

**Copyright Review Board**

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

February 14, 2022

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Los Angeles, CA 90025

Re: Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071)

Dear Mr. Abbott:

The Review Board of the United States Copyright Office (“Board”) has considered Steven Thaler’s (“Thaler’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “A Recent Entrance to Paradise” (“Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORK

The Work is a two-dimensional artwork, reproduced below:



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II. ADMINISTRATIVE RECORD

On November 3, 2018, Thaler filed an application to register a copyright claim in the Work. The author of the Work was identified as the “Creativity Machine,” with Thaler listed as the claimant alongside a transfer statement: “ownership of the machine.” In his application, Thaler left a note for the Office stating that the Work “was autonomously created by a computer algorithm running on a machine” and he was “seeking to register this computer-generated work as a work-for-hire to the owner of the Creativity Machine.” In an August 12, 2019, letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the human authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Ryan Abbott (Aug. 12, 2019).

Thaler subsequently requested that the Office reconsider its initial refusal to register the Work, arguing that “the human authorship requirement is unconstitutional and unsupported by either statute or case law.” Letter from Ryan Abbott to U.S. Copyright Office at 1 (Sept. 23, 2019) (“First Request”).¹ After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work “lacked the required human authorship necessary to sustain a claim in copyright,” because Thaler had “provided no evidence on sufficient creative input or intervention by a human author in the Work.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Ryan Abbott at 1 (March 30, 2020). The Office also stated that it would not “abandon its longstanding interpretation of the Copyright Act, Supreme Court, and lower court judicial precedent that a work meets the legal and formal requirements of copyright protection only if it is created by a human author.” *Id.* at 1–2.

Now, in a second request for reconsideration, pursuant to 37 C.F.R. § 202.5(c), Thaler renews his arguments that the Office’s human authorship requirement is unconstitutional and unsupported by case law. Letter from Ryan Abbott to U.S. Copyright Office (May 27, 2020) (“Second Request”). The Second Request repeats the same arguments from the First Request, largely advancing public policy arguments that the Office “should” register copyrights in machine-generated works because doing so would “further the underlying goals of copyright law, including the constitutional rationale for copyright protection.” Second Request at 2. In response to the Office’s citation of relevant case law addressing human authorship, Thaler asserts that “there is no binding authority that prohibits copyright for [computer-generated works],” *id.*; that copyright law already allows non-human entities to be authors under the work made for hire doctrine, *id.* at 4; and ultimately that the Copyright Office “is currently relying upon non-binding judicial opinions from the Gilded Age to answer the question of whether [computer-generated works] can be protected.” *Id.* at 7.

III. DISCUSSION

The Board accepts as a threshold matter Thaler’s representation that the Work was autonomously created by artificial intelligence without any creative contribution from a human actor: “As a general rule, the U.S. Copyright Office accepts the facts stated in the registration

¹ The top of the First Request is dated September 8, 2019, but the attorney’s signature bears a date of September 23, 2019.

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materials.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 602.4(C) (3d ed. 2021) (“COMPENDIUM (THIRD)”). But copyright law only protects “the fruits of intellectual labor” that “are founded in the creative powers of the [human] mind.” COMPENDIUM (THIRD) § 306 (quoting *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)); *see also* COMPENDIUM (THIRD) § 313.2 (the Office will not register works “produced by a machine or mere mechanical process” that operates “without any creative input or intervention from a human author” because, under the statute, “a work must be created by a human being”). So Thaler must either provide evidence that the Work is the product of human authorship or convince the Office to depart from a century of copyright jurisprudence.² He has done neither.

Thaler does not assert that the Work was created with contribution from a human author,³ so the only issue before the Board is whether, as he argues, the Office’s human authorship requirement is unconstitutional and unsupported by case law. Currently, “the Office will refuse to register a claim if it determines that a human being did not create the work.” COMPENDIUM (THIRD) § 306. Under that standard, the Work is ineligible for registration. After reviewing the statutory text, judicial precedent, and longstanding Copyright Office practice, the Board again concludes that human authorship is a prerequisite to copyright protection in the United States and that the Work therefore cannot be registered.

