Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
Notice of Inquiry Regarding	)	**Docket No. 2022-2**
Standard Technical Measures	)	**Submitted May 27, 2022**
And Section 512	)	

COMMENTS OF THE MOTION PICTURE ASSOCIATION, INC.

I. INTRODUCTION

The Motion Picture Association, Inc. ("MPA") is pleased to provide comments in response to the Notice of Inquiry ("NOI") regarding Standard Technical Measures and Section 512, published at 87 Fed. Reg. 25,049 (April 27, 2022) (Docket No. 2022-2).

The MPA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPA's member companies are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

Copyright piracy is an enormous worldwide problem. Every year, US-produced movies are illegally downloaded or streamed 26.6 billion times and US-produced television episodes are illegally downloaded or streamed 126.7 billion times.[1] Piracy of filmed entertainment costs the

[1] 2019 US Chamber of Commerce Study (https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf)

U.S. economy $29.2 billion and over 230,000 jobs each year.[2] Piracy continues unabated despite the consistent and widespread use of takedown notices. Accordingly, we believe that combatting online piracy requires a variety of approaches, including the greater use of technical measures to identify and protect copyrighted works online by both rightsholders and service providers.

MPA members individually invest in the development of these technologies and have partnered with many online service providers ("OSPs") to expand their use. Indeed, many OSPs, particularly the larger ones operating in the United States, have adopted content protection measures that exceed what might be required through a mandated technology solution and we remain committed to encouraging those efforts. This willingness to partner with rightsholders is not universally true, however, and certainly the failure after 22 years since the enactment of the DMCA to develop widely recognized standard technical measures ("STMs") as defined by section 512(i) of the Copyright Act remains one of the notable failures of the DMCA.

We therefore appreciate the opportunity to provide these responses.

II. RESPONSES

1. Are there *existing technologies that meet the current statutory definition of STMs in section 512(i)? If yes, please identify. If no, what aspects of the statutory definition do existing technologies fail to meet?*

As the MPA noted in our response submitted on February 8, 2022 to the Copyright Office's Notice of Inquiry regarding Technical Measures: Public Consultations, published at 86 Fed. Reg. 72,638 (Dec. 22, 2021) (Docket No. 2021-10), there are many technical measures in use today to identify and protect copyrighted works, both online and for physical product. It is possible that some existing technologies may ultimately be determined to meet the statutory definition of an STM under section 512(i). However, at the present time we are not aware of any that have been

[2] *Id.*

identified or designated as such. While we cannot say that any particular technology definitely fails to meet a particular aspect of the statutory definition, it is clear that most technical measures currently in use online were not developed pursuant to a "broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process".

Our industry has participated in many multi-stakeholder discussions to develop industry standards to address piracy of its physical products. The Content Scramble System ("CSS") on DVDs and the Advanced Access Content System ("AACS") on Blu-ray discs were developed and continue to be managed by a consortium of motion picture studios and consumer electronics and information technology companies. In fact, Congress had CSS and similar standards-development projects in mind when adopting section 512(i).[3]

In the online context, MPA has worked with partners such as the "Trustworthy Accountability Group" (TAG), payment processors and domain name registrars to establish "trusted notifier agreements" pursuant to which those entities agree to act upon information supplied by our members regarding unauthorized content. Several MPA members also worked with leading user-generated-content service providers to develop a set of "Principles for User Generated Content Services."[4] However, none of the online solutions has been universally adopted, and we are not aware of any technical solutions currently in development among a broad cross-industry group to address online piracy. Notably, digital rights management ("DRM") systems used by the major download and streaming platforms reflect what might be seen as industry-standard features and requirements, but the specific technologies were developed by individual companies.

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[3] S. Rep. No. 105-190 at 24 (1998).

