



- 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.**

As currently drafted, the framework of the DMCA provides both the flexibility and certainty necessary for service providers, creators, and users of all sizes. Changes to the law that would create different requirements based on new and arbitrary size definitions would cause harm to the entire ecosystem potentially stifling both innovation and creativity. Definitions based on size or market share are very fluid and there are no other metrics that have universal application. As a result, it would be impossible to define categories that accurately measure the market size, technological capability, and capacity of different companies to respond to additional burdens. Additionally, depending on the type of content that is in question, there could be very different issues around application. For example, a transformative works-based fan fiction site like the Archive of Our Own, run by Re:Create member the Organization for Transformative Works, relies on concepts of fair use for almost all user submitted works. It is a massive database of fanworks that require a case by case analysis of fair use for each work. However, it is also a nonprofit staffed by volunteers. Would they be classified as big? Even if they were not big, given the nature of the works on their site could they properly vet for fair use if additional burdens were placed on them? The same is true of online service providers (OSPs) offering the backend of websites, hosting and design templates. It would seem unwise to place any type of affirmative burden on these providers because it would require them to intrude on the privacy of their website creator clients and because of the sheer volume of such intrusions that would be necessary to comply. Yet they are likely to qualify as large platforms for user generated content.

Engine, in their 2019 [testimony](#) to the Copyright Office on this very issue, highlighted the challenges with the definitions for small and midsize startups and how hard it will be for growing companies to meet the demands placed on them. Engine also spoke about the misplaced incentives it would create against growth, as well as the important capital to grow their business. Having an arbitrary size where massive liability and onerous compliance will scare investors from investing in businesses that host user generated content.

In addition, while a blanket carve out for nonprofits, libraries, archives and educational institutions might seem like a workable solution, it would not solve all the problems with such an approach. For example, Wikipedia depends on links, and the legitimacy of those links, from for-profit websites to allow Wikipedia to work properly.

So while they would benefit from a nonprofit opt-out, this type of new standard would still create huge problems for them since much of their content is sourced from for-profit links on the Internet.

- 2. OSPs eligible for the safe harbor under section 512 are divided into four categories (conduits, caching services, hosting services, and web location tools) that can be both under-inclusive and over-inclusive. First, what types of OSPs should be covered to account for technological advances and business practice changes that have occurred during the past twenty-two years? Second, how should the categories be revised to better cover the types of OSPs that need—rather than just appreciate—the safe harbor’s benefit? Among the possibilities would be to either increase the number of statutory categories to more explicitly cover specific types of service providers or to reduce the number of 2 statutory categories, possibly to only one, and delegate authority to the Copyright Office to identify, by regulation, the covered types of service providers. If Congress were to take the latter approach, would this raise concerns about such authority being delegated to a non-presidentially-appointed Register?**

The categories are working for some hosting services and web location tools, but not for other hosting services, conduits and caching services. The idea that conduits or caching services are subject to any liability under the DMCA is an outdated concept. As Public Knowledge testified to the IP Subcommittee, Internet service providers were very different in 1998. They were edge services on the Internet that operated in a highly competitive marketplace that used the existing common carrier telephone network. Congress did not intend for the provider of the telephone access to be held liable for copyright infringement.

However, that is happening today. The Cox case is a perfect example of this, as is the pending Charter litigation. These cases have an absurd premise to them that highlights the whole issue: broadband providers should not be in the business of dealing with copyright infringing activities by their users. Instead the users themselves, if they are violating copyright, are the problem. The threat of billions in damages is creating massive problems for broadband providers on something they are really not in the business of. If I pick up the phone and call someone to infringe copyright, we would all agree that the phone company should not be responsible for that action, even if they were notified by a copyright holder that I was doing so. Given how the Internet has evolved since 1998, broadband providers are now no different than phone companies for purposes of the DMCA.

As for hosting, whether it is working or not is heavily dependent on the type of hosting service. Enterprise cloud providers should not face copyright liability for any content they host for another ISP or that is not available to anyone besides the client. When it is publicly available, and not content from another ISP, then it does make sense to include them and the current classification “works.”

