



## American Intellectual Property Law Association

March 5, 2021

The Honorable Thom Tillis  
Ranking Member  
Subcommittee on Intellectual Property  
Committee on the Judiciary  
U.S. Senate  
113 Dirksen Senate Office Building  
Washington, DC 20510

RE: Discussion Draft of The Digital Copyright Act

Dear Senator Tillis:

The American Intellectual Property Law Association (“AIPLA”) is pleased to provide comments in response to the discussion draft of The Digital Copyright Act (“DCA”) of 2021. AIPLA appreciates your and your staff’s, as well as the Subcommittee on Intellectual Property’s, continued efforts to improve the copyright system and to address the myriad of important issues impacting stakeholders in the copyright community.

AIPLA is a national bar association of approximately 8,500 members who are engaged in private or corporate practice, government service, and the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping to establish and maintain fair and effective laws and policies that stimulate and reward invention and authorship while balancing the public’s interest in healthy competition, reasonable costs, and basic fairness.

AIPLA’s comments largely mirror and reflect AIPLA’s positions expressed on prior occasions and we do not attempt to address separately each topic covered by the proposed legislation. Moreover, at this time our comments are directed to the concepts addressed and not to any specific proposed language. We look forward to participating in further discussions on these issues as future drafts are crafted. The draft DCA is ambitious in scope, covering a wide array of important issues. Of these, AIPLA believes that: (1) the proposed amendments to Section 512; (2) the proposed amendments to Section 1202; and (3) the proposed amendment to Section 409 to address good faith errors in copyright applications are significant. While future drafts might eschew certain issues in favor of others, we believe it is important that any future iterations of the DCA address these issues in particular. Moreover, AIPLA recommends that Congress contemplate additional changes to the law in light of the Supreme Court’s decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881 (2019), in which the Court held that a copyright registration (rather than a pending application) is a pre-requisite to suing for infringement.

*Section 2: Limitations on Liability Relating to Material Online (512)*

The draft legislation proposes several amendments to Section 512, including lowering the knowledge standard for an online service provider (“OSP”) to qualify for the safe harbor provisions, requiring reasonable on-going monitoring for infringement, and providing a “notice-and-staydown” system for certain types of works. AIPLA supports the concept of advancing the DMCA towards a “notice-and-staydown” regime. In particular, we believe that, to qualify for the statutory immunity with respect to any properly noticed content, the OSP must remove the specifically identified copy as well as make reasonable efforts to examine its systems for other identical copies of the identified content, including potentially screening newly arriving content from users. This type of system has already been privately implemented by agreement among certain platforms and rights holders, including a compensation scheme that provides a portion of the platform’s ad revenues to the copyright holder to incentivize rights holders against unduly aggressive policing. We reserve comment at this time on how this might best be implemented and look forward to exploring these issues in future drafts.

AIPLA has and continues to advocate for enhanced penalties for abuse, whether by notice or counter-notice. We are pleased to see this concept included and believe that the tribunal established by the CASE Act will provide a useful forum for such claims.

AIPLA advocates further study into the use of a standardized unique identifier in takedown notices, such as a URL, universally unique identifier (“UUID”), or other identifier that would more effectively identify content. The rights holder could use this unique identifier in the takedown notice to identify the allegedly infringing content with particularity. This technological solution can identify the content in question with certainty, providing speed, clarity, and efficiency, which would reduce some of the frustrations on all sides arising from the current system, and should make the move towards a “staydown” regime as discussed above more feasible.

The draft legislation further contemplates a greater role for the Copyright Office in the notice-and-takedown system. AIPLA supports this, as a general matter. We strongly support both the standardization of web forms for submitting notices and the Copyright Office’s involvement in developing and maintaining the system. We likewise support the proposed role of the Copyright Office in developing and maintaining a repeat infringer policy. We further believe that the Copyright Office should establish a centralized, publicly accessible repository for takedown notices and counter-notices. A repository would make it easier to flag repeat infringers and abusers alike, and the public nature of the system should itself deter abuse. We encourage the Subcommittee to explore this in future drafts.

*Section 3: Orphan Works Act*

As a general matter, AIPLA supports legislation to address orphan works and limit the liabilities of a user who has conducted a reasonably diligent good faith search. AIPLA believes that Congress should move forward to address this long-standing problem. AIPLA reserves comment at this time on the specific proposal embodied in the draft legislation.

*Section 4: Appointment of the Register of Copyrights; Copyright Office Relocation*

A modern copyright system requires a modern Copyright Office. We support the various initiatives introduced in recent years to further that goal. While AIPLA takes no position at this time on where the Copyright Office sits, we believe that the Register of Copyrights should be appointed by the President and confirmed by the Senate, and that this is critical to a strong and balanced system.

*Section 6: Promoting Attribution through Copyright Management Information (1202)*

The proposed attribution requirements in section 1202A, requiring the copyright owner of a work who is not also the author to affix CMI to all digital copies of the work, raises certain concerns.

*First*, it is not clear what problem proposed 1202A (b) seeks to remedy. AIPLA is unaware of any significant issue resulting from the current system, which leaves attribution to the parties' discretion and thus may be properly adjusted according to the particular circumstances.

*Second*, the practical ramifications of proposed 1202A (b) are enormous and may be detrimental to the primary objective of U.S. copyright law "to promote the Progress of Science and the useful Arts" as recognized under the Constitution and by the Supreme Court. *Feist Publications, Inc. v. Rural Telephone Co., Inc.*, 499 U.S. 340, 349 (1991) (emphasis added). Many copyright owners possess and distribute vast quantities of material for which they are not the author. The proposed attribution requirements would place an enormous burden on copyright owners and result in various undesirable outcomes.