The Copyright Act affords protection to “original works of authorship” that are fixed in a tangible medium of expression. 17 U.S.C. § 102(a). The phrase “original work of authorship” was “purposely left undefined” by Congress in order to “incorporate without change the standard of originality established by the courts under the . . . [1909] copyright statute.” H.R. REP. NO. 94-1476, at 51 (1976). The term is “very broad,” *id.* at 52, but its scope is not unlimited. Congress chose this language to encompass a smaller set of creative works than could be protected under the Constitution.⁴ Because of this gap, the Act leaves “unquestionably other

² Under the heading “Policy Objections,” the Second Request argues that denying copyright protection for machine-generated works will encourage individuals to “act dishonestly” and “inaccurately claim authorship for work done by machines.” Second Request at 5. The Board is unconvinced that applying existing case law will result in applicants committing fraud. The Copyright Act provides criminal penalties for anyone who “knowingly makes a false representation of a material fact in the application for copyright registration . . . or in any written statement tied in connection with the application.” 17 U.S.C. § 506(e). In addition, the Register of Copyrights has the authority to cancel any registration where the “material deposited does not constitute copyrightable subject matter” or “the claim is invalid for any other reason.” 17 U.S.C. § 410(b); *see also* COMPENDIUM (THIRD) § 1807. Applicants who mislead the Office do so at their peril.

³ Because Thaler has not raised this as a basis for registration, the Board does not need to determine under what circumstances human involvement in the creation of machine-generated works would meet the statutory criteria for copyright protection. *See* COMPENDIUM (THIRD) § 313.2 (the “crucial question” of human authorship is whether a computer is “merely being an assisting instrument” or “actually conceive[s] and execute[s]” the “traditional elements of authorship in the work”) (quoting U.S. COPYRIGHT OFFICE, SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, at 5 (1966)).

⁴ As the House Report explains, Congress selected the term to avoid confusion about how the scope of statutory protection compared with the scope of material the Constitution authorizes Congress to protect. H.R. REP. NO. 94-1476, at 51. Under the 1909 Copyright Act, protection accrued to “all the writings of an author,” which led to uncertainty about whether the scope of protected material under the law was “coextensive” with the “writings” of “authors” that the Constitution gives Congress the power to protect. H.R. REP. NO. 94-1476, at 51; *compare* 1909 Copyright Act, Pub. L. No. 60-349, § 4, 35 Stat. 1075, 1076 (1909) (“the works for which copyright may be secured under this Act shall include all the writings of an author”) *with* U.S. CONST. art I, § 8, cl. 8 (authorizing Congress

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areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.” *Id.* at 52.⁵

Courts interpreting the Copyright Act, including the Supreme Court, have uniformly limited copyright protection to creations of human authors. For example, in *Burrow-Giles Lithographic Co. v. Sarony*, a copyright defendant argued that photographs could not be protected by copyright because the statute at the time protected certain types of creations of an “author or authors” and “a photograph is not a writing nor the production of an author” because it is simply “a reproduction on paper of the exact features of some natural object or of some person.” 111 U.S. 53, 56 (1884). The Court rejected this argument, holding that an author is “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature” and that photographs are “representatives of original intellectual conceptions of [an] author.” *Id.* at 57–59. In the opinion, the Court referred to “authors” as human. *See id.* at 58 (describing a copyright as “the exclusive right of a man to the production of his own genius or intellect”), 60–61 (citing as “instructive” a decision from England where justices described an “author” as the “person” who was “the cause of the picture which is produced” and “the man” who creates or gives effect to the idea in the work).⁶

The Court has continued to articulate the nexus between the human mind and creative expression as a prerequisite for copyright protection. In *Mazer v. Stein*, the Court cited *Burrow-Giles* for the proposition that a work “must be original, that is, the author’s tangible expression of his ideas.” 347 U.S. 201, 214 (1954). And in *Goldstein v. California*, the Court again cited *Burrow-Giles* for the proposition that “[w]hile an ‘author’ may be viewed as an individual who writes an original composition, the term in its constitutional sense, has been construed to mean an ‘originator,’ ‘he to whom anything owes its origin.’” 412 U.S. 546, 561 (1973). The Office is compelled to follow Supreme Court precedent, which makes human authorship an essential element of copyright protection.

