAI (3:23-cv-03416) (N.D. Ca.).

⁶⁸ Madigan, *supra* note 7.

⁶⁹ Harmonizing Penalties for Criminal Copyright Infringement, THE COPYRIGHT ALLIANCE, <https://copyrightalliance.org/wp-content/uploads/2017/09/Position-Paper-Harmonizing-Penalties-for-Criminal-Copyright-Infringement.pdf>.

law in 2020, which created the Copyright Claims Board (CCB)—a voluntary alternative to federal court for certain types of small copyright claims.⁷⁰ Prior to enactment of the CASE Act, federal courts had exclusive jurisdiction over all copyright claims. Most individual creators and small businesses cannot afford to defend their rights in federal court—costs which can easily amount to hundreds of thousands of dollars—when someone infringes their copyrighted works, and copyright infringement litigation is often prohibitively expensive for other creators.⁷¹ As a result, these infringements regularly went unchallenged, leading many creators to feel disenfranchised by the copyright system. In effect, these creators had rights but no remedies. The CCB began taking cases in June 2022, providing an accessible enforcement mechanism for individual creators and small businesses. As the CCB continues hearing cases, we and other interested stakeholders will have more qualitative and quantitative data with which to judge the efficacy of the system, however, to date, the CCB has already resulted in disputes being resolved either due to a determination on the merits by the CCB or settlements between the parties.⁷²

12. Please describe any fraudulent documentation or materials you have observed in the furtherance of online counterfeiting and piracy activity. For example, after reporting infringements to platforms, have you seen fraudulent materials attached to a counter-notification?

DMCA counter-notifications that contain false information, make meritless claims related to fair use or the existence of a license, or do not comply with the requirements of the DMCA are a consistent and increasing problem. Fraudulent and/or meritless counter-notices are reflective of a notice and takedown system that is stacked against copyright owners. A user can simply file a counter-notice and have the content in question reposted, and most service providers are willing to repost the content following a counter-notice because they're not liable should the content turn

⁷⁰ Terrica Carrington and Keith Kupferschmid, *CASE Act Signed Into Law: What This Means*, THE COPYRIGHT ALLIANCE (Jan. 7, 2021), <https://copyrightalliance.org/case-act-signed-into-law/#:~:text=The%20CASE%20Act%20authorizes%20the,can%20bring%20in%20a%20year.>

⁷¹ *Id.*

⁷² Rachel Kim, *Significant Observations as the CCB Turns One*, THE COPYRIGHT ALLIANCE (June 15, 2023), <https://copyrightalliance.org/significant-observations-ccb-turns-one>.

out to be infringing. The copyright owner, by contrast, then faces the choice of allowing the infringement to continue or taking legal action in federal court or before the Copyright Claims Board. For more information about these types of problems generally, please see the music community comments submitted in connection with the Copyright Office DMCA study.⁷³

13. Please provide any data you have on counterfeiting and piracy, including any data showing how the activities may adversely or disproportionately affect certain industries or companies.

A 2022 report by MUSO, a technology company providing antipiracy, market analytics and audience connection solutions that disrupt the piracy market for digital content, provides data insights on the online piracy landscape and how it affects different content industries.⁷⁴ In the first quarter of 2022, MUSO measured 52.5 billion visits to pirate websites, which was a 29.3% increase when compared to the first quarter of 2021. When broken down by industry, the report tracked significant increases across television content (19.2%), film (42.5%), (book) publishing (58.5%), music (13.9%), and software (9.6%).⁷⁵ The report attributes the significant increase in publishing sector piracy to a worldwide demand for Manga, the Japanese comic and graphic novel genre. According to the report, the United States showed the strongest global piracy demand in the first quarter 2022, accounting for 10.9% of all traffic with 5.7 billion visits to pirate websites—a growth of 1.6 billion (38.9%) in the first quarter of 2022 from the first quarter of 2021.⁷⁶ The MUSO study predicts that this alarming trend of increasing pirate site visits will continue, especially due to the current streaming video subscription wars combined with uncertain economic conditions and fast-growing global inflation.

