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August 21, 2023

Katherine K. Vidal

Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office
600 Dulany St.
Alexandria, VA 22314

Subject: *Future Strategies in Anticounterfeiting and Antipiracy (Docket No. PTO-C-2023-0006)*

Dear Director Vidal:

The Association of American Publishers (AAP) is the national trade association of the U.S. book and journal publishing industry. AAP represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. The U.S. publishing industry supports an extensive network of American businesses and thousands of jobs, with revenue of \$28.10 billion for 2022.¹ The publishing industry is also an integral part of the broader U.S. copyright industries, which collectively added more than \$1.8 trillion in annual value to U.S. gross domestic product in 2021.² Beyond these important economic contributions, an independent and thriving publishing industry supports the nation's political, intellectual, and cultural systems.

The Nature of the Online Piracy and Counterfeiting Problem for Book and Journal Publishers

A wide range of online platforms continue to make available, without compensation to nor permission from publisher rights holders, unauthorized and pirated copies of books (consumer trade, professional books, and textbooks) and journal articles. These platforms include online distribution hubs ("cyber lockers"), auction sites, P2P technologies, apps, ecommerce platforms or marketplaces, social media platforms, and other online services. It is unfortunately the case that the infringing activity occurring on some of these platforms is supported, in some cases knowingly, by third-party service providers such as hosting providers, payment processing services, advertising networks, domain name registrars, and content delivery networks (CDN). While some platforms cooperate to a certain extent with rights holders to address the infringing conduct, many provide little or no support to rights holders trying to take action against the infringing activity occurring on these sites.

In addition to the more widely known problem platforms described above, the problem of **Read Online Sites** continues to rise in significance, with the number of "read online" sites continuing to increase.

¹ [AAP StatShot Annual Report: Publishing Revenues Totaled \\$28.10 Billion for 2022 - AAP \(publishers.org\)](https://www.aap.org/statshot).

² *Copyright Industries in the U.S. Economy: The 2022 Report*, by Robert Stoner and J  ssica Dutra of Economists Incorporated, prepared for the International Intellectual Property Alliance (IIPA), (December 2022).
https://www.iipa.org/files/uploads/2022/12/IIPA-Report-2022_Interactive_12-12-2022-1.pdf.

These sites provide the text of an ebook to be viewed or “read online.” As “read online” sites are optimized to allow for “viewing” or “reading” on mobile devices, these sites reach more consumers than sites optimized for desktop or laptop devices given the ubiquity of mobile devices through which infringing works can be accessed without having to download the work. This type of online book piracy is particularly problematic as it significantly increases enforcement costs for publishers. In the “read online” scenario, the infringing content is displayed across several linked pages on a website. For download sites, one takedown notification will address the complete work. In contrast, for a “read online” site, a takedown notification must be sent for every online page (i.e., every URL) associated with a single title. This easily translates into hundreds of takedown notifications for a *single* work, and thus, thousands of notifications by a publisher for the many copyrighted works they must protect.

Likewise, counterfeit copies of textbooks and trade books (consumer fiction and non-fiction) continue to be available on ecommerce marketplaces, with many platform operators doing little to adequately address the continued availability of counterfeit copies on their sites. The counterfeits are typically produced overseas in great quantities, and overseas manufacturers and distributors use online marketplaces, distribution networks, and international financial institutions to sell to distributors and consumers in the U.S. Sellers of counterfeit and pirated goods have found that online marketplaces are an ideal avenue through which to sell their infringing goods as the existing legal framework does not adequately hold online marketplaces accountable for the conduct of vendors they allow to operate on their platform. The problem continues unabated because of the way online marketplaces conduct their operations. Most allow vendors (many anonymously) to conduct business on their platforms with few controls and little enforcement. International distribution networks, through which U.S. based distributors also procure goods, are extremely efficient such that overseas vendors can cost effectively move their goods into the U.S., using a U.S.-based distribution center from which the counterfeit goods are subsequently distributed to other vendors (who sometimes will also be unaware that they are procuring counterfeit or pirated goods) as well as directly to consumers.