In addition to the Supreme Court precedent, lower courts have repeatedly rejected attempts to extend copyright protection to non-human creations. For example, the Ninth Circuit held that a book containing words “‘authored’ by non-human spiritual beings” can only gain copyright protection if there is “human selection and arrangement of the revelations.” *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 957–59 (9th Cir. 1997) (holding that “some element

“[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

⁵ For this reason, the Board rejects Thaler’s argument that the human authorship requirement is “unconstitutional” because registration of machine-generated works would “further the underlying goals of copyright law, including the constitutional rationale for copyright protection.” *See* Second Request at 1–2. Congress is not obligated to protect all works that may constitutionally be protected. “[I]t is generally for Congress,” not the Board, “to decide how best to pursue the Copyright Clause’s objectives.” *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). The Board must apply the statute enacted by Congress; it cannot second-guess whether a different statutory scheme would better promote the progress of science and useful arts.

⁶ In this case, as well as a previous case, the Court suggested that the requirement that an “author” be human is required by the Constitution. *See Burrow-Giles*, 111 U.S. at 56 (describing beneficiaries of the Constitution’s intellectual property clause as “authors,” who are one of “two classes” of “persons”); *see also Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (reading the Constitution’s grant of power to Congress to protect “writings” as extending “only as such [works] as are original, and are founded in the creative powers of the mind” or are “the fruits of intellectual labor”).

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of human creativity must have occurred in order for the Book to be copyrightable” because “it is not creations of divine beings that the copyright laws were intended to protect”). Similarly, a monkey cannot register a copyright in photos it captures with a camera because the Copyright Act refers to an author’s “children,” “widow,” “grandchildren,” and “widower,” — terms that “all imply humanity and necessarily exclude animals.” *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018); see also *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011) (rejecting a copyright claim in a “living garden” because “[a]uthorship is an entirely human endeavor” and “a garden owes most of its form and appearance to natural forces”) (internal citations omitted); *Satava v. Lowry*, 323 F.3d 805, 813 (9th Cir. 2003) (finding depictions of jellyfish not protected by copyright because material “first expressed by nature are the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them”). These court decisions are reflected in the Office’s guidance in the *Compendium*, which provides examples of works lacking human authorship such as “a photograph taken by a monkey” and “an application for a song naming the Holy Spirit as the author.” COMPENDIUM (THIRD) § 313.2. While the Board is not aware of a United States court that has considered whether artificial intelligence can be the author for copyright purposes,⁷ the courts have been consistent in finding that non-human expression is ineligible for copyright protection.

Federal agencies have followed the courts. In the 1970s, questions about the impact of computing technology on the copyright system led to the creation of the National Commission on New Technological Uses of Copyrighted Works (“CONTU”). CONTU’s mandate was, in part, to study “the creation of new works by the application or intervention of [] automatic systems of machine reproduction.” National Commission on New Technological Uses of Copyrighted Works, Pub. L. 93-573, § 201(b)(2), 88 Stat. 1873, 1873 (1974). After conducting its review, CONTU determined that the existing judicial construction of “original work[s] of authorship” as requiring human authorship was sufficient to enable protection for works created with the use of computers and thus “no amendment [to copyright law] is needed.” CONTU, FINAL REPORT at 1 (1978). As CONTU explained, “the eligibility of any work for protection by copyright depends not upon the device or devices used in its creation, but rather upon the presence of at least minimal human creative effort at the time the work is produced.” *Id.* at 45–46 (noting that “[t]his approach is followed by the Copyright Office today”).

The CONTU Report mirrors the views of the Copyright Office. A decade before passage of the 1976 Copyright Act, the annual report of the Register of Copyrights considered when copyright protection could vest in expressive works created with a computer. The Register concluded that human authorship was required:

The crucial question appears to be whether the “work” is basically one of human authorship, with the computer merely being an assisting instrument, or whether the traditional element of authorship in the work (literary, artistic or musical

⁷ It appears, however, that the Eastern District of Virginia held that artificial intelligence systems cannot claim inventorship of patents. *Thaler v. Hirshfeld*, No. 1:20-cv-903, 2021 U.S. Dist. LEXIS 167393, at *16–18 (E.D. Va. Sep. 2, 2021) (concluding that under the Patent Act, “an ‘inventor’ must be a natural person” and upholding refusal of a patent application). Though the court’s opinion was based on construction of the Patent Act, rather than the Copyright Act, the similarity of the court’s statutory analysis to that in the copyright cases relied on by the Board supports the conclusion here.

