



Legislative Comment

Comments on DMCA Reform

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Introduction

The Niskanen Center is grateful for the opportunity to respond to the questions sent out by Senator Tillis's office. The Niskanen Center is a nonprofit, nonpartisan 501(c)3 public policy think tank working to protect private property rights, economic liberty, well-functioning markets, and to roll back regressive regulations that restrict freedom of exchange and increase inequality.

It is the position of the Niskanen Center that the current Section 512 notice-and-takedown system, though imperfect, is preferable to an alternative system that would increase monitoring requirements or raise the bar needed to qualify for safe harbor protection. Though piracy is a serious problem, a more rigorous enforcement regime will generate false positives that would make it harder for members of the new class of online creators to ply their trade. Related to this, increasing the requirements to qualify for safe harbor protection under a re-worked DMCA would only make it more likely for well-established platforms to sanction users who use works protected by copyright in a non-infringing manner. And, as monitoring costs increase, the barrier to entry for smaller platforms or upstarts increases as well.

The Niskanen Center welcomes a reexamination of Section 1201 of the DMCA, a provision of law we believe should be removed in its entirety or at least scaled back significantly. It is well within the right of a manufacturer to install technological protection measures (TPMs) in their products, but it is another issue entirely for the state to enforce these digital locks after possession has passed from the control of the manufacturer to the user.

In the spirit of that reexamination of Section 1201 and in recognition of the desire of Senator Tillis to increase the enforcement of copyright infringement online, Niskanen also recommends several changes to the scope of

the exclusive rights granted under copyright law. Stricter enforcement of copyright infringement designed to increase the returns to the creators of protected works should come with a corresponding reduction of what is considered infringing.

Narrow the Scope of Copyright

The current protections afforded by copyright are too strong. In the history of copyright law, it is relatively recent that anything other than outright copying was considered to be infringement.¹ Terms have expanded significantly beyond the estimates of optimal duration, copyright has been extended to cover works which are not traditionally associated with creative and cultural output such as computer code, and copyright law has been extended to significantly restrict the ability of property owners to use or fix their property as they see fit. This has created a situation where a wide variety of activities which were not considered copyright infringement are now violations of the exclusive rights granted under copyright.

Any changes that will increase the monitoring requirements of platforms or put the users of copyrighted materials at risk for greater liability for copyright infringement must be paired with a significant narrowing of the scope of copyright protection. It is perfectly reasonable for the creators of works protected by copyright to capture the gains from their creations, but it should also be recognized that the reuse, reimplementaion, and borrowing that comes from easy access to creative works itself increases creative output, and broader copyright protections can interfere with this process. This can be observed based on a history of creative output since the passage of the DMCA. From 1998 to 2019, real revenues for the U.S. music industry declined by half,² yet between 1999 and 2011 the number of new albums released went from 40,000 per year to 80,000.³ Research also suggests that despite deflated music industry revenue, the current environment has made it possible for more artists to generate revenue from streaming.⁴ And since the passage of the DMCA, a whole new industry of creators, many of whom rely on the use of copyrighted works to produce their content and make a living, has emerged.⁵

Current copyright law has a “leaky bucket” problem, where rights holders have a large bucket that leaks. The design of a well-balanced copyright regime will ensure that artists can generate a sufficient return to bring their works into creation, with society reaping the rest of the benefits. The significant rights (and associated exceptions) afforded to copyright holders⁶ and the duration of those protections⁷ are the bucket that “leaks” out

¹ Anthony Reese, “[Innocent Infringement in U.S. Copyright Law: A History](#),” *Columbia Journal of Law & the Arts*, Vol. 30, No. 2 (2007): 133-184.

² Recording Industry Association of America, “[U.S. Sales Database](#),” accessed November 30, 2020.

³ Glynn S. Lunney, “[Copyright on the Internet: Consumer Copying and Collectives](#),” in *The Evolution and Equilibrium of Copyright in the Digital Age*, eds. Susy Frankel and Daniel Gervais (Cambridge: Cambridge University Press, 2014), 292-93.

⁴ David Hesmondhalgh, “[Is music streaming bad for musicians?](#) Problems of evidence and argument” *New Media & Society*, September, 2020.

⁵ For an analysis of how YouTube channels can grow and become more successful, see Mathias Bärtl, “[YouTube channels, uploads and views: A statistical analysis of the past 10 years](#)” *Convergence: The International Journal of New Media Technologies*, Vol. 24, No. 1 (2018): 16-32.