[4] http://ugcprinciples.com

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

While many technical measures exist in the marketplace, they have not been uniformly adopted. Many reasons exist for this failure, but the main one may be insufficient incentives on the part of OSPs to adopt them. OSPs frequently express concerns that STMs will be indiscriminately required in a "one-size-fits-all" tech mandate, that they are simply too costly, can be abused, or chill non-infringing speech.[5] Accordingly, OSPs have a disincentive to participate in standard-setting efforts because their absence from the negotiation can be used to argue that the technology was not developed pursuant to a broad consensus of service providers, and therefore cannot be deemed an STM. This is not to say that all OSPs refuse to implement technical measures. As discussed above, we partner with many OSPs to do just that. But this implementation has produced a patchwork of measures, with each OSP deploying its own technologies and practices, often for a subset of copyright owners.

The requirement in section 512(i)(1)(B) that an OSP "accommodate and [ ] not interfere" with STMs has also hindered the adoption of existing technologies as STMs because this language does not unambiguously require that OSPs affirmatively adopt widely available and implemented technology solutions that would protect copyrighted works.

3. *Process under the current statute: a) Formal Process: Does section 512(i) implicitly require a formal process for adoption of an STM? If so, what are the requirements for such a process, and what should such a process entail? b) Informal Process: If the statute does not require a formal process, is an informal process appropriate or necessary? What type of informal process would facilitate the identification and adoption of an STM, and what should such a process entail?*

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[5] *See, e.g.,* Statements of Interest Regarding Technical Measures: Public Consultations (February 8, 2022) submitted by Citizens and Technology Lab, Cornell University at 3-5; Computer & Communications Industry Ass'n at 4; Digital Media Ass'n at 4-5; Engine at 2.

To meet the statutory definition of an STM, the technology simply must satisfy all of the elements of the definition in section 512(i). The statute, which does not on its face require the entities that participate in the creation of the standard be formally appointed, nor the resulting standard to be formally adopted. The Senate Judiciary Committee explained in its 1998 Report that it "anticipates [STMs] could be developed both in recognized open standards bodies or in ad hoc groups."[6] Congress made no explicit provision for the formal designation or adoption of STMs, seemingly intending a given STM to be designated by the multi-industry group that developed it and then simply adopted by the relevant rightsholders and OSPs. Although such a process may not result in the unambiguous designation of an STM, there is nevertheless a route to enforcing the statutory requirement if a copyright owner believes an STM has been developed but not appropriately accommodated by one or more OSPs. In such a case, the copyright owner could sue the OSP for copyright infringement and a federal court would have to determine whether the technology qualified as an STM in order to determine whether the OSP was entitled to the protection of the safe harbor. Unfortunately, while this "informal" process is theoretically available, to date it has not been utilized to test the existence of any STM.

Certainly a "formal" process would be more predictable. Presumably, a process in which the stakeholders were formally appointed and charged with creating a standard would be less likely to require the intervention of a federal court to determine whether an STM had been created. But even a formal process under the current statute remains largely theoretical since it would require the voluntary cooperation of many stakeholders that do not have sufficient incentive to participate in a standard-setting process.

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[6] S. Rept. 105-190 at 24 (1998).

3. *Process under the current statute: c) Entities: What entity or entities would be best positioned to convene the process, whether formal or informal? What, if anything, is needed to authorize such an entity to convene the process? Is there any role under section 512(i) for third parties, such as regulatory agencies or private standard-setting bodies, to determine whether a particular technology qualifies as an STM? If so, what is the nature of that role? How would the third party determine that a particular technology qualifies as an STM? What would be the effect of such a determination?*

The Copyright Office is the natural entity to convene the relevant stakeholders in a standard-setting process. Since the Office has no power to compel any party to participate (and if it did have that power, it could not exercise it because the process would then no longer be voluntary), its role would be limited to issuing invitations to the relevant stakeholders and possibly providing leadership and substantive input at any meetings. No additional authority is required for the Office to undertake any of those roles. In order for that process to result in the designation of an STM, a sufficiently representative group of relevant stakeholders would need to participate in the process and ultimately agree that a particular technology should be designated as an STM. Third parties other than the Copyright Office, such as government or private standard-setting bodies, could also be potentially useful participants in the development of a standard by contributing relevant technological and commercial expertise to assist the stakeholders. But to be clear, while formal approval or designation of a technological standard as an STM by a government entity would eliminate uncertainty around whether an STM has been created, government validation is neither necessary nor sufficient to create an STM under the statute as written.