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expression or elements of selection, arrangements, etc.) were actually conceived and executed not by man but by a machine.

U.S. COPYRIGHT OFFICE, SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, at 5 (1966).

For this reason, the *Compendium of U.S. Copyright Office Practices* — the practice manual for the Office — has long mandated human authorship for registration. After enactment of the 1976 Copyright Act, the second edition of the *Compendium* was updated to reflect the Office’s understanding that human authorship is required by the law. See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 202.02(b) (2d ed. 1984) (“COMPENDIUM (SECOND)”) (“The term ‘authorship’ implies that, for a work to be copyrightable, it must owe its origin to a human being. Materials produced solely by nature, by plants, or by animals are not copyrightable.”), available at <https://www.copyright.gov/history/comp/compendium-two.pdf>. The current *Compendium* retains this requirement and articulates its application in multiple circumstances where non-human expression raises unique challenges. See COMPENDIUM (THIRD) §§ 709.1 (automated computer translations); 803.6(B) (derivative sound recordings made by purely mechanical processes); 805.4(C) & 806.4(C) (human performance required for choreography and pantomimes); 808.8(E) (human selection of color in colorized motion pictures); 906.8 (machine produced expression in visual arts works, such as linoleum flooring); 909.3(B) (x-rays and other medical imaging); 1006.1(A) (hypertext markup language if created by a human being “rather than a website design program”). Although no *Compendium* section explicitly addresses artificial intelligence, the Board concludes that Office policy and practice makes human authorship a prerequisite for copyright protection.

The Office’s position is supported by a recent report from the U.S. Patent and Trademark Office (“USPTO”) addressing intellectual property issues raised by AI. USPTO sought public comment on whether “a work produced by an AI algorithm or process, without the involvement of a natural person . . . qualif[ies] as a work of authorship” under the Copyright Act. U.S. PATENT AND TRADEMARK OFFICE, PUBLIC VIEWS ON ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY POLICY at 19 (2020), available at https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf. In its summary of responses, USPTO noted that “the vast majority of commenters acknowledged that existing law does not permit a non-human to be an author [and] this should remain the law.” *Id.* at 20–21. The Board agrees.

Thaler’s secondary argument, that artificial intelligence can be an author under copyright law because the work made for hire doctrine allows for “non-human, artificial persons such as companies” to be authors, is similarly unavailing. See Second Request at 3–4. First, the Work is clearly not a work made for hire as defined in the Copyright Act. A work made for hire must be either (A) prepared by “an employee” or (B) by one or more “parties” who “expressly agree in a written instrument” that the work is for-hire. 17 U.S.C. § 101 (definition of “work made for hire”). In both cases, the work is created as the result of a binding legal contract—an employment agreement or a work-for-hire agreement. The “Creativity Machine” cannot enter

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into binding legal contracts and thus cannot meet this requirement.⁸ Second, the work-for-hire doctrine only speaks to the identity of a work's owner, not whether a work is protected by copyright. As explained above, the statute requires that a work contain human authorship. In sum, the Work is not a work made for hire because it is neither a "work of authorship" nor a work created "for hire."

Much of Thaler's second request amounts to a policy argument in favor of legal protection for works produced solely by artificial intelligence. He cites to no case law or other precedent that would undermine the Office's construction of the Copyright Act. Because copyright law as codified in the 1976 Act requires human authorship, the Work cannot be registered.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board
Shira Perlmutter, Register of Copyrights
Suzanne Wilson, General Counsel and
Associate Register of Copyrights
Kimberley Isbell, Deputy Director of Policy and
International Affairs

⁸ Autonomous systems are not "artificial persons" because they lack legal personhood. *See* Nadia Banteka, *Artificially Intelligent Persons*, 58 HOUS. L. REV. 537, 593 (2021) (noting the "trend" across state and federal courts that legal personhood requires "that an entity be an aggregate of individuals [who] have legal personhood," as is true for corporations); *cf.* *Software Solutions Partners Ltd. v. H.M. Customs & Excise*, [2007] EWHC 971 [67] (Admin) (noting that "on current authority," "automated systems" could not enter contracts because "only a person with a 'mind' can be an agent in law").