The current system is working well for web location tools and there is no need to make changes to that section. Additionally, we are generally skeptical of giving rulemaking authority over substantive areas of copyright law to the Copyright Office as they do not have any expertise in technology. There are also real concerns on separation of powers because the Copyright Office is in the legislative branch and has a non-presidentially appointed head.

- 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 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?

We are strongly opposed to any notice-and-staydown system and agree with the Copyright Office, which specifically objected to the viability of a notice-and-staydown regime in their recent study of Section 512.

The Office correctly notes that the studies available -- from both those in favor and against -- are inconsistent. While some rightsholders pointed to Europe as a region that has successfully implemented notice-and-staydown, the Office has prudently called for further study of this issue. Significantly, EU member states have not yet transposed the new Copyright Directive into local law, and Poland has filed suit in the CJEU challenging the Directive's implied staydown mandate as a violation of the public's expressive and information rights under the Charter of Fundamental Rights of the European Union. Furthermore, the Office expressed great caution and questioned the evidence pointing to its viability and application in the United States:

“The Office does not currently have empirical evidence from countries that have adopted a widely-applicable staydown requirement along the lines of what many rightsholders support, making it difficult to gauge the efficacy of such a system, or to measure the potential speech and competition externalities that may result from a widely-applicable filtering requirement... For these reasons, it is the opinion of the Office that a general staydown requirement and/or mandatory OSP filtering should be adopted, if at all, only after significant additional study, including of the non-copyright implications they would raise [\(pp.190, 193\)](#).”

Notice-and-staydown by its very nature would presume copyrighted material is automatically infringed, without considering cases where the use of this content is permissible. Even without a staydown regime, there are already countless examples of non-infringing uses, including licensing, fair uses, and many other exceptions under copyright law, which have been taken down either by an automatic filtering regime (see: *Lenz v. Universal Music Corp.*) or a [bad actor seeking retribution](#).

A notice-and-staydown regime would further impair legal uses and reshape copyright policy and law as it has been understood for centuries - chilling expression and creativity. This is because there is no way to design such a system without filtering technology. A filtering mandate that would respect user rights would require proper reporting of licensed uses and the ability to analyze fair use. The former just does not happen and the latter goes against the basic tenets of our common law legal system that requires a case by case analysis of fair use. And as noted below in Question 5, it is a near-technological impossibility. As a result, much of Internet-based creativity, which allows for any individual to be a creator, would be stifled.

The Copyright Office also questioned the applicability of mandatory filtering as a solution to piracy in its 512 Study, noting potential impacts on speech. Furthermore, while the Office did cite studies in favor of filtering, it noted other studies that showed this solution to be inoperable and ineffective for securing “significant reductions in piracy” [\(p. 196\)](#).

Additionally, a notice-and-staydown provision would disproportionately hurt startups, smaller services, nonprofits and educational institutions who will struggle to afford and maintain filtering systems. As the Office

notes, mandatory filtering may lead to “anti-competitive behavior,” act as a “barrier to entry” and “entrench the market dominance of current platforms that have already invested significant time and money to develop *sui generis* filtering technology like Content ID” [\(p.190\)](#).

Notice-and-staydown would also end the careful balance of the DMCA in its interaction with First Amendment freedom of speech protections. The Supreme Court rightly pointed out in [Eldred](#) that fair use is a built-in safety valve for the First Amendment. Re:Create member Electronic Frontier Foundation has argued that the current DMCA Section 512 language violates the First Amendment. However, if there was a move to a notice-and-staydown system, it would leave little doubt the system in place for digital copyright is unconstitutional on First Amendment grounds.

- 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?**

Given the problems of notice-and-staydown, and the corresponding implementation of content filtering systems that would be needed, implementing such a regime would place a *de facto* duty to monitor on platforms in contradiction to 512(m) and would be highly problematic. Creating a duty to monitor is troubling for all platforms. But most significantly, for platforms that host a lot of content that operate on a small budget, like the Organization for Transformative Works, a duty to monitor would be prohibitively expensive and time consuming.