The flow of counterfeit textbooks and trade books through online marketplaces continues unabated, due to the volume of the traffic and the lack of accountability of online marketplaces. Unfortunately, there has only been marginal improvement in this situation, and it remains particularly onerous for small and medium-sized companies to gain any assistance from the platforms.

The Question of Future Strategies

AAP appreciates the efforts of the U.S. Patent and Trademark Office (USPTO) to again focus attention on the harm counterfeiting and piracy inflict on American workers, creators, and rights holders. The need remains for the U.S. online enforcement framework to be updated to provide rights holders with more effective tools and remedies to adequately address the nature and scale of piracy and counterfeiting they face today.

Below AAP addresses the questions posed in the request for comments, regarding current trends in anticounterfeiting and antipiracy strategies, their efficacy in addressing the availability of pirated and counterfeit goods across multiple platforms, and whether the current U.S. online enforcement framework provides rights holders with adequate and efficient remedies to effectively address the problem. AAP member publishers continue to invest in efforts to protect and enforce their intellectual property rights — including those of the authors and author-researchers whose works they bring to market; however,

improvements to the current U.S. anticounterfeiting and antipiracy framework are urgently needed to address the weaknesses and imbalance in the current framework.³

1. *Please identify current anticounterfeiting and antipiracy strategies and any trends you see in how often these practices are guiding the public's plans for addressing these issues in the future.*

Publishers employ third-party online monitoring services to monitor websites, ecommerce marketplaces, apps, and social media platforms for infringing copies of their works and authorize these services to send take down notifications to the website operators (if the site provides information as to where to send such notices) and to search engine operators to prevent problematic sites and links from continuing to appear in search results, as well as to payment processors that facilitate commercial transactions for the sellers of infringing unauthorized PDF copies and counterfeit books. While some success has been achieved with respect to some online platforms and ecommerce marketplaces, it remains the case that online enforcement under the current U.S. online enforcement framework is very much a game of whack-a-mole. No sooner is a link to infringing content taken down, the same content is likely to re-appear on the site. The same problem exists in the infringement reporting process employed by ecommerce marketplaces. In many cases, due to the lack of a robust repeat infringer policy, a third-party vendor whose account has been suspended, even terminated for trafficking in counterfeit or pirated goods will re-surface under a different account profile.

Improvements to the current notice sending process would be helpful in mitigating its inadequacy. Such improvements could include the development of standardized web forms for notices, which would simplify the burden on rights holders and online platforms when reporting and responding to infringement notifications.

2. *Please identify the types of harms you have observed from sales of counterfeited and pirated goods.*

The harm caused by the sale of counterfeit and pirated goods has long been documented. As a number of government reports already state, counterfeits cause “significant financial losses for U.S. rights holders and legitimate businesses, undermine critical U.S. comparative advantages in innovation and creativity to the detriment of American workers, and pose significant risks to consumer health and safety,”⁴ and “threaten national security and public safety directly when introduced into government and critical infrastructure supply chains, and indirectly if used to generate revenue for transnational criminal organizations. Counterfeits also pose risks to human health and safety, erode U.S. economic competitiveness and diminish the reputations and trustworthiness of U.S. products and producers. Across all sectors of the economy, counterfeit goods unfairly compete with legitimate products and reduce the incentives to innovate, both in the United States and abroad.”⁵

³ See [Section 512 of Title 17 \(copyright.gov\)](#) [USCO Section 512 Report], “In the twenty-plus years since section 512 went into effect, the question has often been asked whether the balance that Congress sought has been achieved, particularly in the light of the enormous changes that the internet has undergone... Based upon its own analysis of the present effectiveness of section 512, the Office has concluded that Congress’ original intended balance has been tilted askew.”

⁴ See [2020 Review of Notorious Markets for Counterfeiting and Piracy \(final\).pdf \(ustr.gov\)](#).

⁵ See [Combating Trafficking in Counterfeit and Pirated Goods \(dhs.gov\)](#).