**The Register of Copyrights of the United States of America**

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The Honorable Christopher A. Coons
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June 30, 2022

Dear Senators Leahy, Tillis, Hirono, Cornyn, Klobuchar, and Coons:

On behalf of the United States Copyright Office, I am pleased to deliver a copy of a report entitled *Copyright Protections for Publishers*, which is available to the public on the Office's website.

Following a series of hearings on reforms to digital copyright law, you requested that the Copyright Office undertake a study to assess the viability of establishing "ancillary copyright" protections for press publishers, similar to protections now being implemented in Europe, that would require online news aggregators to pay publishers for excerpts of content they provide for others to view.

In response to your request, the Office solicited the views of interested stakeholders via the Federal Register and held a public roundtable to enable stakeholders to explain their positions. The Office received comments from press publishers' and authors' groups who assert that news aggregators "free ride" on publishers' investment in original reporting. In contrast, internet platforms, libraries, and users' rights groups assert that aggregators provide significant value to news publishers and to the public at large. These sets of stakeholders disagree on how far copyright law permits aggregation of news headlines and snippets. At the same time, both groups emphasize that they see the challenges publishers face as more a matter of competition policy than copyright. The Office also conducted extensive research into the legal standards governing news aggregation, including both domestic copyright law and international treaty obligations.

After carefully evaluating the information provided, the Office does not recommend adopting additional copyright-like rights for press publishers in the United States. We have concluded that ancillary copyright protections have not been shown to be necessary in light of publishers' existing rights, and would likely be ineffective so long as publishers depend on news aggregators for discoverability. Moreover, to the extent that any ancillary copyright protections would lack traditional copyright limitations and exceptions, they would raise significant policy and Constitutional concerns.

The Office nevertheless continues to believe that the challenges facing journalism are worthy of congressional attention. Stakeholders suggested a range of alternative approaches Congress could pursue, from antitrust reform to tax policy. The Office leaves assessment of these proposals to experts in the relevant fields but stands ready to assist on any copyright-related issues.

Please do not hesitate to let me know if you have any questions regarding the report.

Respectfully,



Shira Perlmutter
Register of Copyrights and Director
U.S. Copyright Office

Enclosure

ACKNOWLEDGMENTS

I am pleased to deliver this Report addressing the issue of copyright protections for press publishers in the digital age. The Report is the outcome of substantial work by many people within the U.S. Copyright Office, in particular, in the Office of Policy and International Affairs. Andrew Foglia and Chris Weston, Senior Counsels for Policy and International Affairs, along with Melinda Kern, Barbara A. Ringer Copyright Honors Program Fellow, served as principal authors.

Also critical to the success of this Report was the expertise of Kimberley Isbell, Deputy Director of Policy and International Affairs, as well as the research assistance of Keyana Pusey, Barbara A. Ringer Copyright Honors Program Fellow, and Law Clerks Narae Choi, Clara Dagenais, Chris McMillan, Brandon Tuell, and Rachael Williams.

Suzanne Wilson, General Counsel and Associate Register of Copyrights, Jordana Rubel, Assistant General Counsel, Jalyce Mangum, Attorney-Advisor, Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy & Practice, and Erik Bertin, Deputy Director of Registration Policy & Practice also contributed important insights. And from start to finish, the entire staff in the Office of Policy and International Affairs and the Office of Public Information and Education provided invaluable assistance.

Finally, I appreciate the essential contributions of the many individuals and organizations who participated in the Roundtable and provided comments.