Suppose, for example, that (a) a small business contracts with a web developer to design a website; (b) the business or the web developer lawfully obtains assignment of photographs for use on the website; and (c) the website displays images of products for sale (obtained by agreement by the business' clients). The ultimate website (which is subject to copyright protection), is not a work made for hire because it was not created by an employee and does not otherwise qualify under the Act. In such case, not only would the business owner be required to affix CMI to the website, the statute would require it to add CMI to each photograph and to each product illustration used on the website, presumably even if the parties did not feel attribution were appropriate. These types of situations could arise in virtually any business that has a website or generates digital content.

*Third*, absent greater clarity, subsection (c)'s creation of a cause of action may result in substantial, additional litigation burdens. Every infringement action that includes one work taking a portion of another copyrighted work—even if that work is ultimately subject to a claim of fair use—will incorporate a Section 1203 claim, particularly given the potential statutory damage windfall. Moreover, we would expect to see additional litigation on this issue alone as the section provides for statutory damages of \$2500 to \$25,000 "for each violation" and courts routinely have found that registration is not a prerequisite to Section 1203 damages. *See, e.g., Gattoni v. Tibi, LLC*, 254 F. Supp. 3d 659, 663-64 (S.D.N.Y 2017) and cases cited therein.

*Fourth*, it is not clear that this requirement is necessary. This provision would not apply to works made for hire because under Section 201(b), "...the employer or other person for whom the work was prepared is *considered the author* for purposes of [the Act]." (Emphasis added.) Ownership separate from authorship, therefore, would likely be based on assignment or testamentary succession. Since assignments must be in writing under Section 204, any such conveyance could include an attribution requirement, *should the parties desire and agree to one*.

In view of these concerns, AIPLA believes a general attribution requirement is best left to the parties' discretion in negotiating the assignments.

#### *Section 7: Copyright Alternative in Small-Claims Enforcement*

AIPLA was pleased to see enactment of the CASE Act and looks forward to participating in rulemakings in the coming months. AIPLA believes that the tribunal established by the CASE Act may have a meaningful role to aid in resolving many of the problems addressed by the draft legislation.

#### *Section 9: Good Faith Error in Application for Registration*

AIPLA supports in concept the provisions proposed in Section 9 of the DCA. Although the United States is somewhat unique in its registration requirements for copyrights, it remains a registration rather than prosecution regime. Copyright subsists upon fixation and, consistent with the goal of the 1976 Act to limit formalities, mistakes made in registration applications should be actionable only when the registration has made such errors with the specific intent to defraud or otherwise mislead the Copyright Office in an application. A number of AIPLA members have experienced copyright litigation that focuses far too much on language in an application rather than on the work itself.

Copyright applications call for applicants to make a variety of determinations that are often far from straightforward, particularly for laypersons, including a work's publication status, authorship, and other requirements. In *Gold Value International Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1140 (9th Cir. 2019), a registration covering plaintiff's work was held invalid as to that work because it had been published at the time of application, yet, was included in a group application for unpublished works. This type of error is not correctable under the current regime. The plaintiff would have had to file a new application because published and unpublished works cannot be covered by the same application. The plaintiff lost, and attorneys' fees were awarded to the defendant. In conjunction with the proposed amendment, AIPLA encourages the Subcommittee to consider additional changes to the law that might enhance the flexibility of the registration system to avoid unduly harsh litigation consequences resulting from mere mistakes.

#### *Section 16: Study On Publication*

AIPLA supports this provision and the education efforts it contemplates. Publication status can be confusing and is frequently misunderstood. Further, publication affects multiple aspects of copyright, including duration, deposit, registration, and the availability of statutory damages.

*Section 20: Group Registration of Works*

AIPLA supports broadening the opportunities for group registrations. Rather than continuing the current system that hinges on publication status, however, we have advocated for a more flexible system.

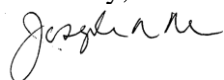
Specifically, AIPLA has proposed a wholly new “wizard” system for online applications that enables users to register a variety of works in a single session regardless of publication status and regardless whether such works would qualify for any of the existing group registration options. The user would simply identify the works and input various data (including publication status), and fees would be assessed based on the types and volume of works. Such a system would streamline the application process and allow the Office to assess fees proportionate to the efforts required to review the applications. It would also avoid fatal consequences of publication errors as discussed in response to Section 9. Moreover, it would discourage the practice of applicants claiming that published works are unpublished to reduce costs. Thus, it may improve the integrity of Copyright Office records.

*Additional Comments: Consideration of the Impact of Fourth Estate*

AIPLA is pleased to see in Section 13 a provision (Section 411(e)) that addresses certain implications of the Supreme Court’s decision in *Fourth Estate*. In *Fourth Estate*, the Supreme Court held that a domestic copyright owner must have registered, not merely have applied for registration, to institute suit on a copyrighted work. The draft provision addresses situations where the recipient of a counter notification under Section 512(g) requires expedited review of an application to satisfy the statute’s prerequisites for commencing civil infringement actions. These deadlines are short and AIPLA believes further accommodation is appropriate in light of these short deadlines to ensure that pendency of applications before the Copyright Office does not unduly prejudice applicants for registration and present a barrier to justice. While further review is necessary, among those potential considerations might be reducing the fee for expediting certain applications—which is currently 15 times the fee for normal processing—or guaranteeing particular turn-around times for special handling.

In closing, AIPLA appreciates the opportunity to comment on the discussion draft and thanks you in advance for considering these views. We look forward to working with you and your colleagues as consideration of these issues moves forward.

Sincerely,



Joseph R. Re  
President  
American Intellectual Property Law Association