In addition to significant economic losses, the sale of pirated and counterfeit goods also results in reputational harm to a rights holder's brand, reducing consumer trust in the product and the brand owner. In such cases, consumers will return to the publisher a counterfeit or pirated book purchased from a third-party vendor on an ecommerce platform, often not knowing the book they purchased was not sourced from the publisher. In such cases, the publisher may have little choice but to shoulder the cost of the returned counterfeit or pirated book.

With revenue not being fully realized by the creator, distributor, or producer of the legitimate products, rights holders may be forced to down-size their work force, resulting in lost jobs and significant harm to American workers. Further, rights holders, including publishers are forced to increase spending on anticounterfeiting and antipiracy strategies (such as retaining external monitoring and notice sending services, responding to frivolous counter notices), instead of being able to increase investment in nurturing authors and bringing new works to market.⁶ Finally, counterfeiters and pirate-producers also deprive governments of revenue that should go to funding schools, community services, and other programs as purveyors of pirated and counterfeit products do not invest in the community nor pay taxes.

In addition to the health and safety risks that consumers face, when consumers browse sites that traffic in infringing content and counterfeit products, they make themselves vulnerable to malware and cyber-attacks (such as phishing), putting at risk their personal and financial information. For instance, scam (and phishing) sites⁷ may promote the availability of "free" content, but when one navigates to the site, there typically is no content for download. Instead, the site will ask the consumer to subscribe and provide credit card information. Scam sites may also utilize the (brand) name of a publishing house in its domain name, using a play-on-words, to mis-direct an unsuspecting consumer to the wrong site where their personal and financial information may be harvested.

3. Please indicate how consumers are educated about the harms and dangers that may result from the use and sale of counterfeited or pirated products.

Rights holders and their trade associations engage in awareness raising or IP education campaigns to educate consumers and the public on the importance of copyrights, and intellectual property in general. In addition to private sector efforts, government and inter-governmental bodies also engage in informing and educating consumers about the harms and dangers that result from patronizing pirate sites and purchasing and using counterfeit products.

In 2000, Member States of the World Intellectual Property Organization (WIPO) designated April 26th as World Intellectual Property Day, "with the aim of increasing general awareness and understanding of IP," around which educational campaigns are also built. These campaigns speak not only to the necessity of a strong IP framework to incentivize continued investment in the creative process, but also to the harms and risks to which consumers expose themselves when they choose to purchase counterfeit products or patronize websites that promise free access to copyrighted works.

⁶ See [What the Online Piracy Data Tells Us About Copyright Policymaking | Hudson](#): "... (w)ith near unanimity, the peer-reviewed empirical literature confirms what many advocates for the creative ecosystem have been claiming for years, namely, that online piracy harms both creators and consumers."

⁷ E.g., <https://sdl.anmtresawapo43.com/?book=1119358809>; <https://booksfriendly.com/?book=111980955X>; <https://bookscloud.net/?book=1118385349>; and <https://twitter.com/i/events/1571772881465671680>.

The U.S. government plays an equally vital role in educating consumers and the public about the pitfalls of engaging with sites and marketplaces that traffic in pirated and counterfeit goods. For several years, the Department of Commerce has operated the [STOPfakes.gov](https://stopfakes.gov) site, a “one-stop shop for U.S. government tools and resources on intellectual property rights (IPR),” that provides “resources to educate and assist businesses, particularly small and medium-sized enterprises (SMEs), as well as consumers, government officials, and the general public.” The site hosts a dedicated consumer page through which consumers may learn how to “shop smart and avoid becoming a victim,” by learning how to “spot and report fakes.”⁸ Similarly, USPTO, in partnership with the National Crime Prevention Council, also runs the “GoForReal” campaign.⁹ While these education campaigns may be known to those who work in the creative sectors, the average consumer may not be familiar with these sites. A campaign to promote these educational resources and more directly connect with consumers would likely broaden their reach and help consumers avoid falling victim to scammers and vendors of pirated and counterfeit products.

4. Please describe current anticounterfeiting and antipiracy strategies that may be available, identifying which elements have proven successful and those that have not. Your answer should identify the targets of anticounterfeiting and antipiracy efforts, such as ecommerce platforms, physical markets, and social media.

