



AUTHORS
ALLIANCE

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February 8, 2022

The Honorable Shira Perlmutter
Register of Copyrights
U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559

RE: Technical Measures Notice of Inquiry

Dear Register Perlmutter:

Authors Alliance appreciates the opportunity to provide input on the Copyright Office's notice of inquiry on the development of technical measures for copyrighted works available online. We submit this comment to share our input and concerns with the Office, but do not request participation in the plenary discussion to be held on February 22, 2022. In view of the Office's clarification that it will promulgate a separate notice of inquiry focused on the interpretation of 17 U.S.C. § 512(i), we confine our comments here to questions regarding voluntarily identified and implemented technical measures.

Authors Alliance is a nonprofit organization based in Berkeley, California. Founded in 2014, Authors Alliance exists to advance the interests of authors who want to serve the public good by sharing their creations broadly. To effectuate our mission, we create resources to help authors understand and enjoy their rights and promote policies that make knowledge and culture available and discoverable, advocating for our members' interests before Congress, the courts, and other government entities.¹

Authors Alliance represents member authors who rely on being able to access and use copyrighted materials online, and the organization itself produces and shares its works online. Authors Alliance is also part of a community of scholars, organizations, and institutions that have a significant stake in ensuring that technical measures reflect and accommodate their lawful creation and use and copyrighted works. As this comment will explain, certain technical measures may impair our members' ability to engage in that lawful creation and use. Furthermore, Authors Alliance believes that voluntary technical measures should be genuinely voluntary rather than developed under threat of regulation. Finally, any standards for technical

¹ For more information about Authors Alliance, see *About Us*, Authors Alliance, <http://www.authorsalliance.org/about>.

measures should be developed voluntarily, technologically neutral, and should reflect the consensus of all communities who will be implementing or affected by these measures.

1. Rightsholders: Please identify any technical measures currently used or in development by you, your organization, company, industry, or sector to identify or protect copyrighted works online. How do these technical measures affect your ability to protect your copyrighted works online?

Authors Alliance creates a variety of expressive content, including blog posts and book-length guides for authors.² While Authors Alliance holds the copyright in these works, we also make them freely available online on an open access basis under a Creative Commons license³ without the use of any technical measures to prevent access or onward uses. This choice allows Authors Alliance’s works to reach broad audiences and be freely shared among authors, an integral part of our mission. Our author members are also rightsholders, and like our organization, many also choose to make their works available under open-access conditions.⁴ This is consistent with the goals of authors who wish to see their works reach as many readers as possible and prioritize access over maximizing financial gain. While some rightsholders have as their utmost priority protecting their works available online, others choose to make works available under licenses that allow—and require others to allow—reproduction, distribution, and modification of their works⁵ under terms consistent with their goals. Creative Commons licenses often require attribution, preserving an author’s right to be associated with their works, while also facilitating enhanced access to those works, and some allow authors to place further restrictions on onward uses.⁶ It is essential that technical measures deployed by platforms and other online service providers accommodate these choices and lawful uses of copyrighted works.

3. Users: How are you, or your organization, company, industry, or sector affected by technologies implemented by rightsholders and service providers to identify or protect copyrighted works online?

Authors Alliance members are authors engaged in creating expressive works of authorship. As part of this creation, many of our members need to access and use other works available online in order to facilitate their scholarship, making them users of copyrighted works. Certain technical

² *Resources*, Authors Alliance, <https://www.authorsalliance.org/resources/>.

³ *Creative Commons License Picker*, Authors Alliance, <https://www.authorsalliance.org/2014/11/14/creative-commons-license-picker/>.

⁴ See *Open Access Success Stories*, Authors Alliance, <https://www.authorsalliance.org/category/resources/open-access/oa-successes/> (collecting interviews with authors who made their works available on an open access basis).

⁵ See, e.g., *Attribution-ShareAlike 4.0 International License*, Creative Commons, <https://creativecommons.org/licenses/by-sa/4.0/legalcode>.

⁶ *About the Licenses*, Creative Commons, <https://creativecommons.org/licenses/>.

measures may hamper our members’ ability to make these uses, even when they are squarely within the ambit of fair use. For example, Authors Alliance has successfully petitioned the Office for several exemptions to the Digital Millennium Copyright Act’s prohibition on bypassing technical protection measures.⁷ These exemptions have enabled authors to bypass technical protection measures for certain, delineated uses of a work which the Office considers to be noninfringing. And these exemptions have led to the creation of new, expressive works. Yet, technical measures deployed by rightsholders or online service providers may block, filter, or obscure those expressive works.⁸ Any policy intervention must account for the fact that existing technical measures *already* make certain fair uses of works impossible or excessively burdensome.

8. Please identify any other pertinent issues not referenced above that the Copyright Office should consider in these consultations.

Authors Alliance respectfully suggests that any technical measures developed as a result of this inquiry should be truly voluntary rather than adopted under regulatory threat. Some of the examples of voluntary measures cited in the Office’s notice of inquiry followed actual or recommended action by regulators against similarly situated service providers.⁹ Further, some of these voluntary measures involved only a few industry sectors or even a single company. Such measures are a far cry from those “developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry process[.]”¹⁰ and should not become de facto standards.

Similarly, it is important that any standards for technical measures be technologically neutral in order to be fair to all involved parties. As § 512(i) counsels, these measures should reflect the consensus of the entire community that will be affected by them. This community consists of not

⁷ See *Library of Congress Expands 1201 Exemptions to All Nonfiction Multimedia E-Books*, Authors Alliance, Oct. 25, 2018, <https://www.authorsalliance.org/2018/10/25/library-of-congress-expands-1201-exemptions-to-all-nonfiction-multimedia-e-books/> (exemption for the use of film clips in multimedia nonfiction e-books); *Update: Librarian of Congress Grants 1201 Exemption to Enable Text Data Mining Research*, Authors Alliance, Oct. 27, 2021, <https://www.authorsalliance.org/2021/10/27/update-librarian-of-congress-grants-1201-exemption-to-enable-text-data-mining-research/> (exemption enabling researchers to bypass protection measures in order to conduct text data mining research).

⁸ See Katharine Trendacosta, *Unfiltered: How YouTube’s Content ID Discourages Fair Use and Dictates What We See Online*, Electronic Frontier Foundation, Dec. 10, 2020, <https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online>.

⁹ Compare Press Release, *Donuts and the MPAA Establish New Partnership to Reduce Online Piracy*, Feb. 9, 2016, <http://www.mpaa.org/wp-content/uploads/2016/02/Donuts-and-MPAA-Establish-New-Partnership-2.9.16.pdf> (announcing a domain name registrar’s designation of the MPAA as a “trusted notifier” to flag large-scale piracy sites for deregistration) with U.S. Trade Representative, *2014 Out-of-Cycle Review of Notorious Markets*, Mar. 5, 2015, at 12, https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List%20-%20Published_0.pdf (“urg[ing] trading partner governments and ICANN to investigate” certain domain name registrars”).

¹⁰ 17 U.S.C. § 512(i).

only rightsholders motivated to protect works available online, but also rightsholders like our author members that favor open access and free sharing as well as a community of other users whose interests may diverge from those singularly focused on inhibiting the unauthorized reproduction or distribution of copyrighted works available online.

Sincerely,

A handwritten signature in black ink, appearing to read "Rachel Brooke". The signature is fluid and cursive, with the first name "Rachel" and last name "Brooke" clearly distinguishable.

Rachel Brooke

Interim Executive Director, Authors Alliance