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Committee on the Judiciary

Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades

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Statement of
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Chairman Nadler, Vice Chair Scanlon, Ranking Member Jordan, and Members of the Committee, thank you for giving me the opportunity to submit these comments on behalf of the Authors Guild in connection with the hearing titled *Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades*.

The Authors Guild is a national non-profit association of almost 10,000 professional writers, many of whom struggle daily to combat the unauthorized online distribution of their works. Founded in 1912, the Guild counts historians, biographers, academicians, journalists, and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, contracts, and taxation. As an organization whose members earn their livelihoods through their writing, the Guild has a fundamental interest in ensuring that works of authorship and the rights of authors are protected online, and that the hard work and talents of our nation's authors may be rewarded so that they can keep writing, as intended by the Framers of the Constitution.

The Authors Guild welcomed the Copyright Office's report "Section 512 of Title 17" (hereafter "Copyright Office Report" or the "512 Report") when it was released in May, viewing it as one of the most thorough and clear analyses of the statute in the context of the prevailing piracy epidemic. We wholeheartedly agree with the Copyright Office's call to realign section 512 with Congress' intent. During the course of the Office's multi-year 512 study, the Authors Guild submitted comments to the Office and participated in several hearings. We are satisfied that our concerns were heard, along with the concerns of other participants. We believe the report is a balanced and fair representation of how the law is functioning today and what needs to be fixed. We especially appreciated the attention devoted to the plight of individual creators, who

lack the financial and technological resources to create their own technical solutions to piracy and who are rarely eligible for the technical solutions provided by some internet platforms to large notice senders and businesses.

As the United States Copyright Office concluded in its 512 Report, section 512 is not working as Congress intended. When enacting section 512 with the DMCA in 1998, Congress stated two goals for the law: 1) to protect copyright owners against internet piracy; and 2) to limit internet platforms' liability for the infringements of their users. Congress sought to achieve these goals through a bargain between copyright owners and service providers: in exchange for protection from financial liability for the infringement of their users, the ISPs were to cooperate with copyright owners in protecting against copyright infringement on their services.[1]

The unabated growth of online piracy since section 512's enactment in 1998 evinces the law's failure to achieve its first goal of protecting copyright owners in the online environment. This failure can be attributed to the extremely narrow way in which the courts have construed the qualifications for section 512's safe harbors, effectively eliminating several prerequisites. As the Copyright Office noted in the 512 Report, courts have interpreted ISPs' "obligations and limitations…quite narrowly, resulting in broader application of the safe harbors than Congress likely anticipated."[2]

We believe that only legislative action can reset the intended balance of section 512. In this statement we offer some background on how we view the problem of online piracy and

[1] Rep. Goodlatte underscored this two-pronged approach when deliberating the bill, saying that "[i]f America's creators do not believe that their works will be protected when they put them on-line, then the Internet will lack the creative content it needs to reach its true potential; and if America's service providers are subject to litigation for the acts of third parties at the drop of a hat, they will lack the incentive to provide quick and sufficient access to the Internet." 144 Cong. Rec. 18774 (1998) (statement of Rep. Goodlatte).

[2] U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 85-86 (2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf (hereafter "512 Report").

provide recommendations for amending section 512 to help ebb the flow of pirated copies on the internet, which are severely hurting authors.

For a more thorough discussion of our practical experiences with piracy and our position on section 512, we invite you to read the written testimony that we submitted to the Senate Judiciary Committee's IP Subcommittee in June 2020 in connection with Authors Guild president Doug Preston's testimony at the hearing titled *Is the DMCA's Notice-and-Takedown System Working in the 21st Century*, as well as the responses submitted to the follow-up questions (QFRs).[3]

I. The Piracy Epidemic

From authors' perspective, ebook piracy is out of control and authors feel helpless to do anything. In the last decade, the number of piracy complaints handled by the Authors Guild has skyrocketed. A study by Nielsen and Digimarc in 2017 indicated that pirates were selling 315 million dollars' worth of stolen ebooks a year through illegal downloads,[4] with pirated ebooks depressing legitimate book sales by as much as 14%.[5] Since then, based on the amount of ebook piracy reported to the Authors Guild, that number has probably doubled. In the last couple of years, a new front in the piracy battle has opened with the rise of pirated commercial ebooks sold

[4] NIELSEN AND DIGIMARC, INSIDE THE MIND OF A BOOK PIRATE 4 (2017), https://www.digimarc.com/docs/default-source/default-document-library/inside-the-mind-of-a-book-pirate.pdf. The study also found that "convenience" was the most common reason users gave for choosing an illegal download over acquisition of a legitimate copy. 69% of study participants said that they would have acquired the book legally (by buying a legal ebook or print copy or checking one out from the library) if pirated copies were not conveniently available.