With respect to addressing online piracy, there is of course the notice-and-takedown (NTD) regime under section 512 of the Digital Millennium Copyright Act (DMCA). Unfortunately, the NTD system is no longer effective nor adequate in addressing the nature and scale of online piracy rights holders contend with today.¹⁰ The system perpetuates the “whack-a-mole” problem, and platform responses to takedown notifications are highly inconsistent or non-existent. Rights holders, such as publishers, continue to bear the significant burden in combatting counterfeiting and piracy, and as such need additional tools and remedies to address large scale infringing activity more effectively and efficiently. We encourage USPTO to look to processes and remedies already available in other jurisdictions, such as a notice-and-staydown framework and a no-fault injunctive remedy, and to recommend adoption of such measures and other international best practices.

A **notice-and-staydown** framework would more adequately prevent the cyclical re-uploading of previously notified infringing content on to websites, as routinely occurs in the current notice-and-takedown system. Under a staydown regime, an online intermediary — having become aware of infringing content present on its service or website — would be required to act not only to remove or disable access to that infringing content, but also to take such measures as are necessary to prevent the re-appearance of the infringing content on its site or service.

Adoption of a notice-and-staydown regime would not impose upon online intermediaries a general obligation to monitor. Rather, a duty to monitor for infringing activity on their service would arise only when the online intermediary is already on notice that infringing activity is occurring. Frameworks that protect willful blindness by online intermediaries should be avoided. For example, a system that predicates action solely on actual knowledge of specific instances of infringement, typically from a notification from a rights holder. The statutory framework should clearly provide that both actual and constructive knowledge will

⁸ See [Consumer Guide to Counterfeits and Pirated Goods - IPR | STOPfakes.gov - Intellectual Property Rights Resources and Assistance](https://stopfakes.gov).

⁹ See [#GoForReal - National Crime Prevention Council \(ncpc.org\)](https://ncpc.org).

¹⁰ See USCO Section 512 Report.

trigger a duty to remove the infringing content for an online intermediary to be eligible for safe harbour protection. This should apply to websites and other online distribution hubs, as well as to ecommerce marketplaces, which perversely appear to benefit from turning a blind eye to ongoing infringing activity by third-party vendors operating on their platform.

We recommend giving serious consideration to recalibrating the knowledge standard to determine eligibility for safe harbour protection. The law should make clear that an online intermediary that is aware of infringing activity on its site or service should act expeditiously to remove or disable that infringement regardless of whether actual notice of the infringement from the copyright holder is received. Thus, if a site or service is aware of infringing content on its site, whether through actual knowledge of specific infringements or constructive knowledge of the infringing activity (i.e., from facts and circumstances that indicate or suggest infringing activity is occurring), there should arise an obligation not just to take the infringing content down or render the same inaccessible, but also a corresponding responsibility to take reasonable measures to prevent the re-appearance (re-upload) of the previously identified infringing content. As entities best positioned to prevent infringing activity online, online intermediaries should have an obligation to mitigate the infringing activity occurring on their platforms or networks, and failure to do so should give rise to consequences.

Tools are already available that allow online intermediaries to take appropriate measures to mitigate and prevent infringing activity on their sites. The government should actively consider requiring online intermediaries to adopt technological measures — such as fingerprinting, filtering, and other content recognition technologies — that serve this purpose and were envisioned when the DCMA was adopted. These tools would enable online service providers to identify infringing content and prevent its appearance or reappearance on their site or service.

The **no-fault injunctive remedy**, or website blocking, is available in at least forty countries. Website blocking works to disrupt piracy or large-scale copyright infringement occurring on or facilitated by blatant pirate sites located in foreign jurisdictions. In Europe, where the remedy has been available since at least 2010, over 1,800 websites and over 5,300 domains have been blocked.¹¹ The remedy is not and has not been argued as a silver bullet to cure all online piracy ills. Rather, this remedy— as has been shown in several countries — is simply another useful tool with which to equip rights holders in their efforts to mitigate rampant online piracy more effectively and efficiently.