The current red flag knowledge system, which balances 512(c) with 512(m)'s no duty to monitor is actually working very well, despite misleading complaints from rightsholders. In both of the cases most cited by rightsholders as bad outcomes ([Youtube v. Viacom](#) and [Perfect 10 vs. CCBill](#)), the content in question was not all infringing content. In one case, adult content is sometimes labeled as infringing to create illicitness for the consumer of that content, which is apparently a marketing tactic. Because of this, there was no red flag knowledge. In the other case, representatives of the plaintiff uploaded some of the content in question which meant it was not an infringing use. Facts matter, especially in cases of copyright infringement and red flag knowledge, and under the facts of both cases, the courts got it correct.

Changing the duty to monitor, as suggested, would put platforms in a position of having to staydown the non-infringing content in both of the aforementioned cases out of fear of liability. This would take non-infringing content off the internet to the detriment of creativity and thus the purpose of copyright law to begin with. Congress understood this in enacting 512(m) as have the courts. We would recommend you heed their guidance.

- 5. The injunctions available under section 512(j) have been narrowly interpreted by courts and thus little-used by copyright owners. Is it worthwhile for Congress to consider revising this provision to make injunctions more readily available for website-blocking in special circumstances (with an eye toward article 8(3) of the Information Society Directive)? Such injunctions could be issued by a special tribunal and appealed to federal district court, or, out of**

concern for user protections, the law could require that injunction orders come from the district court alone. If warranted, what would be the best way to enact limited website-blocking via such injunctions? Again, please provide suggested legislative text. If you do not think the law should be amended to expand the availability of injunctions, please be specific about any ways you think section 512(j) could be improved.

Congress should not amend 512(j) to provide for more availability of injunctions for website-blocking. The Copyright Office did not recommend employing site-blocking as a solution in its Section 512 report and called for further study of this issue ([p.196](#)).

We have been here before: the American people rose up against site-blocking during the debate over the Stop Online Piracy Act and the PROTECT IP Act (SOPA-PIPA). Websites went dark, and Americans pressured their Members of Congress to withdraw their sponsorship. Website blocking is not only a [technological nightmare to implement](#) (if it can even be implemented), but widely unpopular. Copyright infringement does not rise to the level of relief that should be ordered without a trial by jury under the 7th Amendment protections of the Constitution for copyright infringement.

- 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?**

The CASE Act is fundamentally flawed. ReCreate and many other stakeholders have [written](#) to Congress numerous times about the CASE Act's constitutional problems, as well as the disparate impact it will have on the user community while doing little to prevent piracy. The biggest flaw with the CASE Act is that it is simply unappealing for defendants. Most, if not all, of CASE Act's constitutional problems would be solved by making the proceeding opt-in for defendants. However, this change has not been made despite arguments by some of CASE Act's proponents that it will be in a defendant's interest to participate. We encourage that this change be made for constitutional reasons as well as to prevent the proceeding from being used as a tool to harass defendants, who may have a plausible defense like fair use, in order to secure settlements. We suspect that, as currently proposed, it will make sense for most defendants to opt-out, rendering the CASE Act useless as a tool except against those who would either opt-in, or did not know better about opting out. In the latter case, these unsophisticated defendants are precisely those who the Constitution seeks to protect with the right to a jury trial and who are the most vulnerable to harassment schemes.

The only stakeholders who want the CASE Act come from the traditional rightsholder community. To our knowledge, no one in the user community supports the CASE Act as a means to solve abusive and counter notice issues. The suggestions to do so have come from rightsholders and their allies, and were done so as a cynical play to say they were offering something. However, this is not a good faith concession to the user community and has no value as a solution for abusive and counter-notice challenges.

As for the put-back and filing suit time period, we refer you to the comments of Re:Create's members as a guide.

- 7. More generally, the notice- and counter-notice sending process have many shortcomings. These could be improved by clarifying when automation is appropriate and that OSPs cannot erect requirements beyond those in section 512(c)(3); by authorizing the Copyright Office to develop standardized web forms for notices and counter-notices and to set regulations for the communications that OSPs must deliver to a user when their content is taken down or had access disabled (including offering information about the fair use doctrine as codified in section 107 and as illustrated in the Copyright Office's Fair Use Index); and by increasing privacy protections for notice and counter-notice senders by masking certain personally identifiable information, including address and phone number. How could this best be done? Please provide specific provisions for accomplishing these goals.**

We are skeptical about automated removal as it is a waiver of rights under Sections 107, 108, 110 and other statutory limitations and exemptions. These rights should be non-waivable, and an automated removal system cannot fully respect these rights.