[4] NIELSEN AND DIGIMARC, INSIDE THE MIND OF A BOOK PIRATE 4 (2017), https://www.digimarc.com/docs/default-source/default-document-library/inside-the-mind-of-a-book-pirate.pdf. The study also found that "convenience" was the most common reason users gave for choosing an illegal download over acquisition of a legitimate copy. 69% of study participants said that they would have acquired the book legally (by buying a legal ebook or print copy or checking one out from the library) if pirated copies were not conveniently available.

[5] Imke Reimers, *Can Private Copyright Protection Be Effective? Evidence from Book Publishing* (2016), 59 J. L. & ECON. (2016): 411, 414, https://doi.org/10.1086/687521 ("While physical formats are not affected by piracy protection, closer substitutes for online piracy such as legally distributed ebooks see a mean differential protection-related increase in sales of at least 14 percent.").

at low cost on the same platforms as legitimate copies, leading to readers buying illegal copies, thinking they are just getting a good deal. All of this is taking place concomitant to a historic decline in writing income: in 2018, mean writing incomes for full-time professional authors went down to $20,300, a 42% reduction in real dollars from a decade prior.

In order to defeat this swell of piracy and mass copyright infringement, two main problems require Congress' urgent attention:

1. **The whack-a mole problem on third-party platforms**

The courts have, as a practical matter, reduced section 512 to a notice-and-takedown statue and eliminated the knowledge, awareness, and vicarious liability standards. The resulting law requires copyright owners to notify platforms of each individual infringing copy on the service by URL before triggering any obligation to cooperate on the part of the ISP and excusing them from removing any other infringing copies at other URLs—including those inevitably reposted by the same infringers. This system is ineffective at reducing piracy and that imposes enormous costs and burdens on creators, copyright owners and ISPs alike. For authors, who send countless notices only to see the books they spent hours trying to take down reappear almost instantly, the system creates an absurdist, Sisyphean ordeal. The "whack-a-mole" metaphor in the context of online piracy captures the diffuse and ephemeral nature of pirate activities as well as to the absurd manner in which section 512 is applied today due to judicial decisions of the last 25 years that have expanded ISP safe harbors while reading burdensome requirements for copyright owners into the DMCA.

2. **Easy access to criminal pirate sites**

Studies have shown that the vast majority of illegal book downloads occur because they are so easy to find and acquire, and that users who acquire ebooks illegally would have acquired the

book legally (by buying a legal ebook or print copy or checking one out from the library) if the "search costs" of pirated ebooks were higher—in the other words, if illegal ebooks were more than a few clicks away.[6] Yet most notorious and well-known pirate sites, even those, like Libgen/Sci-Hub, that have faced lawsuits and have been previously enjoined by U.S. courts, can be found through a simple search if you type in a close approximation to the name.

The Authors Guild tracks a number of the well-known pirate websites that authors frequently complain about. These sites, many of which earn money from advertising, are accessible through Google and other search engines and show up in search results for book-related queries. Google, which controls more than 90% of the search market, will demote (meaning that in a search for a book by book title, for instance, the pirate site will appear much further down in the list of results) such sites in their search results after a certain number of takedown notices have been received for the site—usually, it seems, in the thousands or tens of thousands. They do not disable or take the links down, however, so that anyone who knows the name of the site can easily find it by typing in the name. Even if an ebook pirate's domain is taken down or their account suspended—in which case they often simply move to an address with a similar name—the search engines still link to them.

II. **Recommendations**

We support all the twelve substantive recommendations to realign section 512 with the Congress' intended goals in the Copyright Office Report, and have made our own suggestions, including those provided to the Senate in connection with Doug Preston's testimony. While our suggestions in this statement are focused on three areas of priority for us, we encourage this

[6] *Id.* at 11.

subcommittee to consider all of the recommendations made by the Copyright Office, and those made in our submission on record in the Senate.