As the Federal Register notice for this request for comments notes, a report by the Global

⁷³ See generally, <https://www.copyright.gov/policy/section512/>.

⁷⁴ MUSO, *supra* note 47.

⁷⁵ *Id.*

⁷⁶ *Id.*

Innovation Policy Center (GIPC) highlights the harms specific to the growth of digital streaming piracy.⁷⁷ While the notice cites the hundreds of thousands of jobs lost to digital streaming piracy, and the billions of dollars in lost revenue and reduced gross domestic product (GDP) per year, the GIPC report provides another data point that is worth repeating. According to the report, in 2019, 80% of all piracy was attributable to illegal streaming, which has overtaken BitTorrent and other download-based technologies as the dominant form of digital video infringement.⁷⁸ This pre-pandemic number has almost certainly grown in the years since the study, given the significant shift of content to online markets, as described in our response to Question 6. Finally, the report stresses that while there is no single solution to the digital streaming piracy problem, there must be (1) global collaboration among industries and governments to educate consumers of the dangers of piracy and (2) an expansion of legal remedies in cases of infringement.⁷⁹ These problems are compounded by the fact that OSPs frequently do not respond expeditiously to takedown requests for livestreams despite the unique time-sensitivity of such content, as discussed above.

14. Please share your thoughts on what more the USPTO or government and private parties can do to ensure entities, including under-resourced individuals and small businesses, can readily enforce their intellectual property rights against counterfeited or pirated goods. What other solutions have you seen or can you envision?

We support the following approaches to addressing piracy and ensuring that all copyright owners can enforce their rights:

- Federal law should be revised to account for new technological developments and sustained trends in piracy along the numerous dimensions addressed above (including with respect to red-flag knowledge, expeditious removal, and repeat infringers).

⁷⁷ Digital Video Piracy on the U.S. Economy, *supra* note 6.

⁷⁸ *Id.*

⁷⁹ *Id.*

- Federal law should protect the market from harmful “commercial scale” online infringement and require platforms and other service providers to implement and provide access to technical and other measures that protect against and deter infringement from taking place on their services.
- Criminal penalties must reflect the realities of how piracy is occurring. The presence of meaningful criminal penalties plays a significant role in deterring willful and egregious infringement. The Copyright Alliance urges further utilization of the Protect Lawful Streaming Act, and as necessary, supports continued updates to the law to harmonize and strengthen copyright enforcement.
- The development and implementation of effective standard technical measures for the protection and identification of copyrighted works online are critical components to combatting infringement in the digital age and realizing Congress’ intent in enacting section 512(i) of the Copyright Act.
- To keep pace with the rapid growth and changing landscape of online infringement, strong and effective laws must be augmented through the use of voluntary cross-industry collaborative efforts that reduce and equitably apportion the burden of reducing infringement, remove profit from infringement, and educate users about the harms of online infringement and about legal alternatives.
- To keep pace with the evolving challenges of piracy in the digital age, and the antipiracy strategies of a large and growing number of countries around the world, the United States should implement a no-fault injunction system that would protect consumers and the rights of copyright owners by allowing for the suspension or elimination of access to large-scale commercial pirate sites.
- Obligations on OSPs that require ID verification, transparency, reporting, and enforcement regarding customer and supplier activity in online marketplaces should be extended to third-party digital goods providers and intermediaries that facilitate their

distribution and/or consumption, including domain name registrars.

Again, we appreciate the opportunity to submit these comments and commend the USPTO's continued commitment to protecting U.S. creators and innovators. The Copyright Alliance stands ready to assist the USPTO in its strategic objectives and priorities and can provide any additional information or assistance at the public roundtable on October 3rd.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Kupferschmid', written in a cursive style.

Keith Kupferschmid
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