Website blocking allows rights holders to secure an order from either a court or an administrative agency requiring ISPs to block subscriber access to sites that have little purpose other than to provide access to or traffic in infringing content online. Where the remedy exists, rights holders take great care to ensure that applications for injunctions have been brought against only the most notorious of infringing sites. Courts or the administrative agencies, before which such applications are brought, have been rigorous in their review of such applications to ensure that only egregious bad actor sites are subject to blocking orders. This remedy has already proven effective in multiple jurisdictions around the world¹², and a similar remedy should be adopted in the United States.

¹¹ An AAP member reports that to date, in 2023 alone, it has already detected some 1,900 pirate sites. Many of the 1,900 sites are mirrors to known pirate sites, which create the mirror or alternate sites to evade site blocking injunctions.

¹² See [A Decade After SOPA/PIPA, It's Time to Revisit Website Blocking | ITIF](#); [Website Blocking in Europe: Debated, Tested, Approved, and Defended | ITIF](#); and [The Normalization of Website Blocking Around the World in the Fight Against Piracy Online | ITIF](#).

5. Please identify the challenges you anticipate in the ongoing fight to prevent counterfeited and pirated goods from entering the stream of commerce and reaching the hands of consumers. Please add information on how those challenges might be addressed.

In the preceding section, we describe the challenges rampant online piracy, and the lack of adequate and effective enforcement measures pose to rights holders. Rights holders also face similar challenges in enforcing their rights on online marketplaces.¹³ Many of these challenges stem from the lack of procedures to identify and effectively weed out vendors of counterfeit and pirated goods from ecommerce marketplaces, and a system that protects a platform's willful blindness.

The identities of marketplace vendors are often masked or not readily disclosed. Marketplaces do not employ mechanisms to adequately verify the identities of the vendors that set up store fronts on their platform, and thus, do not detect the many cases where vendors of counterfeit books have used fake names, false contact information, fake (or non-existent) addresses to which the counterfeit vendor has no connection, or multiple seller accounts. Where the vendor has been the subject to enforcement, the lack of vendor verification procedures enables suspect sellers to simply create or register new storefront accounts or switch to a different storefront account, and thereby continue the sale of counterfeit and pirated goods unabated. In short, the online marketplace does not know, and perhaps cares not to know the third-party vendors operating on its platform. There has been an unfortunate reluctance by ecommerce marketplaces to adopt robust "know your business customer" (KYBC) policies, which policies would be helpful in early identification of potential bad actors (i.e., third party vendors whose only intent is to traffic in pirated and counterfeit goods) from being authorized to operate on the platform. With the adoption of the "Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act" (INFORM Consumers Act),¹⁴ consumers and rights holders may now be able to obtain information on third-party sellers. However, the scope of the law is limited to so-called "high-volume third-party sellers," or those with more than 200 transactions and \$5,000 in revenue in a 12-month period, who are required to provide government IDs, tax IDs, bank account information, and contact information to large marketplace platforms, which in turn must disclose the seller's contact information. The INFORM Consumers Act would be of greater utility if its application extended to more types of platforms and services, including by requiring domain name registrars to adopt KYBC policies with respect to their client registrants and making information about such registrations available, as appropriate.

It is also the case that the notification procedures for reporting infringements are often cumbersome and have uncertain consequences. In some cases, once the counterfeit item has been purchased and the offer is no longer active, marketplace notification processes simply stop accepting notices. Many marketplaces also do not allow bulk uploading of infringement notices for counterfeit products, making this process more burdensome for rights holders. It has been member experience that online marketplaces do not often take action against bad actor vendors, and when they do, these actions are not communicated to the rights holders nor are the identities of the bad actors shared.

Also, in many cases, marketplaces may remove the infringing offer but do not review the other offerings of the offending vendor for additional counterfeit products that may be in its inventory.

¹³ See [What Happens After Amazon's Domination Is Complete? Its Bookstore Offers Clues - The New York Times \(nytimes.com\)](https://www.nytimes.com/2023/06/27/technology/amazon-bookstore-counterfeit.html).

¹⁴ See [The INFORM Consumers Act and online marketplaces: What to know | Consumer Advice \(ftc.gov\)](https://www.ftc.gov/consumer/advice/the-inform-consumers-act). The Act went into effect June 27, 2023.