1. **Clarify Knowledge Standards**

Congress should clarify that the knowledge and awareness provisions refer to the common law (and common sense) meanings of "actual knowledge" and "awareness," including general awareness. The current standard, as interpreted by the courts, has removed the obligation on platforms to take down any infringing copies at other URLs not specified in the copyright owner's complaint—including those copies that have been reposted by the same infringer—resulting in an absurd whack-a-mole ordeal for copyright owners who must constantly send notices with new URLs that pop up as soon as one is taken down. "Red flag" awareness would have an independent meaning and effect and should include awareness of the *general nature* of a pirate site; not just specific instances of infringement. As the Copyright Office notes in its 512 Report, "a standard that requires an OSP to have knowledge of a specific infringement in order to be charged with red flag knowledge has created outcomes that Congress likely did not anticipate."

This clarification can be achieved by amending sections 512(c)(1)(A)(ii) and 512(d)(1)(B) to disqualify an ISP from safe harbor if it has "a general awareness that there is pervasive infringing material on the system or network, whether or not it is aware of the specific location of the infringement or the specific infringing material." This is consistent with a plain reading of the statute, as noted in the Copyright Office's 512 Report, because the statute uses the definite article when describing actual knowledge but not when describing red flags knowledge, leading a group of copyright scholars to conclude that "[i]n Congress's view, the critical

distinction between the two knowledge standards was this: actual knowledge turns on specifics, while red flag knowledge turns on generalities."[7]

Further sections 512(c)(1)(A)(ii) and (d)(1)(B) should be amended to create a presumption of red flag awareness when an ISP knows its service is hosting or linking to a significant amount of infringing content. For instance, red flag awareness should be presumed if the service provider has received over a fixed number of takedown notices within a month or year—whatever figure demonstrates that the ISP has clear knowledge that its service is being used regularly for piracy. Such awareness would not mean the ISP is automatically liable, but it would trigger the obligation to take steps, such as filtering, to take down infringing content or disable access to it generally—without the need for the copyright owner to send a notice. The statute could expressly require ISPs that receive over the fixed number of notices and that have revenue of over, say, $10,000,000 per year to implement filtering, fingerprinting, and other "standard technical measures" (as redefined per the recommendation below) to screen out full-length, identical infringing copies. It is only fair that these ISPs that profit from infringement at the expense of copyright owners should assume the cost of weeding it out. A natural reading of the statute bears out that this is the result that Congress intended.

We also endorse the 512 Report's suggestion that Congress may want to direct courts to consider additional factors when determining whether as ISP qualifies for one of the safe harbors, such as an evaluation of intent and of the severity and frequency with which it ignored red flags awareness, because "a personal blog to which users occasionally paste the contents of a newspaper article in the comment section is not, and should not be treated, the same as a website

[7] 512 Report, *supra* note 4, at 118 (quoting Copyright Law Scholars Initial Comments at 3–5).

whose business model is premised on distributing primarily infringing content."[8] Similarly, we agree with the Copyright Office that "a reasonableness standard that accounts for each ISP's relevant characteristics would be appropriate for right-sizing section 512, and necessary to continue section 512's promotion of a diverse internet ecosystem."[9]

2. **Standard Technical Measures**

In the more than 20 year since the passage of section 512, no process has yet been put in motion to develop a "standard technical measure" as defined in the law. Congress had the foresight to understand that "technology is likely to be the solution to many of the issues facing copyright owners and service providers in this digital age;" and it "strongly urge[d] all of the affected parties expeditiously to commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals."[10] This has not occurred as Congress envisioned, however, because section 512, as interpreted by the courts, provides no incentives for ISPs to work with copyright owners to develop effective technical measures. Moreover, the definition of "standard technical measures" sets too high a bar of "broad consensus" by an entire industry, and assumes that copyright owners not ISPs should implement them, envisioning technologies such as DRM, not the types of fingerprinting and filtering technologies that have proven to be most effective technical measures for keeping infringing content off of internet platforms.

The failure to develop "standard technical measures" can also be attributed to the fact that many major ISPs *benefit* from user-posted or user-distributed infringing content and thus lack effective legal incentives for adopting piracy-prevention measures. Many user-posted content

[8] 512 Report, *supra* note 4, at 112, n. 593.
[9] Id. at 124.
[10] S. Rept. 105-190, at 49 (1998).

platforms earn revenue through advertising, and that revenue is directly related to the number of eyeballs or clicks they can attract. Infringing content is often a draw for users, especially if provided for free. And with the case law interpreting section 512 so staunchly in their favor, ISPs have no incentive to participate in a multi-industry process or concede the need for standard technical measures.