Shira Perlmutter
Register of Copyrights and Director,
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Appendix A: Congressional Request Letter

Appendix B: Notice of Inquiry – Publishers’ Protections Study: Notice and Request for Public Comment (October 12, 2021)

Appendix C: Notice of Inquiry – Publishers’ Protection Study: Request for Additional Comments (November 9, 2021)

Appendix D: Participants Who Submitted Comments in Response to the Notices of Inquiry

Appendix E: Publishers’ Protections Study Roundtable Agenda

EXECUTIVE SUMMARY

At the request of Senators Leahy, Tillis, Cornyn, Hirono, Klobuchar, and Coons, the Copyright Office undertook this Study to assess press publishers' existing protections under U.S. copyright law and to evaluate the advisability of adding new protections, such as those the European Union has recently adopted, that are intended to strengthen publishers' ability to demand payment for third-party uses of their news content.

Part I of the Report describes the context and history of the Study. Part II provides factual background, focusing on how the internet has changed the business of press publishing and spurred the emergence of third-party services that aggregate news content. Part III surveys recent experiments in other countries with adopting protections for press publishers beyond existing copyright law and provides an overview of competition-based approaches that have been adopted or are under consideration, including in the United States.

Part IV contains the Copyright Office's findings and recommendations, as follows:

- Press publishers have significant protections under U.S. copyright law. They generally own a copyright in the compilation of materials that they publish. In addition, they often own the copyright in individual articles through the work-made-for-hire doctrine and may also own rights in accompanying photographs. This is in contrast with the context for adoption of a new "ancillary" right in the European Union, where press publishers often lack ownership of the copyright in the underlying materials.
- A press publisher would therefore likely have a *prima facie* case of copyright infringement against an aggregator that reproduced extensive excerpts of news articles. Copyright law does, however, permit certain unlicensed uses of news content, by news aggregators or others. Facts and ideas are not protectable by copyright. The merger doctrine allows the use of original expression where there are limited ways of expressing a particular fact or idea, and individual words, titles, and short phrases are generally not protectable. Even where an aggregator reuses protectable expression, the fair use doctrine may apply. As a result, press publishers' ability to rely on copyright to prevent third-party aggregators from using their content depends on the specific circumstances, including the nature and amount of the content used.
- Although press publishers also have certain protections beyond copyright rights, notably legal prohibitions on circumvention of technical protection measures, the relevant legal theories are untested in the context of news aggregation.
- The effectiveness of all of these protections appears, at least to some degree, to be contingent on the competitive landscape. Publishers may have difficulty requiring news aggregators to pay to use news content due to disparities in bargaining power.
- Given all of these variables, the Copyright Office does not recommend adopting new

copyright protections for press publishers. Any change to U.S. copyright law that would meaningfully improve press publishers' ability to block or seek remuneration for news aggregators' use of their works would necessarily avoid or narrow limitations on copyright that have critical policy and Constitutional dimensions. Additionally, we note that this Study revealed little demand for additional copyright-related rights for press publishers. Most commenters identified changes to competition (antitrust) policy as a more effective means to improve the position of press publishers in dealing with news aggregators.

The Office recognizes that adequate funding for journalism may currently be at risk, and that there are implications for the press's essential role in our system of government. But the challenges for press publishers do not appear to be copyright-specific. It has not been established that any shortcomings in copyright law pose an obstacle to incentivizing journalism or that new copyright-like protections would solve the problems that press publishers face.

Amy Klobuchar

U.S. Senator for Minnesota

Klobuchar Statement on Judiciary Committee Passage of Bipartisan Legislation To Save Local Journalism

September 22, 2022

The Journalism Competition and Preservation Act would allow news organizations to jointly negotiate fair terms for access to their content by Google, Facebook, and other dominant platforms.

WASHINGTON - U.S. Senator Amy Klobuchar (D-MN), Chairwoman of the Senate Judiciary Subcommittee on Competition Policy, Antitrust and Consumer Rights, issued the statement below after the Senate Judiciary Committee passed the *Journalism Competition Preservation Act* by a 15-7 vote. Klobuchar and Senator John Kennedy (R-LA) lead this bipartisan, bicameral legislation to address dominant online platforms' power over news organizations.