Marketplaces are also often reluctant or simply refuse to share information with rights holders regarding a bad actor vendor or entity to which the platform is providing services, absent subpoenas, or a court order. Further, where a rights holder utilizes the platform's required infringement reporting process, many platforms do not allow the rights holder to download its own history of reported infringements. This information would be useful to rights holders, allowing them to track suspect vendor patterns of behaviour, potentially improving enforcement outcomes.

6. *What patterns and trends have you observed in counterfeiting and piracy during the COVID-19 pandemic? Do you anticipate that these patterns and trends will continue past the pandemic?*

The pandemic lockdown saw an exponential increase in piracy across all sectors.¹⁵ In April 2020, one month into the lockdown, piracy reportedly increased by 40% in the U.S.¹⁶ According to a similar report for 2021,¹⁷ there was a “dramatic increase in piracy demand for publishing media,” seeing a 49% increase from 2020 (at the onset of the pandemic). Unfortunately, the trend appears to be continuing. Data indicates that, overall, piracy rates continue at elevated levels.¹⁸ The cause, however, is not so readily identified nor so easily tied to the pandemic. What is clear is that piracy and counterfeiting are not waning.

7. *What patterns and trends have you observed in counterfeiting and piracy due to shifts in the economy? Do you anticipate that these patterns and trends will continue? And if so, what impact will they have on any current and future strategic plans to combat counterfeiting and piracy?*

Producers and distributors of counterfeit and pirated products do not act to address or in response to economic shifts. Rather, these entities engage in producing counterfeit and infringing goods to profit from the intellectual property of and goodwill built by the brand owner or copyright holder — whether there is an economic downturn or economic prosperity. What remains unchanged is the fact that rights holders must enforce and protect their intellectual property, and it is essential that adequate and effective tools and remedies to do so are available.

8. *Please indicate whether any strategic plans to combat counterfeiting and piracy might include collaboration with private or public parties, and if a strategic plan is not collaborative, please explain why not. If a strategic plan does include collaboration, please describe the anticounterfeiting and antipiracy strategies employed in the collaboration.*

AAP member publishers collaborate across the industry — with other publishing companies, the trade associations that represent the industry in specific markets or regions, other creative industry sectors and their trade associations, in the U.S. and overseas — given shared concerns over pirate sites or ecommerce marketplaces, as well as concerns over weak copyright protection and enforcement frameworks. Where appropriate, AAP member publishers may also work through the trade association to bring to the attention of law enforcement particularly egregious pirate sites against which rights holder self-help may be inadequate.

¹⁵ See [Piracy in 2020 \(muso.com\)](https://muso.com/piracy-in-2020); also [Digital Piracy Explodes During Pandemic Shutdown \(cbr.com\)](https://cbr.com/digital-piracy-explodes-during-pandemic-shutdown);

¹⁶ *Id.*

¹⁷ See [2021 MUSO Discover Piracy By Industry Data review \(hubspotusercontent40.net\)](https://hubspotusercontent40.net/2021-muso-discover-piracy-by-industry-data-review).

¹⁸ See [Piracy Is Back: Piracy Statistics for 2023 | DataProt](https://dataprot.com/piracy-is-back-piracy-statistics-for-2023).

Given the borderless nature of online piracy (and counterfeiting), cooperation between and among governments and their agencies remains essential to addressing egregious pirate (and counterfeiting) operations with transnational effect.¹⁹ Collaboration within and across industry sectors and with government/public sector is critical to effectively combating piracy and counterfeiting.

9. Are you considering new collaborative efforts to combat counterfeiting and piracy? What factors will affect your decision? How might those future collaborations be comprised?

AAP joins collaborative efforts to combat counterfeiting and piracy as it allows the pooling of resources to address bad actor targets of shared concern. Collaboration already occurs within the publishing industry, with publishing companies taking collective action against the most problematic actors, as well as with sister trade associations in relevant jurisdictions. In countries where a website blocking remedy exists, publishers have acted jointly to bring applications to enjoin ISPs to prevent subscriber access to notorious pirate sites.