There are two ways to amend section 512(i) to address the lack of incentives for ISPs to engage in a formal multi-industry standards process. First, we suggest removing the requirement for "a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process." Numerous technological solutions already exist, independently developed by platforms and third parties, and are commonly in use. Instead, "standard technical measures" could be defined to include all effective technical measures that are generally accepted in the pertinent industry (i.e., that are commonly used and readily available), regardless of whether they are developed from a multi-industry process. This would encompass the technical measures that are already available and provide the flexibility necessary to cover new technical measures adopted in an industry. It would also encourage the development and licensing of standards that are available on reasonable and non-discriminatory terms, and that do not impose substantial costs.

A standard-setting process could be useful, however, in placing consistent requirements for the implementation and effectiveness of the various existing and future technologies. This can be achieved by establishing a standard-setting regulatory body, tasked with articulating the standards *for* technical measures.

Alternatively, or in addition, we recommend requiring the adoption and implementation of standard technical measures, rather than the requirement to just "accommodate" and "not

interfere with" those implemented by the copyright owners. Many effective standard technical measures are developed and implemented by the ISP, not the copyright owner, so it is not a matter of merely accommodating them. To this effect, we recommend deleting "by the copyright owners" from the preamble to the definition of standard technical measures in section 512 (i)(2), as ISPs are the ones that implement—and in a position to implement—the most effective technical measures like fingerprinting and filtering.

As noted above, Congress should also consider requiring ISPs of a certain scale and revenue to implement filtering, fingerprinting, and other prophylactic technical measures. Ideally, large ISPs would be required to implement technical measures to vet and remove infringing material. Section 512(i)(1)(B) could be modified to stipulate that an ISP that has received more than, say, 10,000 takedown notices in the last month or year, or an ISP with annual revenue of over, say, $10,000,000 must implement reasonably available standard technical measures. Mechanisms could also be placed in the statute to facilitate cooperation between the ISPs and copyright owners to submit digital files and other information necessary for effective implementation of these standard technical measures.

3. Website Blocking

The Authors Guild believes that website blocking by ISPs that provide internet access or search services is necessary to prevent the enormous amount of piracy that occurs today through rogue websites dedicated entirely to distributing pirated material. As long as they are easy to find and access, standalone websites devoted to piracy will continue unabated. Most often, they are operated by criminal enterprises and located in pirate-friendly jurisdictions, where jurisdiction or enforcement is difficult to obtain. As a policy matter, it makes no sense that the U.S. laws do not provide U.S. copyright owners with an effective remedy to stop these criminals from stealing

from them and harming U.S. economic interests. Doing so would require taking down those sites or at least disabling access in the U.S. with the participation of search engines.

Both the Copyright Office's 512 Report and evidence from the E.U., where website blocking is more widely implemented than in the U.S., dispel misperceptions about its efficacy and the potential for abuse.[11] The Authors Guild strongly supports the use of website blocking by search engines (also called "delinking" in the search engine context) after a certain number of takedown notices have been issued against a particular site and it is clear that the site is devoted to piracy. Currently, Google, for instance, only demotes such piracy websites, and does not delink or block them. By allowing these foreign piracy sites to continue appearing in search results, Google and other U.S. search engine companies facilitate and direct millions of user searches to them. If U.S. search engine companies did not direct users to notorious piracy sites overseas, those sites would quickly cease to exist.

III. Conclusion

The largest ISPs have gotten extraordinarily rich in recent years because they provide access to vast quantities of copyrighted content for free. The access they provide has transformed our world: information about almost anything is at our fingertips. It is nothing short of extraordinary. But the way that many courts have interpreted section 512 has allowed those for-profit companies to grow and prosper to an obscene measure and to drain wealth out of the creative community, leaving individual creators poorer than ever. We are a nation built on the inspiration and creative work of individual creators. That's why we need legislative reform to section 512.

[11] Copyright Office's Section 512 Report, *supra* note 1, at 58 (noting that "[r]ecent studies have shown that website blocking has operated as an effective tool in addressing digital piracy, despite the familiar misperceptions about its efficacy and alleged potential for abuse.").

On behalf of the almost 10,000 members of the Authors Guild, I thank you for your attention to this matter. The Authors Guild is available for further consultation.