⁶ [17 USC §§ 101-122](#)

⁷ [17 USC §§ 301-305](#)

in the form of piracy and other forms of copyright infringement which go unenforced or underenforced. If the goal of any reform to the DMCA is to help plug up those leaks, then it must also shrink the bucket.

To begin, computer code should be removed entirely from the scope of what is protected by copyright law. The software industry is one which not only evolves quickly, but is also heavily reliant on borrowing and reimplementing which is in tension with the copyright protection currently afforded computer code.⁸ Future laws governing protections for computer code may have attributes similar to copyright, but they should be placed in a separate legal category.

Statutory damages should be done away with entirely. The current regime of statutory damages can produce absurd outcomes, such as the \$1.92 million statutory damages (later reduced to \$220,000) for sharing 24 songs in *Capitol Records, Inc. v. Thomas-Rasset*.⁹ The logic of damages in a system with imperfect enforcement is to increase the cost of misbehavior on those who can be punished well beyond the actual harm done, but this logic breaks down when considering the nature of online copyright infringement. As one paper notes, “An equitable distribution would require, as a rough first approximation, that each pay roughly in accord with the benefit he derives from this system. While here, some pay *very* much more, and many others, who benefit equally, pay nothing.”¹⁰ A regime of actual damages would still force industrial pirates to pay a significant sum due to the scale of their operations while allowing small-time infringers to avoid such a disproportionate judgment.

Greater requirements for copyright formalities should be brought back. Registration should be required to assert copyright, and a regime of renewal should be required every five to ten years for copyright protection to remain in effect. For the full term of a copyright, renewal will be possible but a work without a current registration will, for most purposes, not have the traditional protections associated with copyright. This would require a significant increase in the capacity of the Copyright Office, to which all necessary resources should be dedicated.

Finally, copyright terms must be restored to their length prior to the passage of the Copyright Term Extension Act. Research indicates that current copyright terms are far longer than is optimal for the production of creative works.¹¹ However, in the interest of compliance with the Berne Convention and to avoid any Takings Clause implications, the copyright terms for new works should be reduced to the pre-1998 life plus fifty.

Expand Non-Infringing Use

⁸ For evidence of the need for less protection in the copyright industry see the amici support of Google in *Google v. Oracle*: [83 Computer Scientists](#), [Microsoft Corporation](#), [International Business Machines Corp. and Red Hat, Inc.](#) This wide range of support from participants across the software industry indicates there is a recognition that restrictions modeled around copyright for computer code would be detrimental to the field as a whole.

⁹ See *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 901 (8th Cir. 2012).

¹⁰ Oren Bracha and Talha Syed, “[The Wrongs of Copyright’s Statutory Damages](#),” *Texas Law Review*, Vol. 98, Symposium Issue (2020): 1241.

¹¹ Rufus Pollock estimates that the optimal copyright term is around 15 years, with the 99% confidence interval extending to 38 years. Rufus Pollock, “[Forever Minus a Day? Calculating Optimal Copyright Term](#)” *Review of Economic Research on Copyright Issues*, Vol. 6, No. 1 (2009): 35-60. Other research based on an analysis of Italian opera production during the Napoleonic era shows that while there were benefits to the adoption of copyright laws, there was no comparable increase in benefits from copyright associated with longer copyright terms. See: Michela Giorcelli and Petra Moser, “[Copyright and Creativity. Evidence from Italian Opera During the Napoleonic Age](#),” *National Bureau of Economic Research*, Working Paper 26885 (2020).

In addition to limiting the scope of what can be protected by copyright and the strength of such protections, the list of activities that are not covered under a rights holder's exclusive rights should also be expanded.

Copyright law should also be changed to allow for the creation of digital first-sale. This would mirror the first-sale rights that already exist in the physical world but are currently categorized as infringement due to transitory copying during the file transfer process. This copying should not be confused, however, with copying that occurs in a way which is actually consumable. A robust regime of digital first-sale would make non-infringing the use of "data migration" software that breaks down files into smaller packets that are deleted on the sender's end once they have been received from the original file-holder.¹² A more modest version of this practice would be the adoption of language similar to that in the "You Own Devices Act" introduced in 2017.¹³

One issue which has emerged during the pandemic is the legal ambiguity surrounding the online transmission of activities which were once "face-to-face." Some book publishers have kindly offered free licenses for story time, but such an offering implies that rights holders have a legal claim to these activities.¹⁴ 17 USC 110 should be modified to clarify that "face-to-face" includes transmissions over platforms like Zoom or Webex.