3. *Process under the current statute: d) Courts: What role, if any, do or should courts play in determining whether a particular technology qualifies as an STM under section 512(i)? How would a court determine that a particular technology qualifies as an STM? What would be the effect of such a determination? For example, would such a determination be binding or advisory? Would it bind non-parties or apply outside of the court's jurisdiction? What would be the effect of pending appeals or inconsistent determinations across jurisdictions?*

In the absence of pending litigation between a rightsholder and an OSP, federal courts would not have jurisdiction to rule on STMs. However, as discussed above, federal courts might be involved in the designation of STMs if an OSP is sued for copyright infringement, and the plaintiff contends that the OSP should not enjoy the protection of the safe harbor due to its failure to accommodate a particular STM.[7] The court would at that point be required to determine whether the subject technology qualified as an STM. Its ruling would be binding only on the particular defendant in the case, but should be viewed as persuasive authority to other federal courts in subsequent cases involving the same technology and similar applications. If the statute were amended to authorize the Copyright Office or other agency to conduct a rulemaking to designate STMs, those decisions would be appealable to the federal courts under certain circumstances, giving courts a greater role in the process.

Of course, having STMs assessed by federal district courts is not generally a positive development. Judges and juries generally lack relevant technical expertise; different courts can produce inconsistent results; and federal litigation is notoriously expensive and slow. The main virtue of a federal court in the context of 512(i) is its ability to provide a formal answer (at least insofar as its jurisdiction runs) on whether a particular technology qualifies as an STM. But in an ideal world, it is not a role courts should be playing.

4. *International Organizations: Could technologies developed or used by international organizations or entities become STMs for purposes of section 512(i)? If so, through what process?*

The current statute would permit a technology used by international organizations or entities provided it was developed pursuant to a broad consensus of copyright owners and service

[7] Courts have occasionally examined technical measures in the context of copyright infringement cases but none has definitely ruled on the issue of whether a particular technology qualifies as an STM. *See generally* Lauren G. Gallo, *The (Im)possibility of "Standard Technical Measures for UGC Websites*, 34 Columbia J. of Law and the Arts 283, 307-11 (2011).

providers. The statute does not mandate that such consortium be comprised only of domestic entities. As with any other putative STM, under the current statute it would have to be designated through agreement followed by industry adoption, or through litigation.

5. *Consensus: Under section 512(i)(2)(A), a measure can qualify as an STM if it has been "developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process." a) What level of agreement constitutes a "broad consensus"? b) What groupings qualify as "multi-industry"? c) Can the phrase "multi-industry" as used in the statute mean a grouping within a subset of industries? Could such sub-industry divisions adopt separate STMs? What would be appropriate sub-industry divisions?*

Unfortunately, Congress did not define these terms. Nevertheless, we can apply some reasonable interpretations to this language. The statute requires both a "broad consensus of copyright owners and service providers" and a "multi-industry" process. These terms should be interpreted to give each of them a unique meaning that is not redundant of the other. We believe "broad consensus" means that industry participants must be representative of the parties that will utilize the particular STM.[8] In addition, the term implies that while there must be widespread agreement on the technology among those representatives, unanimity is not required.[9]

We believe Congress intended "multi-industry" to mean merely that the process of adopting an STM must be a negotiation between rightsholders and OSPs, and not the creation of a proprietary technology by a single entity (although a broad standard such as filtering may be implemented through different propriety approaches). We do not believe STMs are limited to those technologies that can be applied across different types of works or adopted by different categories of OSPs. For example, a technology that was developed among large and small photographers together with OSPs that display photographs could qualify as an STM were the consensus sufficiently broad among those groups, even if no other content-industry groups (*e.g.*,

[8] *Id*. at 303 n. 168.
[9] *Id*. at 299, 313.

from the music or motion-picture sectors) or platforms participated in the development of that standard.

