



Senator Thom Tillis
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Dear Senator Tillis,

Thank you for the opportunity to share our views on potential changes to the Copyright Act to restore the balance between the rights of copyright holders and those of the public in the digital era. The Software Preservation Network (“SPN”) is a non-profit organization established to advance software preservation through collective action. Its 20 institutional members are libraries, museums, and archives on the cutting edge of software preservation. Since its formation, SPN has worked to ensure members understand their legal rights and responsibilities. SPN has also advocated on its members’ behalf for regulatory action and judicial decisions that help ensure software continues to be available for research and teaching uses beyond its commercial life (which is typically a small fraction of the term of its copyright). We secured exemptions favoring software and video game preservation through the triennial 1201 Rulemaking process in 2018, and we seek expansion of those exemptions in the current cycle. We have joined amicus briefs in cases like *Oracle v. Google* and *Allen v. Cooper*, which could dramatically affect our ability to conduct core preservation activities. We expect SPN and its members will continue to see copyright as a top priority for many years to come.

We engage in these processes because without urgent, coordinated action to preserve our software heritage, we will lose access not only to software works themselves (cultural artifacts worthy of study in their own right), but also to the millions of born-digital historic documents that can’t be accessed or experienced accurately without supporting software environments. This challenge is exacerbated by copyright, which creates multiple legal uncertainties associated with software preservation that do not exist for preservation of other categories of works. Digital rights management is one major source of concern, but it is far from our sole concern. The many differences between software and more traditional ‘literary works’ make software more difficult to acquire, preserve, and make available for teaching and research uses. Quite simply, software is created, sold, used, and maintained in ways that diverge, often dramatically, from more traditional media, and yet copyright treats it the same.

SPN could not agree more, therefore, with the notion that “copyright law needs to be modernized to be more responsive to current technologies, copyright markets, and business practices,” and specifically that “Congress should reform copyright law’s framework...to protect users and consumers making lawful uses of copyrighted goods and software enabled products...” The previous generation of major copyright revisions was motivated by a moral panic over digital online piracy, and by the concerns of industries that have benefited from lengthy terms of protection for works that remain popular for generations. Its excesses cry out for correction in light of the way digital markets and technologies have actually developed in the meantime. Specifically, reforms should account for the accretion of power to digital media companies who “sell” works using a licensed access model, and the concomitant loss of power by the public generally, and by libraries, archives, and museums specifically, due to their loss of ownership rights (including their inability to reliably buy and sell digital goods on secondary markets) as well as the high degree of market discrimination and segmentation that licensed markets permit. Reform should also address the “20th Century black hole” caused by copyright terms that vastly exceed the commercial life of most creative works. This issue is well-documented in the context of out-of-commerce books, but it is equally pronounced in software, whose commercial life rarely exceeds a few years, while its copyright can last more than a century. Any attempt to restore balance to copyright should remedy these failures in past reform, not repeat them.

Accordingly, we would like generally to echo the detailed recommendations made by the Library Copyright Alliance with respect to the ways copyright could be modernized to ensure libraries, archives, and other memory institutions regain the rights and affordances we need to perform our essential social functions. Reforming statutory damages would bring the legal stakes of working with in-copyright materials into line with the actual stakes for all involved, making preservation and other research uses less risky in the face of inevitable uncertainty. Preempting contracts when they run counter to the public interest (as is increasingly common in other countries) would help cut the Gordian Knot of digital content licenses that prevent libraries and their users from making uses the Copyright Act has expressly permitted. And in the COVID era, every school in the country has gotten a crash course in the shortcomings of copyright as it applies to distance education and remote access to resources. 21st Century digital collections need to be lawfully accessible to authorized users online, just as physical collections were accessible on the physical premises.

Finally, we would like to call out Section 1201 of the Copyright Act as especially ripe for reform. Section 1201 is the provision with which SPN has engaged most deeply and directly (with help from the Cyberlaw Clinic at Harvard Law School), and its shortcomings have become crystal clear to us in the process. Quite simply, Section 1201 creates a needless legal burden for otherwise lawful uses. Even for communities like ours, who marshal the resources necessary to secure a temporary exemption through the triennial rulemaking process, the current system is falling far short of its intended goal of protecting content against piracy *without* unduly burdening lawful uses. The only way to fully correct Section 1201’s shortcomings, short of complete repeal, would be to adopt the reforms proposed in the past by Rep. Zoe Lofgren and Sen. Ron Wyden, which would require a nexus to infringement for 1201 liability to attach. Such a requirement would restore the rights of lawful users while retaining the law’s protections, such as they are, against actual infringers.

Thank you for your interest in these matters, and please let us know if we can provide additional information to your deliberations.