We do think voluntary standardized forms are a good idea in a notice-and-takedown regime. There should be a standard form to fill out for both notices and counter notices that includes protections for fair use before a notice is sent. However, these standardized forms should be developed through multi-stakeholder collaboration and should not be developed by the Copyright Office. Any form for counter-notice should properly protect personally identifiable information, as the current requirements act as a deterrent to filing a counter-notice.

- 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?**

Respectfully, it is frustrating that the policy conversation focuses *only* on the burden on rightsholders yet does not consider the extreme burden of a notice-and-staydown system on the rest of the Internet ecosystem. It is important to take into account the nature of these new burdens as well, as they far outweigh the burden placed on rightsholders from requiring more accuracy in notice sending.

If a notice-and-staydown system was implemented, there will be many problems as it relates to faulty notices. As we understand it, once a notice is received about infringing content, the online service provider will need to monitor and keep down any future infringing uses of the content without another notice. The platform itself has the burden of dealing with future uses of that content. So while the initial notice might be accurate as to a particular use, the service provider will have to make a determination about every future use. Platforms will necessarily use automated systems, and need to err on the side of caution, overblocking lawful use and expression.

Under the current notice-and-takedown DMCA framework, we strongly support strengthening the rules around abusive notices. The record before the Copyright Office during its 512 inquiry and the IP Subcommittee hearings in 2020 have documented a host of different abuses, including anti-competitive, harassing and criticism-preventing notices. Abusive notices are real and need legislative fixes -- a fact that we appreciate your office and the Copyright Office recognize. This should include increased liability for abuse that corresponds to the liability and recourse available for copyright infringement.

As for faulty notices, there is clearly a difference between those that are due to negligence and those that are truly honest mistakes. Being able to use the notice-and-takedown system as a rightsholder is a privilege that should be respected. Having negligent notice practices needs to be punished. Given it impacts so many in the ecosystem, civil liability will be tough, and best served by class actions against the notice senders. Repeat offenders, in parallel with existing copyright law, should be subject to a graduated response that includes suspension from sending takedown notices by the service provider.

9. Though section 512 says that OSPs must accommodate standard technical measures (STMs), no such measures exist after more than twenty-two years, and some stakeholders have complained that service providers have no incentive to establish STMs. The Copyright Office could help here, if Congress provided regulatory authority to adopt STMs and promulgate related regulations. How broadly or narrowly should the scope of this authority be defined?

It goes against decades of U.S. policy to have the government involved in setting a standard that is not going to be used by the U.S. government as a party or that does not involve a core government function. Having the Copyright Office involved in any way around standard technical measures (STMs) would go against the traditional government role. At a recent roundtable on STMs, panelists were universally opposed to the idea of the Copyright Office's involvement; instead, panelists agreed that private entities need to come together.

Additionally, standard technical measures are not adopted by regulation. Rather, they are adopted by an inclusive and collaborative process that leads to agreement by all parties involved. Traditional standards setting processes must allow for flexibility over time and the ability to adapt to changing conditions and improvements in technology. It goes against the very nature and purpose of standards to have the government put thumbs on the scale in a standard adoption for private parties on issues that are really between those private parties.

Congress correctly envisioned in adopting the DMCA, that standards would need to be voluntary and without government involvement. In many discussions around standards setting in the copyright framework, there seems to be serious confusion about the difference between a standard and a voluntary measure or best practices.

It is important to also note that abuse of standards for anti-competitive purposes is a real problem in the patent world, even with protections for fair, reasonable and nondiscriminatory (FRAND) licensing rates for patented technologies. Congress also used similar language to FRAND in adopting the DMCA section of standard technical measures. Furthermore adoption of a particular technology as the whole standard, for example Content ID, would be the equivalent of either the state seizing private property for public use or the granting of a permanent monopoly to a single technology provider. In either instance it would be well outside the norms, and in the latter instance it would violate current antitrust jurisprudence unless an immunity, like state action immunity, applies.