The Copyright Act should also be clarified to explicitly allow physical works to be consumable online provided the original physical work is made inaccessible for the period that it is allowed online and no more than one copy of that work is available online at any given time. This practice is sometimes called "controlled digital lending" (CDL), and it would require eligible institutions to maintain a one-to-one "own-to-loan" ratio of physical works in possession to works available for online consumption. For example, a library with three physical copies of *The Hobbit* would be allowed to make available online up to three viewable copies of that book provided it kept the three physical copies inaccessible. Eligible institutions could be restricted to university, public, and private non-profit libraries and could be required to maintain certain technological safeguards to prevent the downloading (i.e. copying) of protected works.¹⁵

Finally, legal sanctions against circumventing TPMs should be done away with entirely, in addition to all penalties associated with the manufacture, import, distribution, etc. of technologies designed to circumvent TPMs. These laws are an affront to private property rights and restrict not only the rights of individuals to make use of and repair their property as they see fit, but also prevent those who are willing to offer the technical assistance in the circumvention of TPMs from putting their skills to productive use. The next-best reform which could be made to Section 1201 would be to require any penalties associated with circumvention be associated with activities which constitute copyright infringement. Under the current structure of Section 1201, many otherwise lawful modifications to protected works are not allowed; the requirement that a nexus between infringement and circumvention exist would solve this issue.

¹² See the description of the technology used by ReDigi in [Capitol Records, LLC v. ReDigi Inc.](#), 934 F. Supp. 2d 640 (S.D.N.Y. 2013) pp. 5-9.

¹³ [You Own Devices Act](#), HR 905, 115th Congress, 1st sess, Introduced in House February 7, 2017.

¹⁴ Penguin Random House, "[Penguin Random House Open License Online Story Time and Classroom Read-Aloud Videos and Live Events](#)".

¹⁵ For a more thorough discussion of Controlled Digital Lending, see David R. Hansen & Kyle K. Courtney, "[A White Paper on Controlled Digital Lending of Library Books](#)," September 24, 2018.

Answers to Specific Questions

1. The record established in my DMCA reform hearings indicated that an overarching principle of any reform should be making digital copyright less one-size-fits-all. The law needs to account for the fact that small copyright owners and small online services providers (OSPs) may have more in common with each other than they do with big copyright owners and big OSPs, respectively. Accordingly, I think we should consider whether copyright law should be revised to account for such differences among stakeholders. In particular, could copyright law borrow from employment law, or other relevant fields, to establish different thresholds for copyright owners and OSPs of different size, market share, or other relevant metric? If so, what is the best way to accomplish this? Is there a particular area of law, or existing section of the U.S. Code, that provides crucial guidance? As with all questions where it is relevant, please include in your response specific recommended legislative text.

The Niskanen Center appreciates the differentiation necessary between big and small actors on both sides of the debate, and while we would disagree with policies to change the current structure of Section 512, we believe that any changes should have different policies for different actors. To this end, we believe that any actors that are on the “small OSP” side of the issue should be subject to the current structure of Section 512.

The most straightforward way to separate big from small entities receiving safe harbor protection under this chapter is to give preferential regulatory treatment to 501(c) nonprofits. By definition, these institutions are already subsidized by the taxpayer to advance some public good. Many nonprofits are cash-strapped (especially considering how charitable giving has declined during the COVID-19 pandemic). Placing them in a category that provides the most favorable safe harbor protections and creates the least burdensome requirements to qualify for such protections would satisfy the spirit of the 501(c) nonprofit tax exemption.

The differentiation between non- and for-profit entities is fairly straightforward, but it becomes more difficult to separate the “big” from “small” entities using other metrics. One tool which could be used to determine whether or not an entity is “large” or “small” would be to utilize the definitions established by the Small Business Administration (SBA).¹⁶ This is a metric which could be applied to both OSPs and rights holders equally. Rights holders could also be classified as “small” for the purposes of any distinctions made by a reworked Section 512, using definitions similar to those of “small” or “micro” entities filing for a patent.¹⁷

It is easy to draw these lines, but as they relate to copyright infringement online they have serious shortcomings. For example, imagine a large company with a small online forum attached to its website. The company may be large, but the portion of the company relevant to anything related to online copyright infringement is small and it would be inefficient for them to dedicate significant resources to meet any regulatory requirements that exceed the current bounds of the DMCA. On the other end of the spectrum, many law offices could easily be

¹⁶ See [13 CFR 121.201](#).