“The Senate Judiciary Committee has once again stood up to monopoly tech companies on a bipartisan basis. As the daughter of a newspaperman, I understand firsthand the vital role that a free press plays in strengthening our democracy. But local news is facing an existential crisis , with ad revenues plummeting, newspapers closing, and many rural communities becoming ‘news deserts’ without access to local reporting. To preserve strong, independent journalism, we have to make sure news organizations are able to negotiate on a level playing field with the online platforms that have come to dominate news distribution and digital advertising,” said Klobuchar. **“Our bipartisan legislation ensures media outlets will be able to band together and negotiate for fair compensation from the Big Tech companies that profit from**

their news content, allowing journalists to continue their critical work of keeping communities informed. Now that this bill has advanced through the Judiciary Committee with a strong bipartisan vote, I look forward to working with my colleagues on both sides of the aisle to get it passed by the full Senate and signed into law.”

The *Journalism Competition and Preservation Act*, which Klobuchar and Kennedy introduced alongside Representatives David Cicilline (D-RI) and Ken Buck (R-CO), would:

- Empower eligible digital journalism providers—that is, news publishers with fewer than 1,500 exclusive full-time employees and non-network news broadcasters that engage in standard newsgathering practices—to form joint negotiation entities to collectively negotiate with a covered platform over the terms and conditions of the covered platform’s access to digital news content.
- Require covered platforms—which are online platforms that have at least 50 million U.S.-based users or subscribers and are owned or controlled by a person that has either net annual sales or market capitalization greater than \$550 billion or at least 1 billion worldwide monthly active users—to negotiate in good faith with the eligible news organizations.
- Enable non-broadcaster news publishers to demand final-offer arbitration if their joint negotiation with a covered platform fails to result in an agreement after six months.
- Create a limited safe harbor from federal and state antitrust laws for eligible digital journalism providers that allows them to participate in joint negotiations and arbitration and, as part of those negotiations, to jointly withhold their content from a covered platform.
- Prohibit discrimination by a joint negotiation entity or a covered platform against an eligible digital journalism provider based on its size or the view expressed in its content and provide a private right of action for violations of this prohibition.

- Prohibit retaliation by a covered platform against eligible digital journalism providers for participating in joint negotiations or arbitration and provide a private right of action for violations of this prohibition.
- Sunset within six years.

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Mar 18 2022



Tillis and Leahy Introduce Bipartisan Legislation to Combat Copyright Theft, Enhance Content Sharing, and Hold Tech Accountable

(<https://www.tillis.senate.gov/2022/3/tillis-and-leahy-introduce-bipartisan-legislation-to-combat-copyright-piracy-enhance-content-sharing-and-hold-tech-accountable>)

WASHINGTON, D.C. – Today, U.S. Senators Thom Tillis (R-NC) and Patrick Leahy (D-VT) introduced the *SMART Copyright Act of 2022*, bipartisan legislation that would hold tech accountable by developing effective, widely-available measures to combat copyright theft.

“In the fight to combat copyright theft, there is currently no consensus-based standard technical measures and that needs to be addressed,” **said Senator Tillis**. “I am proud to introduce this bipartisan legislation that will provide widely available piracy-fighting measures and create a trusted and workable internet for our creative communities.”

“Nearly twenty-five years ago we enacted the Digital Millennium Copyright Act, a landmark update to the copyright laws for the internet age. Since then, the internet has significantly changed, and with it so has the world of copyright,” **said Senator Leahy**. “I’m excited to work, alongside Senator Tillis, with filmmakers, musicians, authors, and artists of all stripes, enlisting the help of online platforms, to address online copyright theft that robs these artists of the fruits of their creativity and hard work. The technology exists to protect against this theft; we just need online platforms to use the technology. I’m working hard to make sure our artists get paid, and we can enjoy legal access to their wonderful creations. I look forward to working with all realms of the copyright community to address the problem of copyright theft.”

Background:

Online service providers struck a deal with Congress twenty years ago—they wouldn’t have to pay for copyright theft facilitated by their systems if they worked with copyright owners to create effective standardized technical measures (STMs) to identify and protect against distribution of stolen content. In enacting this grand bargain, Congress clearly envisioned this safe harbor immunity would act as an incentive for platforms and rights holders to collaborate on developing effective measures to combat copyright theft, lower transaction costs, accelerate information sharing, and create a healthy internet for everyone.