The stakeholders who are complaining about the lack of standards adoption are missing many key points. First, the standards contemplated by the DMCA were for anti-circumvention technology, not for filtering technologies. There is a competitive anti-circumvention tool marketplace that is working. While there have not been filtering standards developed, the competitive anti-circumvention marketplace has developed as intended by Congress. Second, critics seem not to understand that a standard is a very technical term with a specific meaning that does not neatly apply to the problem they wish to solve. Third, many have also suggested that a consensus is not needed for standards adoption. By their very nature, standards must have a consensus so that every user that needs to interact with the system can do so in the same way. Fourth, many have called for a particular technology to be the standard with no idea of the significant competition and property rights concerns involved. Finally, most of them do not have a technical background and have never been involved in a standard setting process. They do not understand what it is, and why it exists. For example, a useful standard may be one in which the rightsholder community creates a standard for the identification of copyright ownership. Such a system would probably look like a database in a universal format, that has a system for ensuring all rights are accurately identified and up to date, can be accessed by any user who needs the information in a consistent manner, and is robust against false claims of ownership. The rightsholder community would need to agree upon the formatting of the database, the security mechanisms, the APIs used for access, and other necessary details as well as agreeing to improvements over time.

As a final point, the blame for lack of standards adoption is not an OSP problem. Given that particular OSPs have developed proprietary technologies that are used by many rightsholders, there has not been the need to have the development of a standard, nor would it make sense. Consensus standards happen when all parties agree there is a technology problem (especially when interoperability is needed) and voluntarily come together to try and solve that problem. Right now, OSPs are not alone on this. Some proprietary filtering technologies on particular platforms are working well for copyright holders, and for those platforms, they don't need a standard.

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 shut out 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?

On this issue we refer you to Re:Create's members.

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 simplest and best solution for Section 1201's challenges would be to adopt legislation by Senator Ron Wyden and Representative Zoe Lofgren to establish a "nexus" requirement between Section 1201 and copyright infringement. The idea that users are denied a perfectly legitimate use because of 1201 has not stood the test of time. It is inhibiting too many lawful uses, and it is allowing copyright law to prevent people from doing what they have done for a century just because software is embedded into so many everyday products.

Additionally, Section 1201 allows vertical restraints on trade throughout the marketplace, and is used to quash competition instead of legitimate attempts to prevent copyright infringement. The nexus requirement solves all of this. By requiring a nexus to copyright infringement, it will prevent 1201's anti-competitive outcomes and allow users to do what they have always been able to do with copyrighted works.

12. The Copyright Office has recommended revising some of the permanent exemptions so that they are better tailored to the types of uses sought today. In particular, the exemptions for security testing and encryption research should be revised to expand the types of activities permitted, ease the requirements to seek authorization from the owner of the relevant system or technology, and eliminate or clarify the multifactor tests for eligibility. What thoughts do you have about revising these existing permanent exemptions, and how would you recommend that be done?

Moving to a nexus requirement would solve these issues, as the uses in question are non-infringing.

13. Congress should adopt new permanent exemptions for noninfringing activities that have repeatedly received exemptions in recent triennial rulemakings, or where there is a particularly broad-based need, including to enable blind or visually impaired persons to utilize assistive technologies and to allow diagnosis, repair, or maintenance of a computer program, including to circumvent obsolete access controls. What other temporary exemptions should be made permanent?

Again, a nexus requirement would solve these problems as they are not copyright infringing uses.

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?

See previous answers.

15. Though it did not receive as much attention during my hearings as sections 512 and 1201, section 1202 is another important part of copyright law added to title 17 by the DMCA, and it too is in need of modernizing. For example, Congress could amend section 1202 to drop the double-intent standard and only require a copyright owner to prove that a defendant removed or altered rights management information (knowingly or not) with the knowledge that it would encourage infringement. And Congress could adopt the Copyright Office's recommendation to enact a new section 1202A to provide the author of a copyrighted work—rather than just the copyright owner—with a right of action when someone removes or alters rights management information with the intent to conceal an author's attribution information. Do you think that the proposed legislative text that appears on page 98 of *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* is the best way to add a right for the copyright owner, or would you recommend different text? And what are your thoughts on revising section 1202's double-intent standard?