¹⁷ See [37 CFR 1.27](#), [1.29](#).

considered “small” using one of the criteria above, but we would hold practicing attorneys (or other “small” actors who employ attorneys) to the highest standards with respect to making a claim of copyright infringement.

A better approach to resolving the big versus small issue is to step back from examining which firms are big or small, and examine instead which policies that currently exist tend to only benefit firms which are big and are either inaccessible to small firms or come at the expense of small firms.

One family of policies is the practice of giving preferential tax treatment, in the form of tax exemptions, tax credits, or other subsidies, to the production of films or TV programs in states. These are often permanent, free-standing programs which have supported prominent productions like *Joker*, *Little Women*, and *House of Cards*.¹⁸ The benefits of these programs are dubious at best.¹⁹ For the purposes of copyright reform, however, they should be examined as a tool to resolve the potential market failure that could come from piracy in the form of up-front financing for such projects. To that end, projects which receive such support should be ineligible for copyright protection, in the same way that works produced by the government are ineligible.

It should also be noted that major tech companies, such as Google, Amazon, and Facebook, are the beneficiaries of similar subsidies. These take a different form than the film tax credits discussed above, and are often more ad-hoc and given out by local and state governments to attract jobs, but nonetheless provide dubious economic benefits.²⁰ Conditionalizing safe harbor protection for platforms on not receiving these grants would be more difficult to tailor than making any works produced with their support public domain, but this is an option worth exploring.

2. [Question Omitted]

3. Section 512 places the burden on copyright owners to identify infringing materials and affirmatively ask the OSP to remove the material or disable access to it. This burden appears to strike the correct balance, but the burden that the notice-and-takedown system itself places on copyright owners is too heavy; the system is also woefully inefficient for both copyright owners and service providers. I believe U.S. copyright law should move towards some type of a notice-and-staydown system—in other words, once a copyright owner notifies a service provider that a use of a copyrighted work is infringing, the service provider must, without further prompting, remove subsequent infringing uses absent a statement from the user (whether the copyright

¹⁸ For a more thorough exploration of these programs, see National Conference of State Legislatures, “[State Film Production Incentives & Programs](#),” January 30, 2018.

¹⁹ Michael Thom, “[Do State Corporate Tax Incentives Create Jobs? Quasi-experimental Evidence from the Entertainment Industry](#),” *State and Local Government Review*, Vol. 51, No. 2 (2019): 92-103.

²⁰ For a broader discussion of the failure of these policies, see Nathan M. Jensen and Edmund J. Malesky, “[Incentives to Pander: How Politicians Use Corporate Welfare for Political Gain](#),” Cambridge: Cambridge University Press, 2018.

and Pat Garofalo “[The Billionaire Boondoggle: How Our Politicians Let Corporations and Bigwigs Steal Our Money and Jobs](#)” London: St. Martin’s Press, 2019.

owner or not) that they believe the use is licensed or otherwise authorized by law (e.g., fair use). What are your thoughts on such a system, and how could it best be implemented?

As discussed above, Niskanen's position is that any system that changes the current structure of Section 512 should differentiate between larger and smaller actors receiving safe harbor protection, subjecting the latter to the current terms of Section 512. The main problem with a notice-and-staydown regime is that the technology necessary for it to function at scale is highly prone to false positives that would harm users engaged in lawful conduct. While filters such as YouTube's ContentID are useful tools for identifying clearly infringing content (i.e. unadulterated pirated content), non-infringing use of protected works can easily be removed by automated filters. Determining fair use is difficult for an automated system to do, and making notice-and-staydown the standard will unfairly harm users who make fair use of a work which was used in an infringing manner on the same website.

Filtering technology is also particularly expensive. As of 2018, Google had invested \$100 million into its ContentID system, which would need to be replicated to some degree by firms required to implement a robust notice-and-staydown system.²¹ A more lenient version of notice-and-staydown, one which creates a requirement to monitor for only *identical* infringements, would be more reasonable and could be upheld with a hash-matching technology as used by Dropbox.²² This would still impose a considerable expense on platforms, but would be far less prone to false positives.