10. Please identify effective technologies for use in the fight to prevent counterfeited and pirated goods from entering the stream of commerce and reaching the hands of consumers, such as counterfeited product identification devices or advanced algorithms to secure supply chains and identify counterfeited goods online. Please explain how any anticipated strategies will improve an overall anticounterfeiting and antipiracy strategy.

A number of publishers use digital watermarking (either visible or invisible) technology not just to give consumers/readers assurances that they are purchasing legitimate content but also for copyright protection purposes. While watermarks do not prevent pirates from reproducing content without authorization, embedded watermarks may allow the publisher to track the product (content) online and to trace the infringing copy to its source, identify those involved in reproducing and distributing the infringing copies, and potentially take action against those trafficking in the pirated copies.

Similarly, fingerprinting technology may also be helpful in mitigating the whack-a-mole problem with respect to the repeat uploads of infringing copies of works, which have already been the subject of takedown notification. The utility of such measures, however, depends on online intermediaries agreeing to implement the use of such content recognition technology on its platform.

Journal publishers have devised the “Article Sharing Framework”²⁰ (ASF) through which a journal publisher communicates information regarding the “identity” of, and relevant “use and sharing” policies for their published content. An information or online platform can use this framework to correctly identify the content and then match with the publisher’s approved sharing policies.

Under the ASF, participating publishers establish an article’s “identity,” which consists of the article’s unique identifier (the Digital Object Identifier (DOI) and its version (i.e., NISO’s Journal Article

¹⁹ See [Eastern District of New York | Two Russian Nationals Charged with Running Massive E-Book Piracy Website | United States Department of Justice](#), where the office acknowledged noted that “foreign authorities in multiple countries provided critical assistance in this case. In particular, the Office extends its appreciation to the Argentine authorities for their assistance in the capture of Napolsky and Ermakova.”

²⁰ See “Article Sharing Framework: A Framework for Responsible Sharing,” at <https://www.stm-assoc.org/asf-2/#:~:text=%20Three%20major%20features%20of%20the%20Article%20Sharing,instead%20of%20%E2%80%9Cmachine%20readable%E2%80%9D%20sharing%20policies%2C...%20More%20>.

Version (JAV), by embedding this information into the article's PDF file in a machine-readable format. The publisher then asserts the sharing policies that govern the article by registering this information within Crossref's²¹ existing, publicly available metadata services.

When a platform is presented with an article with intent to enable sharing, the article identity information and governing sharing policies can be used by the platform to determine the relevant publisher sharing policies applicable to the specific version of the given article. That is, when an article is uploaded to a platform, the platform decodes the identity and version information embedded in the PDF. The platform then uses this information to query Crossref's metadata services to determine whether the article meets the sharing policies the publisher has defined for the article (assuming these indicators are in Crossref's records for the article). Should a match be made, the platform may permit the article to be shared according to the terms defined by the publisher.

Though the ASF is currently used for journal articles, the framework may be applicable to other types of published works (books/chapters, preprints, etc.) distributed in PDF format and for which a centralized metadata registry exists.

11. Please describe how online enforcement activities intersect with trademark and copyright laws or procedures. Do online enforcement strategies include employing existing trademark laws to combat online counterfeiting? Do online enforcement strategies use existing copyright laws to combat online piracy? If so, please describe in detail those activities, and provide any suggestions for maximizing these practices.

See above response to Questions 4 and 5.

12. Please describe any fraudulent documentation or materials you have observed in the furtherance of online counterfeiting and piracy activity. For example, after reporting infringements to platforms, have you seen fraudulent materials attached to a counter-notification?

An AAP member company reports that it has received an increasing number of baseless or fraudulent counter notices in response to the reports of infringement it has filed with ecommerce marketplaces. In many instances, the counterfeiter or pirate sending the counter notice either does not reside in the U.S. or is using a fake U.S. address and believes itself shielded from litigation. Unfortunately, these fraudulent counter notices place rights holders in the untenable position of having to bring costly litigation, as otherwise, the platform simply reinstates the listing for the counterfeit or pirated products.