6. *Availability: a) Under section 512(i)(2)(B), an STM must also be "available to any person on reasonable and nondiscriminatory terms." Is this a threshold requirement for a technology to qualify as an STM or an obligation to make a technology available on reasonable and nondiscriminatory terms once it is designated as an STM? b) How has concern over the potential availability and accessibility of a technology affected the adoption of STMs? What terms would be reasonable and nondiscriminatory for STMs? In what ways would it be possible to enforce these terms?*

The statute describes a multi-stakeholder group "developing" STMs. Congress seems to have envisioned that when that group concludes its work, an STM will have been created. Such a group, likely comprised primarily of technology experts, cannot know whether the technology they develop will subsequently be available on reasonable, nondiscriminatory terms (and similarly without substantial burden or expense).[10] Moreover, the terms on which a license is available will change over time as the technology becomes more available in the marketplace. Likewise, the issue of burden/expense will certainly vary as to each OSP and even to the same OSP as it grows in revenue or volume of infringing works. Accordingly, we believe Congress did not intend these commercial factors to be part of the definition of an STM, but rather are additional requirements that must be satisfied in order for the STM to become an obligation an OSP must satisfy as a condition of the safe harbor.

It is not apparent what effect any concern over the availability of STMs has on their adoption. However, concern over cost and burden does seem to dissuade OSPs from participating in any multi-industry groups that might develop such standards, even though the mere development of a content protection standard would not trigger an obligation for an OSP to adopt it unless the requirements of sections 512(i)(2)(B) and (C) were also met.

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[10] *Id.*

It is hard to specify in the abstract what would be reasonable and non-discriminatory in the context of an STM, but at a minimum it must mean that the STM is available to all similarly situated parties on similar or equivalent terms. Ideally, it would also be scalable so that larger and smaller parties could benefit from the STM on terms appropriate to their size.

7. *Costs and burdens: Under section 512(i)(2)(C), an STM must not "impose substantial costs on service providers or substantial burdens on their systems or networks." How should the substantiality of costs and burdens on internet service providers be evaluated? Should this evaluation differ based on variations in providers' sizes and functions?*

Notwithstanding this built-in protection for OSPs, as noted above, many have resisted the development of any STM claiming it will be imposed on even the smallest OSP in a "one-size-fits-all" approach or are simply too costly in general. This is incorrect. The statute demands that STMs be reasonable and not impose substantial costs and burdens on OSPs. Determining what is "reasonable" and "substantial" necessarily involves an assessment of the particular OSP, eschewing a "one-size-fits-all" model. However, we believe that in assessing what is unreasonable and unduly burdensome, consideration should be given not to the operational size or valuation of an OSP, but, rather, the volume of infringing material available on the service. All services of every size are required to take reasonable steps to remove infringing material from their platforms. A service with so few infringements that employees can practically remove them manually would not be required to license a technology solution to perform that task. Conversely, even a very small service with a high volume of infringements would reasonably be required to deploy an established STM to control those infringements, even where the cost of the STM is significant.

8. *Internet service provider responsibilities: Section 512(i)(1)(B) states that an internet service provider must "accommodate[] and [] not interfere" with STMs to qualify for the statutory safe harbor. What actions does this standard require service providers to take or to*

affirmatively avoid taking? Must all internet service providers have the same obligations for every STM? What obstacles might prevent service providers from accommodating STMs? What could ameliorate such obstacles?

At a minimum, the statute demands that where a copyright owner has employed an STM to identify or protect its works, the OSP take those steps necessary to accommodate that measure on their system and not take steps that would interfere with its operation. We believe the statute also requires OSPs to affirmatively adopt STMs but concede that the statutory language is not without ambiguity. We do not believe all OSPs have the same obligation for every STM. OSPs must adopt only those STMs relevant to their business and only to the extent necessary to control infringement on their platform.