4. Starting from the place of the provisions that support the current notice-and-takedown system, a notice-and-staydown system would need to give more teeth to the knowledge standards and requirements for implementing a repeat infringer policy; to clarify that section 512(m)'s lack of a duty to monitor does not mean lack of a duty to investigate once notified and also that representative list and identifiable location do not require as much detail as courts have required; and to provide better mechanisms for users to contest a takedown as authorized by a license or by law. How would you revise or add to the existing provisions in section 512 to accomplish this or, if this could better be achieved by starting from scratch, what new legislative text do you think would best accomplish this?

Niskanen does not believe that the adoption of a notice-and-staydown system would require any substantive change to the lack of duty to monitor under Section 512(m), as the very design of a notice and staydown system conditionalizes safe harbor protection on continued monitoring and policing of infringing content which has been previously identified as infringing. Any "teeth" added to Section 512(m) under a notice-and-staydown system would be redundant, as safe harbor protection would be on the line if a platform did not continue to monitor for infringing content once it has been notified of it. The only way "teeth" would not be redundant under a notice-and-staydown system would be if it were a notice-and-staydown system limited to *identical* infringements which required the policing of similar forms of infringement.

²¹ Cedric Manara, "[Protecting what we love about the internet: our efforts to stop online piracy](#)," November 7, 2018.

²² Kyle Orland, "[Dropbox clarifies its policy on reviewing shared files for DMCA issues](#)," March 30, 2014.

5. [Question Omitted]

6. It is clear from the record established across my hearings that one major shortcoming of section 512 is that users who have had their content removed may decide to not file a counter-notice because they fear subjecting themselves to federal litigation if the copyright owner objects to the putback. At the same time, the requirement that a copyright owner pursue federal litigation to keep a user from having content put back up following a counter-notice is a heavy burden. Congress might consider improving dispute resolution by directing disputes between notice and counter-notice filers to a small claims court rather than federal court. What is the best way to accomplish this? Would the copyright small claims court as envisioned by the CASE Act be the proper forum? If not, how should such a tribunal be designed? Related, what should be the time period for putbacks? There is broad agreement that the current 10-14 day window works poorly for both copyright owners and users. How would you amend this?

It is important to note that one shortcoming of a small claims court is that even in “clear-cut” cases of infringement, such infringement may be inadvertent. One review of infringement in the case of online images found that up to 85 percent of those surveyed were either ignorant of the fact that the image was protected by copyright or did not themselves upload the image (e.g. they outsourced the development of the infringing work to a separate developer).²³ This, of course, does not negate the rights holders’ exclusive right to the work. Further research confirms, however, that in the case of “innocent infringement,” simply making the infringer aware of their acts can lead to an increase in licensing or the removal of the infringing content. This research provides empirical validation of a Canadian-style notice-and-notice system.²⁴ The creation of an alternative venue for such dispute resolution should keep this in mind.

Should a small-claims tribunal be designed, it should differ from the CASE Act in a number of significant ways. To begin, the design should be such that both parties must affirmatively opt in. This would remove any Constitutional defects that could emerge if a defendant loses their right to a jury trial without affirmatively waiving their rights. Additionally, damages should be significantly lower than they are in the CASE Act as it was passed in the House, with a maximum cap on damages of \$10,000 for any given proceeding, \$5,000 for any given work, \$1,000 for a “micro-claim,” and actual damages for any work which is not registered. Additionally, any alternative venue should have broad right of appeal.²⁵

7. [Question Omitted]

²³ Hong Luo and Julie Holland Mortimer “[Copyright Infringement in the Market for Digital Images](#)” *American Economic Review*, Vol. 106, no. 5 (2016): 143.

²⁴ Hong Luo Julie and Holland Mortimer, “[Infringing Use as a Path to Legal Consumption: Evidence from a Field Experiment](#),” *National Bureau of Economic Research*, Working Paper 25453 (2019).

²⁵ This proposal is modeled on changes suggested by Meredith Filak Rose, “[What a Reasonable Copyright Small Claims Court Would Look Like](#),” Public Knowledge, August 12, 2019.

8. At the same time that Congress should revise section 512 to ensure that infringing material stays down once identified, it should also discourage the over-sending of notices as a counter-balance to the more significant action that an OSP must take after receiving a notice. This could be done, for example, by heightening the requirements for accuracy in notice sending, possibly with stricter requirements and heavier penalties. As noted above, the standard may be more lenient for small entities and individuals. How might the requirements be heightened in a meaningful way while not unduly burdening copyright owners trying to protect their work against infringement?