We are not experts on this issue and refer you to the comments of Re:Create's members.

In addition to the questions asked, we also wanted to bring up some other pressing copyright issues that deserve your attention.

One of the stated reasons that your office took on a review of the DMCA was because of the Internet's evolution over the last 22 years and the belief that the DMCA was outdated. While we disagree with that premise and do not think the DMCA is outdated, there are a couple other areas of copyright law that predate the DMCA that are proving to be outdated and we encourage looking at them as well.

Statutory damages. No area of copyright law is more outdated than the pre-Internet creation of statutory damages. Statutory damages were created before the Internet, when distribution of infringing works was part of criminal organizations. The cost associated with distributing infringing works was high, and often they were a part of broader criminal activity. Infringement was pretty rare, and normally those infringing, did so at a scale that created real economic harm.

Fast-forward to today, and the costs associated with infringement are miniscule. Acts of infringement are often perpetrated by individuals or small businesses, without even understanding that what they are doing is infringement. Certainly, these are not the criminals Congress intended for statutory damages to touch. The 2000s lawsuits against grandmas and kids and the chilling nature of takedown notices are both directly tied to statutory damages. Almost every major problem with the current copyright system from the perspective of Internet users has its basis in statutory damages.

Our first recommendation would be a repeal of statutory damages. They have outlived their purpose. However, we recognize a repeal may not be possible, so there are other ways to attack the issue with considering. These include, but are not limited to, the following suggestions:

- Statutory damages are only available against repeat offenders.
- Statutory damages are only available if there is proof of facilitating mass infringement.
- Statutory damages are only available if the infringement includes attempts to distribute for further infringement.
- Statutory damages are not available for contributory negligence.

We would encourage holding a hearing on statutory damages in 2021 as a way of parsing this issue further, as it is in desperate need of updating and reform.

First sale doctrine. Another issue that predates the Internet that has now created numerous problems is the first sale doctrine. Before the Internet, a consumer owned the copyrighted works they purchased. However, in today's Internet world, consumers can only lease them, and often at terms that cause mass waiver of other rights under copyright law that would normally be available. It is time to update the first sale doctrine for the digital age.

The end of ownership has created numerous problems. First, it has caused libraries to have to rely on fair use by moving print works into a digital medium, which is contested by the publishers. The other option is leasing works at an extremely high price, and often with conditions that violate the privacy of their patrons. Libraries need digital first sale. It is time for Congress to give it to them.

Second, it has put consumers in a bind. They are getting a less valuable product that can be taken away from them at any moment, even though they think they are purchasing the product. All it will take is the collapse of a major platform for distribution of digital works to create a large consumer backlash over the current system.

Third, it has put schools in a bind. While they have already spent budgets on print copies of books, they are unable to convert those books into digital materials. COVID and the school shutdowns have shown us that schools need to be able to convert physical copies into digital copies for their students. The TEACH Act has done nothing to help with this, despite the claims of publishers. They are doing very little to help school districts while charging schools for more money. The cost of shifting to all e-books can be 10-100 times more expensive over the lifetime of a print book, at a time when schools are seeing their budgets cut. This creates massive educational inequities, especially for lower income school districts in urban, suburban and rural areas.

Copyright term. Another issue is the length of copyright term. It is no longer associated with the incentive to create and goes far beyond that. Economic studies consistently show that increasing the term actually takes money out of the economy. An [analysis](#) by the New Zealand government found that extending the term from 50 to 75 years would cost their country's economy \$55 million per year. As a result, any further extensions of term should be off the table permanently, as well as rolling back the 1998 term extension that was a part of the DMCA deal. Those additional 20 years have harmed the economy, harmed creativity, and completely belied the copyright's constitutional purpose. For older works, entering the public domain is economically beneficial

While our trade agreements have locked the United States into copyright terms that fail to optimize the economic and creative benefits of our copyright system, our policymakers can still do some things to help. Continuing the term of a work should require renewal, including a fee. This would lead to more works entering the public domain and solve the orphan works problem. Non-economically valuable works to an author or their heirs would enter the public domain more quickly unless they were willing to pay a formalities fee. It would also prevent a lot of the litigation abuse seen in inherited copyright ownership that is divorced from the original creator.