9. Definition: How could the existing definition of STMs in section 512 of Title 17 be improved?

There are many ways the existing statute could be improved. Most significantly, it should create a path to the designation of STMs that does not require a rigid, formally-established multi-industry standard-setting forum. Instead, any stakeholders should be able to seek designation of an existing technology as an STM by petitioning the Copyright Office. In this regard, we support the provision of the Strengthening Measures to Advance Rights Technologies ("SMART") Copyright Act of 2022 (S. 3880) that permits the Librarian of Congress, in consultation with the Register of Copyrights, to designate an STM. The statute should also modify the requirement on OSPs to *adopt* or *implement* STMs rather than merely *accommodate* them to the extent the STM is relevant to the OSP's business and appropriate to the scale of infringement on the platform.

10. Obligations: Currently, section 512(i)(1) conditions the safe harbors established in section 512 on an internet service provider accommodating and not interfering with STMs. a) Is the loss of the section 512 safe harbors an appropriate remedy for interfering with or failing to accommodate STMs? If not, what would be an appropriate remedy? b) Are there other obligations concerning STMs that ought to be required of internet service providers? c) What obligations should rightsholders have regarding the use of STMs?

Conditioning the safe harbor on not interfering with (or "adopting," should the statute be amended) STMs might be an appropriate or inappropriate remedy depending on the situation. The loss of the safe harbor can potentially expose the OSP to the full extent of copyright infringement damages the copyright owner might seek from the underlying infringer. While this may be appropriate in some circumstances, it might not be in others. In addition, conditioning damages on the loss of the safe harbor would presumably depend on the copyright owner proving the OSP was liable for copyright infringement which has been challenging given recent federal court interpretations of secondary copyright liability. Accordingly, providing an alternative remedy or measure for calculating damages for an OSP's failure to reasonably adopt STMs would be preferable.

11. *Adoption through rulemaking: a) What role could a rulemaking play in identifying STMs for adoption under 512(i)? b) What entity or entities would be best positioned to administer such a rulemaking? c) What factors should be considered when conducting such a rulemaking, and how should they be weighted? d) What should be the frequency of such a rulemaking? e) What would be the benefits of such a rulemaking? What would be the drawbacks of such a rulemaking?*

As noted above, MPA believes the statute would be improved by creating a path to the designation of STMs by the Copyright Office. Presumably this could occur only through a rulemaking, the specifics of which must be detailed in the statute, many aspects of which are quite complicated. For example, with regard to the frequency of the rulemaking, it seems natural to adopt a triennial process to mirror section 1201. But the section 1201 rulemaking is designed to consider exemptions to the statute, not obligations. Requiring OSPs to adopt new technologies every three years might be quite challenging. Conversely, waiting three years to begin considering a technology already in use might impose needless delay. We have not yet

considered all of the details of how a rulemaking should work and therefore cannot comment on the specifics at this time.

12. Alternatives: Are there alternative approaches that could better achieve Congress's original goals in enacting section 512(i)?

Congress's goal in enacting 512(i) was to foster cooperation between copyright holders and OSPs to protect copyrighted works, while fostering the development of legitimate online businesses. There are several approaches other than STMs that could achieve this goal. These include improving the text of the "red flag knowledge" provision and the addition of a provision for no-fault injunctive relief against internet service providers and other third parties that provide access or services to infringing sites.

13. Please identify and describe any pertinent issues not referenced above that the Copyright Office should consider.

We are concerned that the blanket application of technological requirements can have the result of lowering rather than raising the bar for any OSPs that have voluntarily agreed to utilize more sophisticated measures. STMs should not be designated only to create a "lowest common denominator" that stalls rather than fosters further innovation around copyright protection.

Respectfully submitted,

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