Section 512(f) should be enhanced with statutory damages associated with any fraudulent takedown notices sent. If any differentiation is made in the final legislation between a sophisticated and unsophisticated rights holder, damages could either only be applicable to the sophisticated rightsholder or applicable to both but greater for the former.

To prevent the sending of frivolous notices, Section 512(c)(3)(A) could be modified to include language requiring the sender of a notice to explicitly state why the takedown notice is *not* fair use as outlined in Section 107. Additionally, language imitating the Anti-Strategic Lawsuit Against Public Participation (Anti-SLAPP) laws of various jurisdictions should be added, either to section 512(f) or on its own, to those who file notices with the intent of suppressing unflattering speech rather than simply copyright infringement.

9. [Question Omitted]

10. One concern with the voluntary agreements that copyright owners and OSPs adopt to supplement section 512 is that third-party interests are not often represented in the agreements. That can lead to concerns that certain copyright owners may be shutout from utilizing an OSP or including their works in an OSP's monetization program, or that the speech of specific users and consumers may be censored. I am interested in protecting these interests possibly by allowing for regulatory review to ensure that voluntary agreements do not prohibit uses authorized by law (e.g., fair use) or otherwise unduly burden third parties, including copyright owners not party to an agreement. What would be the best format for such regulatory review? And since these agreements may implicate areas of law outside copyright, such as antitrust, who is best suited to handle such review: Federal Trade Commission, Department of Justice, or Copyright Office?

Voluntary agreements that necessarily exclude some copyright owners from monetization or filters above and beyond what may be required by law do necessarily raise concerns about fair competition.²⁶ However, it is conceivable that such an agreement will not be made available to every conceivable rights holder due to

²⁶ See complaint in [Schneider v. Youtube, LLC, No. 5:20-cv-4423, \(N.D. Cal. 2020\)](#).

logistical constraints on the part of those already involved in the agreement. While this issue has important implications for any changes to the DMCA as it exists today, this matter should be referred to the Federal Trade Commission for further study.

11. Section 1201 currently allows for temporary exemptions to be granted from the circumvention prohibition, but those exemptions do not extend to third-party assistance. This means that when the Librarian of Congress grants an exemption for circumvention of technological protection measures (TPMs) over software for a tractor to allow for repair, the tractor owner must perform the software repair themselves. The Copyright Office has recommended amending the statute to grant the Librarian authority to adopt temporary exemptions permitting third-party assistance “at the direction of” an intended user, and this may be the right way to address this problem. Do you agree with the Copyright Office? If so, how should this provision be drafted to avoid unintended consequences, and to what extent is the Unlocking Consumer Choice and Wireless Competition Act a helpful model? If not, please explain why you do not agree and provide specific recommendations as to how you think this problem should be addressed?

The exemption permitting third-party assistance should be extended so there is no requirement that it be “at the direction of” an intended user. As stated in the introduction, regulations restricting the ability of individuals to modify or repair their property as they see fit should not be restricted in any way, nor should the ability of individuals to provide technical assistance, products, technology, or any other means to circumvent a technological measure. Assuming, however, that Section 1201 cannot be done away with entirely, then Section 1201(a)(1)(A) should be conditioned on the existence of a nexus between infringement and circumvention, with no restrictions on any persons identified in Section 1201(a)(2). In other words, any penalties associated with the anti-circumvention provisions of the DMCA, should they exist at all, must be solely applicable to the person conducting the circumvention.

14. There are various ways that the triennial rulemaking process could be streamlined to be more efficient and so that section 1201 better accounts for user concerns. These include establishing presumptive renewal of exemptions adopted in the previous rulemaking cycle, shifting the burden to those who want to oppose an exemption from the previous rulemaking, and authorizing the Librarian, upon recommendation of the Register, to make permanent a temporary exemption that has been renewed twice without opposition and without modification. How ought section 1201 be revised to reflect the stakeholder desire for a less burdensome triennial rulemaking process and consumer interests, and what other means should be adopted to make the rulemaking process more efficient?

Assuming that Section 1201 remains law, the triennial rulemaking process should be as accommodative to user concerns as possible. In addition to presumptive renewal of any exemptions adopted in the previous cycle, all temporary exemptions that have been renewed twice without modification should be made permanent independent of any opposition.

15. *[Question Omitted]*