13. Please provide any data you have on counterfeiting and piracy, including any data showing how the activities may adversely or disproportionately affect certain industries or companies.

Several reports/studies released over the last few years continue to show that online piracy remains rampant,²² across all creative sectors (whether books, journals, movies, or music). Ascribing a hard number to the losses sustained by content creators (authors, visual artists, performers, and musicians,

²¹ Crossref is a Digital Object Identifier registration agency. See <https://www.crossref.org/>.

²² See [2021 MUSO Discover Piracy By Industry Data review \(hubspotusercontent40.net\)](https://www.hubspotusercontent40.net/2021-MUSO-Discover-Piracy-By-Industry-Data-review).

etc.) and the companies that support these creative artists remains difficult. However, one can with confidence surmise that rampant piracy and counterfeiting do adversely affect the creators of content and the companies that bring these creative works to market. The impact is not limited to loss of income for the author, or for the publisher that is unable to recoup its investment in a creative work. There is also likely a reduction in the investment that would otherwise go towards nurturing new authors and new works as resources are instead diverted towards efforts to combat piracy and counterfeiting.

14. Please share your thoughts on what more the USPTO or government and private parties can do to ensure entities, including under-resourced individuals and small businesses, can readily enforce their intellectual property rights against counterfeited or pirated goods.

Strengthening and improving the online enforcement framework in the United States should be a priority. So long as the weaknesses²³ in the DMCA remain unaddressed, rights holders of whatever size, will continue to be severely disadvantaged in their efforts to mitigate online piracy. These weaknesses already cause a considerable burden on companies that have the resources to retain outside vendors as well as have dedicated internal staff to monitor internet sites and marketplaces for infringing content and counterfeit products and send takedown notifications. For small businesses and under-resourced individuals, this type of self-help may be beyond their means, leaving them without recourse against entities that illegally traffic in and profit from the intellectual property of authors, creators, publishers, and other rights holders.

Government, and in particular law enforcement, should likewise consider how to better assist U.S. rights holders to take effective action against particularly egregious counterfeiters and operators of pirate sites. While reporting mechanisms are provided through certain agencies,²⁴ a response to a report of IP or cyber theft made by the rights holder is often delayed or at times simply absent.

Conclusion

Online platforms and ecommerce marketplaces have provided U.S. consumers with alternative shopping mechanisms as well as entertainment offerings that are convenient, and entirely accommodating of their schedule, while providing a wealth of options in terms of product availability and choice. Unfortunately, these online venues and marketplaces also pose dangers to consumers and challenges to rights holders when the platforms make it easy to traffic in counterfeit and pirated goods. For the publishing industry, the availability of counterfeit and pirated books inflicts significant harm with respect to lost sales, or loss of goodwill arising from a disappointing consumer experience when a poorly produced counterfeit or pirated book is received in place of the expected legitimate version. Counterfeit and pirated goods have infested online marketplaces, but many platform operators have done little to ensure that consumers are protected from fake, and potentially harmful products.

AAP welcomes the USPTO's inquiry regarding future strategies in anticounterfeiting and antipiracy. We note that some strategies identified in this submission, for instance, the no-fault injunctive remedy, have been available in several countries for over a decade and have proven highly effective at disrupting piracy or large-scale copyright infringement facilitated by websites located in foreign jurisdictions. Given the nature and scale of today's online counterfeiting and piracy activities, there is an urgent need for the U.S. to adopt

²³ See USCO Section 512 Report.

²⁴ See [Report IP Theft — IPRCenter](#), and [Internet Crime Complaint Center\(IC3\) | Home Page](#).

additional meaningful tools to enable rights holders to effectively address online piracy. AAP looks forward to working with the USPTO to develop recommendations for the Administration and Congress as to the type of legislative change necessary to achieve the goal of better and more effective protection and enforcement of the intellectual property rights of American creators and rights holders.

Sincerely,

A handwritten signature in blue ink, appearing to read "M. Luisa Simpson". The signature is fluid and cursive, with a long horizontal stroke at the end.

M. Luisa Simpson
Senior Vice President, Global Policy