LIBRARY COPYRIGHT ALLIANCE RESPONSE TO COPYRIGHT OFFICE NOTICE OF INQUIRY CONCERNING STANDARD TECHNICAL MEASURES AND SECTION 512

The Library Copyright Alliance ("LCA") consists of three major U.S. library associations: the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations represent over 117,000 libraries in the United States. LCA welcomes the opportunity to respond to the Copyright Office's Notice of Inquiry ("NOI") concerning standard technical measures ("STMs") and section 512 of the Digital Millennium Copyright Act ("DMCA").

2. What has hindered the adoption of existing technologies as STMs? Are there solutions that could address those hindrances?

This question is based on a faulty premise. It assumes that the absence of STMs within the meaning of section 512(i) of the DMCA is a problem that requires a solution. The rest of the NOI then searches for the causes of this problem and possible solutions. However, the absence of STMs is not a problem that reflects poor drafting by the architects of the DMCA, Senators Hatch and Leahy; nor is it caused by the unwillingness of Internet platforms to participate in a voluntary process to develop STMs. Instead, it is the result of the DMCA providing rightsholders with a much more powerful tool than section 512(i)(1)(B)—that is, Chapter 12 of Title 17, including 17 U.S.C. §§ 1201 and 1202. In other words, the absence of STMs does not demonstrate a failure of section 512(i) but rather the wild success (from the perspective of rightsholders) of Chapter 12.

What are now section 512 and Chapter 12 were introduced as separate bills in the 105th Congress. Section 512(i) was part of the standalone online service provider safe harbor bill. Chapter 12 was included in a separate bill intended to implement the World Intellectual Property Organization's Copyright Treaty and the Performances and Phonograms Treaty. Section 512(i) addressed rightsholders' concern that online service providers would strip out or ignore rights management information. When section 512(i) was included in the safe harbor bill, no one anticipated that the separate WIPO Treaties implementation bill would be enacted simultaneously. Indeed, both bills were stalled until the Senate Judiciary Committee, under the leadership of Senators Hatch and Leahy, merged the two bills, along with other provisions, into the DMCA.

Chapter 12 is far more powerful than section 512(i). Section 1201(a)(1) prohibits the circumvention of technological protection measures ("TPMs") adopted by a rightsholders to

control access to a copyrighted work. Further, section 1201(a)(2) and 1201(b) prohibit the trafficking of devices that enable circumvention. These protections apply to TPMs unilaterally implemented by a rightsholder; the TPMs do not need to be adopted through an open, fair, voluntary, multi-industry process. Additionally, while compliance with section 512(i) is not legally mandated, violation of section 1201 leads to civil and criminal penalties.

Moreover, section 1202(b) prohibits the removal or alternation of copyright management information ("CMI"). Here too, the format of the CMI could be created unilaterally by the rightsholder and does not need to be developed through a standard-setting process. A violation of section 1202 also could result in civil and criminal penalties.

Many rightsholders employ TPMs and CMI, and have asserted before the Congress and the Copyright Office that Chapter 12 has ensured the success of these technical measures in connection to new business models based on streaming from secure servers. At the same time, large commercial platforms have created their own filtering tools that enable rightsholders to prevent or profit from the uploading of unauthorized content. They also have automated the notice and takedown process, which has made the process far more efficient for major rightsholders. Search engines employ algorithms to demote websites that appear to host infringing content.

These voluntary efforts by service providers, combined with the rightsholders' use of TPMs and CMI supported by Chapter 12, have rendered section 512(i)(1)(B) largely superfluous. For this reason, questions 3 through 8 of the NOI concerning the interpretation of section 512(i) are irrelevant.[1]

So what is driving this interest in "fixing" section 512(i)? Clearly, it is the desire of the entertainment industry to impose a filtering mandate similar to that of Article 17 of the European Union's Directive on Copyright in the Digital Single Market. The Copyright Office should not abet the entertainment industry in such an adventure that inevitably would undermine free expression in the digital environment.

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[1] Section 512(i) should be interpreted in a manner consistent with National Technology Transfer and Advancement Act and OMB Circular A-119 discussed below. An "open, fair, voluntary multi-industry process" means a process administered by a standard setting organization that only adopts standards that are available to all possible implementers on fair, reasonable, and nondiscriminatory ("FRAND") terms.