Yet rather than incentivizing collaboration, the law actually inhibits it because service providers cannot risk losing their valuable safe harbors if an STM is created. In addition, the current statute provides only one path to establish that a technological measure is a consensus-based STM that must be available to all. As a result, no STMs have been identified since the law took effect. The issue isn't whether technical measures to combat rampant copyright infringement exist—plenty do—but rather how to encourage service providers to adopt technical measures to combat stealing and facilitate sharing of critical copyright data.

The Strengthening Measures to Advance Rights Technologies (SMART) Copyright Act of 2022 takes a measured approach to addressing these barriers in two ways. It creates flexibility so that more existing measures could be eligible for consensus created STMs and it addresses the incentive issue by authorizing the Librarian of Congress to designate through an open, public rulemaking process technical measures identified by stakeholders that certain service providers must accommodate and not interfere with. Instead of “bet the company” loss of safe harbors, violations involving designated technical measures (DTMs) risk only actual or statutory damages, from which innocent violators can be exempt.

Read a one-pager of the bill **HERE**

(<https://www.tillis.senate.gov/services/files/465759C0-DBFA-4348-9565-CBA4FE6FB45F>) and myth vs. fact **HERE**

(<https://www.tillis.senate.gov/services/files/BBDBFA87-17CA-4D15-AA0F-9B54BFEEA31D>).

Read text of the bill **HERE** (**<https://www.tillis.senate.gov/services/files/435EB2FD-145A-4AD6-BF01-855C0A78CEFC>**).

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<https://www.tillis.senate.gov/2022/3/tillis-and-leahy-introduce-bipartisan-legislation-to-combat-copyright-piracy-enhance-content-sharing-and-hold-tech-accountable> (<https://www.tillis.senate.gov/2022/3/tillis-and-leahy-introduce-bipartisan-legislation-to-combat-copyright-piracy-enhance-content-sharing-and-hold-tech-accountable>)

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APRIL 6, 2022

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The Latest Threat to Independent Online Creators Is the Filter Mandate Bill

Copyright filters are having a bit of a moment in Washington D.C. The [Copyright Office is moving ahead](#) with a process to determine what, if anything, constitutes a standard technical measure (STM) that platforms would have to accommodate. And, if that proves too onerous, [Congress has Big Content's back](#) with the Strengthening Measures to Advance Rights Technologies Copyright Act.

This filter mandate bill would task the Copyright Office with designating technical measures (DTMs instead of STMs) that internet services must use to address copyright infringement. Both the Copyright Office proceeding and this bill have the potential to result in the same thing: more copyright filters.

For those who make and share things online, be it through scripted and edited videos or livestreams, filters have routinely been a huge problem. Right now, the only silver lining has been that American law doesn't require any service to have a filter. YouTube, Facebook, and Twitch use these tools voluntarily, to terrible effect, but they are not doing so under any legal requirement. That means that at least sometimes when they mess up, they can take whatever measures necessary to fix the problem.

And they mess up a lot. Automated systems cannot tell the difference between lawful expression and infringement. YouTube's system flagged static as copyrighted material five separate times. Facebook can't tell the difference between different classical musicians playing public domain pieces. And Twitch has completely failed its users in its implementation of anything resembling copyright rules.

Both the Copyright Office proceeding and the rules imagined by the filter mandate bill could result in a series of new, required automated systems.

If a company's risk is only lowered by having a filter, then the company will want a filter that is oversensitive; the danger of a copyright suit brought by a billion-dollar company looms much larger in the risk equation than ruining the livelihood of independent creators.

That's why we need to make sure that Congress hears from the many independent creators who don't want filters, as opposed to the few multi-billion-dollar corporations that want them.

Join us and the Organization for Transformative Works this Friday for a Copyright for Creators Town Hall. We'll update everyone on what's going on in D.C. and answer your questions.

EFF At Home: Copyright for Creators Town Hall on Filter Mandates
Friday, April 8, 2022 at 11:30 AM Pacific Time
Streaming Discussion with Q&A

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