11. Adoption through rulemaking

A rulemaking to identify STMs for adoption under section 512(i) could very well lead to the designation of filtering technology service providers must implement in order to remain eligible for the section 512 safe harbor. Without doubt, some proponents of such a rulemaking have precisely this objective. Mandatory filtering technologies, however, would be overbroad. Because there is no algorithm for fair use, filters would invariably lead to the blocking of fair uses of works. And because fair use is the Copyright Act's built-in accommodation to the First Amendment, filters would interfere with free speech on the Internet. For this reason, mandatory filters likely are unconstitutional. LCA has the following additional concerns with an STM rulemaking.

An STM rulemaking would be burdensome to libraries. Libraries provide to their users a variety of Internet-related services. As a practical matter, libraries can provide these services only because the DMCA's safe harbors limit libraries' liability for their users' online activities. The "mere conduit" safe harbor in section 512(a) has enabled libraries to provide Internet access to its users; the section 512(c) "hosting" safe harbor has permitted academic libraries to serve as institutional repositories for open access materials; and the section 512(d) "linking" safe harbor has allowed libraries to provide information location services to users. Libraries' reliance on section 512 means that they are interested in the requirement for eligibility for the safe harbor. Because accommodating and not interfering with STMs is a requirement for eligibility for section 512 protection, libraries are acutely interested in what technical means are designated as STMs and the process for their designation.

Libraries would have to participate actively in the STM rulemaking to ensure that the government agency understood the costs and burdens the technical measure would impose on libraries. Libraries, however, would not have the capacity to evaluate the costs and burdens of the many different technical measures that may be proposed. Furthermore, if the libraries failed to anticipate the costs and burdens a technical measure may impose upon them, or they failed to convince the government agency that the technical measure should not be designated an STM due to these costs and burdens, the libraries could find themselves required to implement an STM that they couldn't afford, that could harm their network, or that could reduce the utility of the network to their users.

Government agencies lack the capacity to identify an STM for adoption under section 512(i). In section 512(i)(2), STMs refer to "technical measures that are used by copyright owners to identify or protect copyrighted works." This means that an extremely wide array of measures would potentially fall within the scope of the proposed rulemaking. Some of these measures, for example those relating to fingerprinting or filtering, are extraordinarily complicated. The technical specification could be hundreds of pages long, and the software implementing the specification may have hundreds of thousands of lines of code.

No government agency has the technical competence to evaluate whether a proposed STM would even be effective at identifying or protecting works. Nor could it evaluate the impact of the technical measure on cybersecurity. These kinds of determinations must be made as an initial matter by a standard setting organization ("SSO"). For this reason, the policy articulated by the National Technology Transfer and Advancement Act ("NTTAA") and OMB Circular A-119 is that when a federal agency mandates the use of a technical standard, the standard itself must be developed by an SSO, not the federal agency. In other words, under the NTTAA and OMB Circular A-119, the federal agency in essence ratifies the work done by the SSO. The SSO develops the standard through an open process involving knowledgeable industry participants. This process guarantees that the standard actually works. It also addresses in a fair manner the many tradeoffs inherent in developing a standard. Additionally, it ensures that the standard does not unduly benefit one firm at the expense of all others. Furthermore, an open standards process surfaces the myriad intellectual property issues a standard might implicate. Any sophisticated technical measure relating to identifying and protecting copyrighted works likely reads on many patents. The standards process would navigate through this patent thicket, securing fair, reasonable and nondiscriminatory ("FRAND") licensing commitments from firms controlling the patents; or reconfiguring the standard to avoid patents controlled by firms unwilling to agree to FRAND terms.

Similarly, a sophisticated technical measure probably would require the use of standard application programming interfaces ("APIs"). The precise scope of protection for such APIs remains less than certain because the Supreme Court decided *Google v. Oracle* on the basis of fair use rather than copyrightability. An SSO would resolve any copyright issues relating to the APIs.

Under the NTTAA/OMB Circular A-119 approach, the federal agency does not just rubber stamp the SSO's work; it closely scrutinizes what the SSO has done. Nonetheless, in this approach, the SSO does the heaviest lifting because it is most competent at doing so.

As noted above, LCA has grave concerns about the burden an STM rulemaking would place on free expression in general and libraries in particular. If, however, the Copyright Office does decide to recommend an STM rulemaking, the rulemaking should comply with the tried and true NTTAA/OMB Circular A-119 approach. Standards for technical measures should be developed by SSOs, and an agency with technical expertise such as the National Institute of Standards and Technology or the National Telecommunications and Information Administration should then conduct the rulemaking to determine whether the standard should be designated an STM under section 512(i). Significantly, the Copyright Office does not have the necessary technical expertise to conduct the rulemaking. Appointment of a chief technology officer would not cure this deficiency.

Thank you for considering our views.

Respectfully,

Jonathan Band
LCA Counsel
jband@policybandwidth.com